

VOTE OF CONFIDENCE: CRAWFORD V. MARION COUNTY ELECTION BOARD, VOTER IDENTIFICATION LAWS, AND THE SUPPRESSION OF A STRUCTURAL RIGHT

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In 2008, the Supreme Court, in Crawford v. Marion County Election Board upheld the constitutional validity of an Indiana law that required the presentation of photo identification as a precondition to voting in all state, local, and federal elections. Since 2011, fourteen additional states have enacted their own photo identification requirement. Twenty-one million registered and otherwise qualified voters, approximately eleven percent of the national total, may now be disenfranchised because they do not possess government-issued photo identification. The Court’s decision in Crawford turned on the application of a neutral balancing analysis that weighed the magnitude of the burden on voters against Indiana’s purported interest in the prevention of voter fraud. This article argues that Crawford’s conclusions are no longer sustainable in the face of mounting evidence of the severity of the burden imposed by voter identification laws and the continued absence of voter fraud. Moreover, this article argues for the application of a new constitutional paradigm in the realm of voting restrictions—one that calls for the application of strict scrutiny to all substantive restrictions of individual voting qualifications. The application of strict scrutiny is not only supported by numerous historical and jurisprudential sources, but also necessary given the increasing momentum of a coordinated effort to restrict the fundamental right to vote.

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INTRODUCTION

“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.”

– Chief Justice Earl Warren¹

1. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

In 2005, the Indiana General Assembly passed Senate Enrolled Act 483² (SEA 483 or the Act), which required voters to present government-issued photo identification before casting a ballot in local, state, and federal elections.³ Shortly thereafter, the Indiana Democratic Party, along with a collection of other individuals, challenged the constitutionality of the Act in federal court.⁴ The cases were consolidated on appeal, and in *Crawford v. Marion County Election Board* the Supreme Court voted six to three to uphold the constitutional validity of SEA 483, affirming the holdings of the district court and Seventh Circuit Court of Appeals.⁵ Notably, the Court issued a fractured plurality opinion comprised of two separate three-justice opinions.⁶ Both found SEA 483 constitutional, but the two opinions utilized divergent analytical models based on differing interpretations of the same Supreme Court precedent. Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy (the Stevens Plurality), applied a balancing test analysis,⁷ developed by the Supreme Court in *Anderson v. Celebrezze*⁸ and *Burdick v. Takushi*.⁹ Justice Scalia, joined by Justices Thomas and Alito (the Scalia Plurality), derived a far more deferential constitutional analysis from the same Supreme Court precedent.¹⁰ Under both a balancing test and a more deferential

2. See An Act to Amend the Indiana Code Concerning Elections, Ind. Pub. L. No. 109-2005, 2005 Ind. Acts 2005 (codified as amended in scattered sections of IND. CODE tit. 3 (2006)) [hereinafter SEA 483], available at http://www.in.gov/legislative/pdf/acts_2005.pdf.

3. See IND. CODE § 3-11-8-25.1 (requiring a “voter who desires to vote an official ballot at an election” to “provide proof of identification”); see also *id.* § 3-10-1-7.2 (imposing the same requirement for primary elections).

4. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006); Crawford v. Marion Cnty. Election Bd., 375 F. Supp. 2d 788 (S.D. Ind. 2005).

5. 553 U.S. 181, 189 (2008), *aff’g* 472 F.3d 949 (7th Cir. 2007), *aff’g sub nom.* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

6. See Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 184–204 (2008) (opinion of Stevens, J.); see also *id.* at 204–37 (Scalia, J., concurring).

7. *Id.* at 202–03 (opinion of Stevens, J.) (holding that State’s “precise interests” in regulating were sufficient to justify the “limited burden on voters’ rights”) (internal quotation marks omitted).

8. 460 U.S. 780, 786–90 & n.7 (1983) (holding that constitutional challenges to provisions of state election laws “cannot be resolved by any ‘litmus-paper test’” but rather must be resolved by weighing the legitimacy and strength of the state’s interest in regulating against the burden which the regulation places on protected rights).

9. 504 U.S. 428, 438–40 (1992) (assessing whether Hawaii’s legitimate state interests in regulating write-in voting were sufficient to “outweigh the limited burden that the write-in voting ban impose[d] upon Hawaii’s voters”).

10. See Crawford, 553 U.S. at 204 (Scalia, J., concurring) (arguing that *Burdick* “calls for application of a deferential important regulatory interests standard for non-severe, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote”) (internal quotation marks and citations omitted).

analysis, both pluralities upheld the validity of SEA 483. Justice Stevens concluded that there was no evidence in the record before the Court that SEA 483 imposed a severe burden on voters' constitutional rights, and therefore whatever "limited" burden was imposed was justified by Indiana's legitimate interests in preventing fraud, modernizing elections, and safeguarding voter confidence.¹¹ Justice Scalia rejected the lead opinion's "record-based" approach, but still determined that the law was constitutional because its "universally applicable requirements" were "eminently reasonable" and did not impose a severe burden on voters in general.¹²

At the time, SEA 483 appeared to be of marginal constitutional, electoral, and practical significance.¹³ However, in 2011 state legislatures across the country barreled through the constitutional opening carved by the Supreme Court in *Crawford*, introducing a wave of voter identification bills, and justifying their adoptions with their purported interests in preventing voter fraud.¹⁴ Since 2008, no fewer than thirty-four states have introduced voter identification legislation and sixteen states now boast some form of photo identification requirement.¹⁵ As noted by the Brennan Center for Justice, "A shift that could change the electoral landscape is underway—the tightening of restrictions on who can vote and how Americans can vote."¹⁶ Voter identification laws are now just one breed of an entire species of voting restrictions.¹⁷

11. *Id.* at 191–203 (opinion of Stevens, J.).

12. *Id.* at 208–09 (Scalia, J., concurring).

13. The Seventh Circuit majority opinion in *Crawford* was only five pages in length and closed with the rather candid, albeit seemingly flippant conclusion that "[p]erhaps the Indiana law can be improved—what can't be?— . . ." 472 F.3d 949, 954 (7th Cir. 2007). Moreover, it was one of only two strict voter identification laws in the entire country at the time. For an example of the only other strict voter ID law in place at the time, see GA. CODE ANN. § 21-2-417 (2011).

14. See WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012, at 2–3 (2011) (noting that "at least thirty-four states introduced legislation that would require voters to show identification in order to vote" in 2011), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

15. These states include Alabama, Florida, Hawaii, Idaho, Indiana, Georgia, Louisiana, Kansas, Michigan, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin. See *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Apr. 16, 2013) [hereinafter *Voter Identification Requirements*].

16. *Overview: Voting Law Changes in 2012*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Voting%20Law%20Changes%20in%202012%20Fact%20Sheet%20Four%20Pages%20Separate.pdf> (last updated Nov. 9, 2011).

17. WEISER & NORDEN, *supra* note 14, at 2–3.

The rapid proliferation of voter identification laws, along with empirical data evincing the disproportionate disenfranchisement of minority voters as a result of these laws,¹⁸ has led to a marked increase in public, political, and legal scrutiny of voting restrictions. Critics of voter identification laws argue that there is not a scintilla of evidence of widespread in-person voter fraud, the only type of voter fraud that such laws are capable of preventing.¹⁹ The Justice Department has pushed the implications of new voting restrictions to the front of the national dialogue by exercising its powers under the Voting Rights Act²⁰ to block voter identification laws in South Carolina and Texas, with varying degrees of success.²¹ Lawmakers at both the state and federal levels have endorsed Department of Justice investiga-

18. For example, according to a study by the Brennan Center for Justice, as many as twenty-one million registered and otherwise qualified voters, approximately eleven percent of the national total, may be disenfranchised because they do not possess the government-issued photo identification required by SEA 483 and its progeny. See WEISER & NORDEN, *supra* note 14, at 2. Moreover, the effects of voter identification laws fall most heavily on minority voters, with over twenty-five percent of all African American voters and sixteen percent of Hispanic Americans lacking valid photo identification, as compared to only eight percent of white voters. NAACP LEGAL DEFENSE AND EDUC. FUND, INC. & NAACP, *DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA* 4 (2011) [hereinafter *DEFENDING DEMOCRACY*].

19. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1, A19; see also Eric Russell, *Secretary of State Finds no Student Voter Fraud but still Pledges to Improve System*, BANGOR DAILY NEWS (Sept. 21, 2011, 3:06 PM), <http://bangordailynews.com/2011/09/21/politics/secretary-of-state-finds-no-student-voter-fraud-but-maintains-system-is-vulnerable/>.

20. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (empowering the Department of Justice to sue in federal court to prevent practices that it has deemed racially discriminatory).

21. The Justice Department's reliance on the discriminatory effect of the South Carolina and Texas laws and their disproportionate impact on racial minorities is telling and could pave the way for opponents of voter identification laws to trigger strict scrutiny by the courts and avoid the more lenient balancing test applied in *Crawford*. See Jerry Markon, *Justice Dept. Rejects South Carolina Voter ID Law, Calling it Discriminatory*, WASH. POST (Dec. 21, 2011), http://www.washingtonpost.com/politics/justice-dept-rejects-south-carolina-voter-id-law-calling-it-discriminatory/2011/12/23/gIQAHLJAEP_story.html; see also *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); Richard Dunham, *Justice Department Strikes down Texas Voter ID Law, Texans React Sharply*, HOUS. CHRON. (Mar. 12, 2012), <http://blog.chron.com/txpotomac/2012/03/the-latest-texas-reaction-to-the-justice-department-refusal-to-ok-texas-voter-id-law/>; Brentin Mock, *The Voting Rights Act Protects Two More States from Voter ID Laws*, THE NATION (Oct. 12, 2012, 1:19 PM), <http://www.thenation.com/blog/170475/voting-rights-act-protects-two-more-states-voter-id-laws>.

Federal courts have since arrived at differing opinions about the validity of the Texas and South Carolina voter identification laws. *Compare Holder*, 888 F. Supp. 2d at 144–45 (barring implementation of Texas law), with *South Carolina v. United States*, No. 12-203, 2012 U.S. Dist. LEXIS 146187, *65–67 (D.D.C. Oct. 10, 2012) (holding that proposed South Carolina law does not violate Voting Rights Act).

tions of the new wave of voting restrictions, most notably voter identification laws.²²

Considering the increasing empirical evidence of voter burden stemming from voter identification laws, namely the disproportionate disenfranchisement of minority voters,²³ as well as the weak state justification for imposing such a burden,²⁴ *Crawford*'s conclusions and its underlying analytical methodologies are vulnerable and ripe for re-examination.²⁵ Even under the constitutional balancing test—the test applied by the Court in *Crawford*—voter identification laws should be struck down given the paucity of evidence of in-person voter fraud and emerging evidence of voter burden. Moreover, voter identification laws could be subject to heightened equal protection scrutiny in the face of mounting evidence that they are invidiously discriminatory by virtue of their disproportionate impact upon discrete classes of voters.²⁶ Yet, this article goes further and argues that the right to vote, as the most fundamental of all constitutional rights, should be entitled to an even greater degree of constitutional protection.

The right to vote is unique amongst its constitutionally protected peers in two independent but overlapping ways. First, as Chief Justice Earl Warren stated in *Reynolds v. Sims*, the right to vote is “preservative of other basic civil and political rights”²⁷ and is integral to the structural framework of democratic governance. Second, the right to vote is uniquely susceptible to erosion by the very legislators who derive their authority from its exercise, and those legislators are the ones who stand to benefit from its manipulation.²⁸ The now infamous

22. See, e.g., Ryan J. Reily, *Dem Senators Urge DOJ to Use ‘Full Power’ to Scrutinize Voter ID Laws*, TALKING POINTS MEMO (June 29, 2011, 12:05 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/06/dem_senators_urge_doj_to_use_full_power_to_scrutinize_voter_id_laws.php; 22 *Dem Lawmakers ask U.S. DOJ to review Wisconsin Voter ID Law*, ASSOCIATED PRESS (Jan. 13, 2012, 12:50 PM), http://host.madison.com/wsj/news/local/govt-and-politics/dem-lawmakers-ask-u-s-doj-to-review-wisconsin-voter/article_0d871ffe-3e18-11e1-a463-001871e3ce6c.html.

23. See *supra* note 18 and accompanying text.

24. Lipton & Urbina, *supra* note 19.

25. Compare sources cited *supra* note 14 (describing significant risk of disenfranchisement), with *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200–01 (2008) (“[T]he evidence in the record does not provide us with the number of registered voters without photo identification Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.”).

26. See DEFENDING DEMOCRACY, *supra* note 18.

27. *Reynolds v. Sims*, 377 U.S. 533, 562 (1963).

28. See THOMAS PAINE, COMMON SENSE, reprinted in COLLECTED WRITINGS 44 (Eric Foner ed., 1995) (“And I put it as a question to those, who make a study of mankind, whether *representation and election* is not too great a power for one and the same body of men to possess.” (emphasis added)).

poll taxes and literacy tests of the Jim Crow era provide the most salient examples of how unscrupulous politicians can seek to undermine the voting rights of certain segments of the population under the guise of ostensibly neutral voting regulations.²⁹ Ultimately, the right to vote is not only singularly important, but also singularly vulnerable. As a result, voting rights demand the highest level of judicial protection not only because they are preservative of other constitutional rights, but also because they are subject to manipulation by representative branches of government. There is ample support for the application of such scrutiny, both in the philosophical and political roots of our constitutional democratic system, and in the language and rationale of Supreme Court doctrine.

As Attorney General Eric Holder stated, “Despite [] decades of struggle, sacrifice, and achievement—we must remain ever vigilant in safeguarding our most basic and important right. Too many recent actions have the potential to reverse the progress that defines us—and has made this nation exceptional, as well as an example for all the world.”³⁰ By highlighting the doctrinal shift in the Supreme Court voting rights jurisprudence, the new empirical data resulting from voter identification laws, and the historical and structural importance of the right to vote, this article posits a stricter analytical model for analyzing voter restriction laws. In addition to examining the voting right jurisprudence, this article will conclude by examining historical records³¹ in order to build an argument for stricter scrutiny of substantive voting restrictions.

While there is no shortage of scholarship concerning the right to vote and the effects of various voting regulations, this article suggests a novel bifurcated approach to the otherwise well-worn subject of voting rights. This article will (1) review the arguments of both the plaintiffs and the State of Indiana in *Crawford* and analyze its opinions; (2) discuss the impact of *Crawford* and the deluge of voter identification laws and other voting restrictions the decision has spawned with a focus on the Court’s underestimation of voter burden and the absence of in-person voter fraud; (3) argue that the Court’s holding in *Crawford* is no longer sustainable in light of emerging evidence of voter burden and the invidiously discriminatory impact of voter identifica-

29. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that poll taxes were invidiously discriminatory and therefore unconstitutional).

30. Eric Holder, U.S. Attorney Gen., Remarks at the Lyndon Baines Johnson Library and Museum in Austin, Texas (Dec. 13, 2011) [hereinafter Holder Speech].

31. For example, the political theory of Thomas Paine, John Locke, and James Harrington; the Federalist Papers of Alexander Hamilton; and the Supreme Court voting rights decisions forged in the crucible of the civil rights movement.

tion laws; and (4) argue for the application of a new bifurcated analytical framework to voting restrictions, one that classifies the right to vote as structural in nature, which highlights its singular importance, distinguishes between substantive and procedural restrictions of that right, and applies strict scrutiny to the former given its susceptibility to erosion, and applies Justice Stevens' balancing test from *Crawford* to the latter. By first distinguishing between substantive and procedural voting restrictions and applying different levels of constitutional scrutiny to each, courts will be better able to protect the right to vote because this method strikes a more appropriate balance between the rights of the states to regulate federal elections and the individual's right to freely and fairly exercise the right to vote.

I.

CRAWFORD V. MARION COUNTY ELECTION BOARD

A. The Factual Background and the District and Circuit Court Opinions

Indiana enacted SEA 483 in 2005.³² Almost immediately thereafter, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit in the Southern District of Indiana against the Indiana officials tasked with enforcing its requirements—most notably, its requirement that voters provide government-issued photo identification in order to vote in any local, state, or federal election.³³ The plaintiffs' chief contention was that SEA 483 was facially invalid under both the First and Fourteenth Amendments to the U.S. Constitution, as well as Sections 1 and 2 of the Indiana State Constitution.³⁴ The plaintiffs argued, in part, that SEA 483 substantially burdened the fundamental right to vote, impermissibly discriminated between different classes of voters, and disproportionately affected disadvantaged voters.³⁵ The plaintiffs also argued that SEA 483 operated as a de facto poll tax by requiring those without photo identification to expend financial resources in order to meet its requirements and exercise their right to vote.³⁶ The State claimed that SEA 483

32. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186 (2008).

33. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782 (S.D. Ind. 2006). The Indiana Democratic Party sought a judgment rendering SEA 483 unconstitutional and an injunction prohibiting enforcement of its requirements. *Id.* Two Indiana elected officials, in conjunction with a group of non-profit organizations, subsequently initiated a second suit seeking this same relief. *Id.* The two actions were consolidated and both the plaintiffs and defendants cross-moved for summary judgment. *Id.*

34. *Id.* at 782.

35. *Id.* at 783–84.

36. *Crawford*, 553 U.S. at 188–89.

imposed no significant burden on the right to vote, was justified by legitimate legislative concerns regarding in-person voting fraud, and thus constituted a reasonable and proper exercise of Indiana's authority to regulate the time, place, and manner of elections under Article 1, Section 4 of the U.S. Constitution.³⁷

1. *The Statutory Scheme of SEA 483*

While the voter identification requirement was the primary focus of the *Crawford* litigation, it was only part of a broader statutory scheme that also expounded and qualified the voter identification requirement itself. In general, SEA 483 provided that any voter who wishes to vote "shall provide proof of identification,"³⁸ and carves out a narrow exception primarily for individuals in nursing homes.³⁹ The requirements of SEA 483 apply in both primary and general elections,⁴⁰ but do not apply to the casting of absentee ballots by mail.⁴¹

Where the voter is unable to produce a valid photo identification, following a challenge by any member of the precinct election board,⁴² the voter may sign an affidavit attesting to her eligibility to vote and cast a provisional ballot, which may only be counted if the voter travels to the circuit court clerk's office, presents proof of identification, and executes a second voter's affidavit within ten days.⁴³ SEA 483 also provides two exceptions, one for an indigent voter who is unable to produce photo identification and one for a voter who has a religious objection to being photographed.⁴⁴ These voters need only cast a pro-

37. U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .").

38. IND. CODE § 3-11-8-25.1(a) (2011).

39. *Id.* ("A voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in an election.").

40. *Id.* §§ 3-10-1-7.2, 3-11-8-25; *see also Crawford*, 553 U.S. at 185.

41. *Crawford*, 553 U.S. at 185–86.

42. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 785 (2006) (describing that the precinct election board consists of five local election officials: "an inspector appointed by the political party whose candidate for Secretary of State received the most votes in the last election in the county; two clerks, one from each major party, who are in charge of the poll book and who check voters in and issue the ballots; and, two judges, one from each major party, who administer the voting machine.").

43. IND. CODE §§ 3-11-8-25.1(d); 3-11.7.5-1(b); 3-11.7-5-2.5(b) (2011). As the district court noted in its opinion, "In the 2004 general election 82% of the provisional ballots in Marion County were not counted. Statewide, only about 15% of all provisional ballots were counted." *Rokita*, 458 F. Supp. 2d at 788 (emphasis added).

44. IND. CODE § 3-11.7-5-2.5(c)–(d).

visional ballot and sign the required voter affidavit to have their ballots counted.⁴⁵

The statutory scheme introduces discretion where a voter is able to present photo identification. In this case, if a poll clerk or member of the precinct election board retains a lingering doubt regarding the voter's identity, the poll clerk compares the voter's signature to the signature on the voter's affidavit of registration to determine the authenticity of the voter's signature.⁴⁶ After the authenticity determination, the poll clerk or member of the board decides whether the voter may vote, or if there still remains "doubt [about] the voter's identity . . . [in which case], the poll clerk shall challenge [the voter's identity]" in the manner prescribed by the statute.⁴⁷

2. *Relevant Supreme Court Doctrine*

In assessing the constitutional validity of voting restrictions, the Supreme Court has purposefully avoided the implementation of a mechanical and inflexible standard.⁴⁸ Instead, the Court has adopted a sliding scale, or a balancing test, where the burden on the state to justify the law in question corresponds with the severity of the burden imposed on voters.⁴⁹ Under this framework, heightened scrutiny is reserved for voting restrictions that are invidiously discriminatory and unrelated to voter qualifications, which, in turn, requires the state to present a compelling interest to justify them.⁵⁰ However, the Court has stopped short of an outright endorsement of strict scrutiny. By contrast, where the law is not invidiously discriminatory, the Court will not apply heightened scrutiny and instead merely require the state to justify the voter burden with a regulatory interest of equal or greater

45. *Id.*

46. *Id.* § 3-11-8-25.1(i).

47. *Id.*

48. *See Anderson v. Celebrezze*, 460 U.S. 780, 786–90 & n.7 (1983) (holding that constitutional challenges to provisions of state election laws "cannot be resolved by any 'litmus-paper test'").

49. *Id.* at 789 (holding that court must make "hard judgments" after weighing the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against the "precise interests put forth by the State as justifications for the burden imposed by its rule"); *accord Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (holding that restriction on political party's access to the ballot was not justified by "the demonstration of a corresponding interest sufficiently weighty to justify the limitation").

50. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) ("[In *Harper* we used the term 'invidiously discriminate' to describe" making affluence or ability to pay a poll tax an electoral standard.).

significance.⁵¹ Thus, where the law is invidiously discriminatory, the Court will apply heightened scrutiny. Where the law is neutral in its effect, the Court will apply a balancing test.

For example, in *Harper v. Virginia Board of Elections*, the Supreme Court applied a “stricter standard” than rational basis to invalidate a poll tax under the Equal Protection Clause of the Fourteenth Amendment.⁵² In *Harper*, the Court relied on the invidiously discriminatory nature of the poll tax to justify the application of heightened scrutiny.⁵³ The Court first noted that the right to vote was a “fundamental political right, because preservative of all rights,”⁵⁴ and “where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”⁵⁵ Thus, under *Harper*, while the State had the right to impose “reasonable residence restrictions” on the ability to vote, “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”⁵⁶ While it stopped short of adopting a strict scrutiny requirement in all cases, the *Harper* Court seemed to clearly indicate that future restrictions on voting rights would be analyzed rigorously.

By contrast, in *Anderson v. Celebrezze*,⁵⁷ the Supreme Court distinguished its prior analysis from *Harper* and declined to adopt a heightened level of scrutiny for all voter restriction cases because there was no clear evidence of invidious discrimination. The Ohio law at issue in *Anderson* required independent candidates for president to file documentation earlier than candidates from the two major political parties. The Court in *Anderson* stated that “evenhanded restrictions that protect the integrity and reliability of the election process itself” are not invidious and are thus appropriately subject to a balancing analysis, where the voter burden must be offset by an adequate regulatory interest.⁵⁸ The Court also rejected the implementation of a litmus test that “would neatly separate valid from invalid restrictions.”⁵⁹ Instead, the *Anderson* Court adopted the case-by-case balanc-

51. See *Crawford*, 553 U.S. at 209 (Souter, J., dissenting) (arguing that a state must “make a particular, factual showing that threats to its interests *outweigh* the particular impediments it has imposed”) (emphasis added).

52. *Harper*, 383 U.S. at 670; see also *Crawford*, 553 U.S. at 189.

53. See *Crawford*, 553 U.S. at 189.

54. See *Harper*, 383 U.S. at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

55. *Id.* at 670.

56. *Id.*

57. 460 U.S. 780, 789 (1983).

58. See *Crawford*, 553 U.S. at 189–90.

59. *Id.* at 190.

ing approach and struck down the Ohio law. The Court held that the law burdened the rights of independent voters and candidates alike, as well as the nationwide electoral process.⁶⁰ Ohio offered three separate interests purportedly furthered by the law in question: the need for voter education; the synchronizing of the deadline for independent candidates with the deadline for major party primary declarations; and the need for political stability.⁶¹ The Court considered and rejected each justification, finding them insufficient to justify the substantial voter burden imposed by the Ohio law.⁶²

Nine years later in *Burdick v. Takushi*,⁶³ the Supreme Court again applied the neutral balancing test of *Anderson*, as opposed to the heightened scrutiny of *Harper*, because the law in question was not invidiously discriminatory in nature. This time, the Court upheld a Hawaii prohibition on write-in voting even though it “prevented a significant number of ‘voters from participating in Hawaii elections in a meaningful manner.’”⁶⁴ While the law had a broad scope and precluded a potentially large number of Hawaiian voters from voting for their candidate of choice, the Court determined that the magnitude of the burden was “slight” and thus did not require the State to advance a “compelling interest.”⁶⁵ The Court concluded that the State’s abstract interest in “avoiding the possibility of unrestrained factionalism at the general election” justified the imposition of this burden, and declared the law constitutional.⁶⁶ The reasoning of the Court in *Burdick* surfaced in both the plurality opinions of *Crawford* and is thus critical to understanding the outcome in *Crawford*.

3. *The Opinion of the District Court*

In rejecting the plaintiff’s constitutional challenge to SEA 483, the district court in *Indiana Democratic Party v. Rokita*⁶⁷ applied the balancing approach enunciated by the Supreme Court in *Anderson* and *Burdick* and rendered a number of factual conclusions regarding the absence of voter burden and existence of voter fraud. A comprehen-

60. See *Anderson*, 460 U.S. at 806.

61. *Id.*

62. *Id.*

63. 504 U.S. 428 (1992).

64. See *Crawford*, 553 U.S. at 190 (quoting *Burdick*, 504 U.S. at 443).

65. *Burdick*, 504 U.S. at 439.

66. See *id.*

67. 458 F. Supp. 2d 775 (S.D. Ind. 2006). Though bearing different party names, the decision by District Judge Barker in *Ind. Democratic Party v. Rokita* was what ultimately made its way up the chain of appeal to the Supreme Court and was affirmed by the Supreme Court.

sive review of the district court opinion is warranted in light of the fact that its articulation of the all-important facts surrounding the degree of voter burden and the existence of in person voter fraud heavily influenced the subsequent appellate opinions. Moreover, the initial factual conclusions of the district court were both the most comprehensive and the most easily debunked in light of recent empirical findings.

The *Rokita* court applied a balancing analysis that juxtaposed the competing interests of voter burden and the prevention of voter fraud to determine whether SEA 483 violated the test articulated by the Supreme Court in *Anderson* and *Burdick*. To obtain a driver's license or identification card in Indiana, an individual had to personally visit a branch office of the Bureau of Motor Vehicles and present one primary document,⁶⁸ one secondary document,⁶⁹ and one proof of Indiana residency.⁷⁰ Where neither the primary nor the secondary document established proof of Indiana residency, an individual had to present a third type of document that did, such as current bills, or property deeds.⁷¹

In examining the potential burdens associated with obtaining photo identification, the *Rokita* court noted the indirect costs associated with obtaining secondary documentation (e.g., an original birth certificate), as well as the cost of traveling to the Bureau of Motor Vehicles branch to acquire the state identification card.⁷² Nonetheless, the *Rokita* court gave little weight to anecdotal evidence of individuals being turned away for want of the appropriate documentation, concluding that SEA 483 erected no serious barrier to the exercise of their right to vote.⁷³ The *Rokita* court also rejected the plaintiffs' argument that SEA 483 amounted to a de facto poll tax on the basis that the statute allowed for the provision of free photo identification and that not every incidental burden imposed by a voting regulation amounted

68. Primary documents include an official birth certificate, a passport, or a U.S. military or merchant marine photo identification. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 790 (S.D. Ind. 2006).

69. Acceptable secondary documents include, but are not limited to, bank statements, insurance cards, major credit or bank card, and a W-2 Form. *Id.* at 790–91.

70. *Id.* at 791.

71. *Id.*

72. *Id.* at 792.

73. *Id.* at 824–25. The similar plight of an elderly woman in Tennessee has gained national attention: ninety-six-year-old Dorothy Cooper has become a symbol of the effects of voter identification laws after being denied a voter identification despite residing in the State for over forty years and voting in nearly every major election for the last seventy years. See Ashley Haman, *96-year-old Chattanooga Resident Denied Voting ID*, TIMES FREE PRESS (Oct. 5, 2011), <http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/>.

to a poll tax.⁷⁴ In short, the tangential costs associated with obtaining photo identification (i.e., the underlying cost of a birth certificate and the cost of traveling to the Bureau of Motor Vehicles office) did not constitute a “poll tax”, and thus SEA 483 could not be characterized as invidiously discriminatory.⁷⁵ As a result, the district court declined to apply the heightened scrutiny invoked by the Supreme Court in *Harper*.

Moreover, the *Rokita* court did not require the State to proffer anything more than a series of ostensibly rational (though highly speculative) state interests to justify what the Court considered a de minimis voter burden. The *Rokita* court reviewed the parties’ arguments regarding the main state justification for imposing the requirements in the first place—the existence of in-person voter fraud.⁷⁶ The plaintiffs argued that there was *no* evidence of *any* instance of in-person voter fraud in Indiana,⁷⁷ and the State even *conceded* the absence of in-person voter fraud and made no further attempt to respond directly to the plaintiffs’ assertions. Rather, the State argued that in-person voter fraud was problematic because of the bloated voter registration list—citing merely *one* study that found that the list contained 35,699 voters who were deceased. The State also presented additional evidence of books and media reports of in-person voter fraud in *other* jurisdictions.⁷⁸ Although the *Rokita* court did not assess the substantive merits of these reports, the reports claimed that approximately fifty-nine percent of voters nationwide believed that there was “some” or “a lot” of voter fraud, giving merit to an additional, separate and abstract state interest in “bolstering voter confidence.”⁷⁹

74. *Rokita*, 458 F. Supp. 2d. at 826–28.

75. *Id.*

76. In-person voting fraud is the impersonation of one person by another for the purpose of casting a ballot that she would be otherwise ineligible to cast. This obviously injects only one invalid vote into the electoral process at a time, severely restricting the extent to which in-person voter fraud can influence elections. “Proponents of photo identification assert that voter fraud exists but is tough to measure because it is difficult to detect. . . . Existing studies are incomplete but provide some insight. For example, a statewide survey of each of Ohio’s eighty-eight county Boards of Elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state’s 2002 and 2004 general elections. This is a fraud rate of 0.000044%.” Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 653 (2007).

77. *Rokita*, 458 F. Supp. 2d. at 793. (“[N]o voter in Indiana history [has] ever been formally charged with any sort of crime related to impersonating someone else for the purposes of voting.”).

78. *Id.* at 793–94.

79. *Id.* at 794.

Thus, while the *Rokita* court acknowledged that the right to vote was of “the most fundamental significance under our constitutional structure,” it also noted that the right was not absolute, particularly in light of the State’s legitimate interest in regulating free and fair elections.⁸⁰ Thus, the *Rokita* court upheld SEA 483 under the more lenient balancing test of *Anderson* and *Burdick* given the purported absence of invidious discrimination, noting that the plaintiffs’ arguments were premised on an erroneous assumption that the imposition of any burden should subject that law to the heightened constitutional scrutiny articulated in *Harper*.⁸¹ In light of these conclusions, the *Rokita* court rejected the plaintiffs’ arguments and granted the State’s motion for summary judgment.⁸²

4. *The Opinion of the Seventh Circuit*

On appeal, the Seventh Circuit affirmed the *Rokita* court’s grant of summary judgment in favor of the State.⁸³ However, Judge Terrence Evans wrote a compelling dissent premised on the notion that the voter identification law was neutral in neither its impact, nor its intent.⁸⁴ Judge Evans argued that “the Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”⁸⁵ Had Judge Evans’s view been adopted by the rest of the Seventh Circuit, the heightened scrutiny of *Harper* would have been triggered and SEA 483 might have ultimately met a different fate. Judge Evans advocated for the application of “something akin to strict scrutiny light” and would have invalidated SEA 483 for unduly burdening the fundamental right to vote.⁸⁶ Judge Evans disarmed the State’s primary rationale for upholding the voter identification requirement by characterizing the prevention of voter fraud as a “fig leaf of respectability providing the motive behind the law” and noted not only the absence of any credible evidence of voter fraud, but also the strict penalties for its commission.⁸⁷

80. *See id.* 820–21.

81. *Id.*

82. *Id.* at 845.

83. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007).

84. *Id.* at 954–55 (Evans, J., dissenting).

85. *Id.* at 954 (Evans, J., dissenting).

86. *Id.*

87. *Id.* at 955 (noting that Indiana law made voter fraud punishable by up to three years in jail and a \$10,000 fine).

B. *The Supreme Court Opinion in Crawford v. Marion County Election Board*

In confronting the conclusions of the *Rokita* court and the Seventh Circuit, the Supreme Court had to settle two pivotal and interdependent issues, one doctrinal and one factual. First, should the balancing methodology of *Burdick* and *Anderson* be extended to the state requirement of photo identification or, conversely, was SEA 483 invidiously discriminatory so as to justify the application of heightened scrutiny? And second, what credence was the Court to ascribe to concerns regarding the burden of the photo identification requirement on voters generally?

1. *The Lead Opinion*

The lead opinion authored by Justice Stevens first addressed the threshold issue of the applicable level of scrutiny. The Stevens plurality concluded that SEA 483 was not invidiously discriminatory given its “valid neutral justifications” and therefore applied the neutral balancing analysis applied in *Burdick* and *Anderson*, as opposed to the heightened scrutiny required by *Harper*.⁸⁸ In applying the balancing test, the Stevens plurality recognized that there appeared to be no doctrinal basis for the use of a “litmus test” to measure the severity of voter burden imposed by a state law.⁸⁹ As a result, the Stevens plurality did not articulate a black letter standard for evaluating voting restrictions, and instead stated that “a court must identify and evaluate the interests put forward by the state as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ our adversary system demands.”⁹⁰ Ultimately, the Court concluded that, when evaluating voter burden, courts must apply a “flexible standard,” and weigh the evidence of voter burden against the state interest preserved, with the strength of the former dictating the rigor by which the latter should be judged.⁹¹

In applying the balancing test of *Burdick* and *Anderson*, the Stevens plurality identified three State interests that justified what it described as an unproven “special burden” allegedly experienced by a “small number of voters”⁹²: (1) the improving of election moderniza-

88. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (opinion of Stevens, J.).

89. See *id.* at 191.

90. *Id.* at 190.

91. *Id.*

92. *Id.* at 201.

tion procedures; (2) the deterrence and detection of voter fraud; and (3) safeguarding voter confidence.⁹³

First, the Stevens plurality legitimized the State's interest in election modernization by citing two federal statutes that required states to reexamine their election procedures and "contain[ed] provisions consistent with a state's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote."⁹⁴ The Stevens plurality noted that while "neither [of the federal statutes] *required* Indiana to enact SEA 483, [] they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualifications to vote"⁹⁵ Thus, according to the Stevens plurality, the federal statutes provided a tacit endorsement of voter identification laws like SEA 483 by appearing to endorse voter identification laws as a valid tool for updating election procedures.⁹⁶

With respect to the prevention of voter fraud, the Stevens plurality, like the *Rokita* court and the Seventh Circuit, conceded the absence of actual voter fraud in Indiana⁹⁷ but accepted the State's assertion that "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history"⁹⁸ The Stevens plurality also discussed the alleged inflation

93. *See id.*

94. *Id.* at 192 (citing the National Voter Registration Act of 1993, 42 U.S.C. § 1973 (2006)).

95. *Id.* at 193 (emphasis added).

96. The Stevens plurality also cited a report filed by the Commission on Federal Election Reform, which acknowledged the importance of increasing both the security and efficiency of the Nation's voting apparatus. *Id.* at 193–94 (quoting COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–22 (2005)). The Commission wrote: "Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–22 (2005). However, the report itself concedes the utter absence of voter fraud. It also equates the right to vote, a constitutional right of singular importance, to boarding a plane or cashing a check. *Id.* This sort of false equivalence currently frames the debate over voter identification laws.

97. *Crawford*, 553 U.S. at 194.

98. *Id.* at 195. The State noted the fraud perpetrated by the "Tammany Hall political machine" during the late 19th century, an incident involving fraud by absentee ballot in the 2003 democratic primary for East Chicago Mayor, and a 2004 investigation in the state of Washington that led to the discovery of nineteen "ghost voters" in a gubernatorial election, which led to the discovery of one voter "confirmed to have committed in person voting fraud." *See id.* at 195–96, nn.11–13. It warrants mentioning that the State of Indiana, in attempting to justify a novel restriction on the fundamental right to vote, could muster only these three examples of American voter fraud over the course of nearly three years of litigation: one which occurred more than one hundred years prior; one involving a form of voter fraud that could not have been

of the State's voter registration lists, stating that while the State's own negligence may have contributed to the failure to eliminate those that were deceased or otherwise no longer eligible to vote in Indiana, it nonetheless still provided "a neutral and nondiscriminatory reason supporting the State's decision to require photo identification."⁹⁹ In light of these facts, the Stevens plurality validated the legitimacy of the State's interest in deterring voter fraud.

Lastly, the Stevens plurality briefly discussed the State's interest in safeguarding voter confidence. According to the Stevens plurality, the maintenance of voter confidence by the State "encourag[ed] citizen participation in the democratic process," and the detection and preservation of fraud was integral to ensure such preservation.¹⁰⁰

Against the backdrop of these State justifications, the Stevens plurality reviewed the plaintiffs' evidence of voter burden imposed by a photo identification requirement. Of the greatest constitutional significance was the financial burden on voters, as it would liken the photo requirement to a fee or tax, which would implicate similar issues that led to the invalidation of the poll tax in *Harper*.¹⁰¹ Yet, the availability of photo identification free of cost obviated this issue for the Stevens plurality, reducing the voter burden to the mere "inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph . . ."¹⁰² According to the Stevens plurality, such burdens were not substantial and thus could not form the basis of a constitutional challenge to SEA 483.¹⁰³

While the Stevens plurality did note that this burden could be prohibitive for some,¹⁰⁴ such as "elderly persons born out of state . . . and persons [with] economic or other personal limitations,"¹⁰⁵ the Stevens plurality ultimately concluded that the severity of this burden was mitigated by voters' abilities to cast provisional ballots, regardless of the later burden of traveling to the circuit court clerk's office within

prevented by the restriction in question; and one that led to only one proven instance of in-person voter fraud.

99. *Id.* at 196–97.

100. *Id.* at 197.

101. *See id.* at 198.

102. *Id.*

103. *See id.*

104. *Id.* at 199 ("Evidence in the record and facts of which we may take judicial notice indicate that a somewhat heavier burden may be placed on a limited number of persons.").

105. *See id.* As addressed further below, the weighing of the burden on minority groups hints at the potential for invidious discrimination of the sort that could have rendered SEA 483 unconstitutional under *Harper*.

ten days to execute the necessary affidavit for their votes to be counted.¹⁰⁶ The Stevens plurality held that such peripheral burdens would not rise to the level of being constitutionally significant unless completely unjustified.¹⁰⁷ In the absence of a meaningful burden on the fundamental right to vote, the State's proffered interests, however speculative, were sufficient to validate the constitutionality of SEA 483.¹⁰⁸

2. *The Scalia Concurrence*

Justice Scalia, joined by Justices Thomas and Alito, concurred in the result of the lead opinion but posited a different analytical model for examining voting regulations based on a different interpretation of *Burdick*. According to Scalia, *Burdick* required the application of a “deferential important regulatory interests standard for non-severe, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”¹⁰⁹ In essence, Scalia argued that *Burdick* demanded a “two-track approach” rather than a balancing test.¹¹⁰ “Strict Scrutiny is appropriate only if the burden is severe,”¹¹¹

106. *Id.*

107. *Id.* The plaintiffs in *Crawford* chose to pursue a facial attack to SEA 483 and its photo identification requirement, meaning they bore the heavy burden of establishing that the statute was unconstitutional in all of its applications. *See id.* at 200. While the plaintiffs' theory was all encompassing, the evidence supporting the theory was limited. Even with respect to the burden placed on indigent voters, the record was lacking. The expert report relied upon by the plaintiffs was deemed “utterly incredible and unreliable” by the district court in *Rokita* and the depositions presented little reliable evidence of general or targeted voter burden. *Id.* at 200–01. As the Stevens plurality concluded: “on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.” *Id.* at 200. The Stevens plurality interpreted the gaps in the record not as definitive proof that SEA 483 imposed no voter burden, but rather as not substantial enough to carry the burden warranted by a facial attack. *See id.* at 202. The plaintiffs' inability to present sufficient evidence to support their *facial* attack on SEA proved fatal to their constitutional challenge. Moreover, because there was no evidence of the impact on indigent voters in Indiana, the Court could not find a charge of invidious discrimination either. *Id.* at 202.

108. *Id.* at 202–03. The plurality also addresses one last contention of the plaintiffs—namely, that the party-line vote on SEA 483 in the Indiana legislature provided *prima facie* evidence of malicious and discriminatory intent. To this the Court responded that “partisan considerations may have played a significant role in the decision to enact 483,” and were this “the only justification for the photo identification requirement . . . SEA 483 would suffer the same fate as the poll tax at issue in *Harper*.” *Id.* at 203. But so long as the law did have valid and neutral justifications, the mere inference of political motive would be insufficient to justify striking it down. *Id.* at 204.

109. *Id.* at 204 (Scalia, J., concurring) (internal quotation marks omitted).

110. *See id.* at 205.

111. *Id.* (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (1997)).

and “burdens are severe if they go beyond the merely inconvenient.”¹¹² According to Scalia, SEA 483 was facially nondiscriminatory and imposed a burden falling far short of severe. Because the burden imposed was “minimal and justified,” the premise of the plaintiffs was “irrelevant.”¹¹³ Essentially, *Burdick* called for a presumption of validity in reviewing all voting restrictions that were neither discriminatory in nature, nor overly severe in their impact. Thus, the Scalia plurality analyzed voting restrictions under a far more deferential standard than the one used by the Stevens plurality, allowing state legislatures freedom to exercise the discretion granted by Article I, Section 4 of the U.S. Constitution.¹¹⁴ The Scalia plurality concluded SEA 483 was “eminently reasonable,” nondiscriminatory, and constitutional.¹¹⁵

3. Justice Souter’s Dissenting Opinion

Justice Souter wrote a vigorous dissent, joined by Justice Ginsburg, that adopted the balancing methodology of *Burdick* and *Anderson* applied by the Stevens plurality but differed with respect to the evidence of voter burden and, thus, the nature and degree of the burden the state was required to carry.¹¹⁶ Under the balancing methodology of *Burdick* and *Anderson*, the state’s obligation to justify the law in question is directly correlated to the severity of that burden. Based on Justice Souter’s assessment of voter burden, the State should have been required to present more compelling and concrete justifications than those accepted by Justices Stevens and Scalia.¹¹⁷ “A state may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular factual showing that threats to its interests outweigh the particular impediments it has imposed.”¹¹⁸ In reaching his conclusion, Justice Souter acknowledged the tension between the legitimate state interest in voting regulation and the fundamental right to vote but found that the

112. *Id.*

113. *Id.* at 204. Moreover, the Scalia plurality refused to consider the magnitude of burden for individual voters under particular circumstances, holding that only the “general burden” was relevant. *See id.* at 207.

114. Justice Stevens responded to Justice Scalia’s contentions by arguing that his balancing approach remained more faithful to *Burdick* than Justice Scalia’s interpretation. *See id.* at 190 n.8 (opinion of Stevens, J.). According to Justice Stevens, *Burdick* was “explicit in its endorsement and adherence to *Anderson* and its adoption of a flexible, case-by-case analysis.” *Id.*

115. *See id.* at 209 (Scalia, J., concurring).

116. *Id.* (Souter, J., dissenting).

117. *See id.* at 224.

118. *Id.* at 209.

scales tipped too far in the direction of voter burden to uphold SEA 483.¹¹⁹

In assessing the State's justifications for imposing voter burdens and its corresponding erosion of the fundamental right to vote, Justice Souter read the Court's precedent to require more evidence than a speculative state justification for preserving abstract interests.¹²⁰ Here, the State could not articulate any clear interests that would justify the obvious character and magnitude of the voter burden. The State argued that SEA 483 was justified because it made adequate accommodations to alleviate some of the burdens it might otherwise impose, such as exempting indigent persons from the cost of obtaining photo identification and allowing individuals without photo identification the ability to cast provisional or absentee ballots.¹²¹ Justice Souter rejected these justifications, finding that an indigent individual might still incur travel costs to acquire the requisite identification (or in the case of casting an absentee ballot, cost of travel to the circuit court clerk's office)¹²² and would still have to pay for the birth certificate required to obtain such identification.¹²³ Such costs could be prohibitive to poor, old, or disabled voters.¹²⁴ Moreover, while these travel costs would not amount to a severe burden under *Burdick* (thereby requiring stricter scrutiny), Justice Souter argued that such burdens disproportionately impacted the poor, the old, and the immobile.¹²⁵ Moreover, Justice Souter rejected the legitimacy of the State's absen-

119. *Id.* at 210 ("The Judiciary is obliged to train a skeptical eye on any qualifications of that right. 'Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))).

120. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)) ("A court considering [a constitutional challenge to a voting regulation] must weigh the character and magnitude of the asserted injury . . . against the precise interests put forward by the state").

121. *Id.* at 216–17.

122. *Id.* at 211.

123. See IND. CODE § 3-11-7-5-2.5(c)–(d) (2012).

124. See *Crawford*, 553 U.S. at 212 (Souter, J., dissenting). While voting in person would necessitate some travel costs, Justice Souter highlighted that the number of voting precincts in Indiana exceeded the number of motor vehicle offices, making the travel costs of voting less onerous than the travel costs of executing voter affidavits. See *id.* at 213–14.

125. See *id.* at 216. In an attempt to establish the prohibitive economic and practical costs of SEA 483, Justice Souter noted that of the thirty-four "aspiring voters" that cast provisional ballots in the Marion County municipal elections in 2007, only two made it to the clerk's office to execute the necessary affidavit within the statutory period of ten days. See *id.* at 217. Moreover, of these thirty-four aspiring voters, thirty-three submitted to a signature authentication examination and every one matched the signature on file. See *id.* "All of this suggests that provisional ballots do not obviate the burdens of getting photo identification." *Id.*

tee ballot alternative because, while convenient, an absentee ballot increased the likelihood of voter confusion, as voters no longer had access to the aid of poll workers.¹²⁶

In contrast to the Stevens plurality, Justice Souter focused on the scope of voter burden, specifically on the number of voters impacted by the photo identification requirement.¹²⁷ Irrespective of the fact that plaintiffs themselves did not actually produce evidence, Justice Souter relied on the *Rokita* court's estimate that 43,000 voting-age Indiana residents (approximately one percent of the State's voting population) lacked the kind of photo identification required by SEA 483,¹²⁸ a large proportion of which were likely to be in bad economic shape.¹²⁹ Justice Souter found the evidence of voter burden to be meaningful, and therefore concluded that "more than a cursory examination of the State's asserted interests" was warranted.¹³⁰ Because the burden was severe, Justice Souter found that SEA 483 was subject to rigorous review.¹³¹

Next, Justice Souter identified four core justifications proffered by the State: (1) election modernization; (2) combating voter fraud; (3) addressing the State's bloated voter rolls; and (4) preserving and fostering public confidence in the electoral system. However, according to Justice Souter, "the first two (which are really just one) can claim modest weight at best, and the latter two if anything weaken the State's case."¹³² According to Justice Souter, the primary purpose in the modernization of election procedures was the detection and prevention of voter fraud. And while the prevention of voter fraud is a compelling state interest, Justice Souter noted that the voter identification requirement of SEA 483 prevented only in-person voter fraud, of

126. *See id.* at 212 n.4.

127. *Id.* at 218 ("Indiana Voter ID Law thus threaten[ed] to impose serious burdens on the voting right, even if not 'severe' ones, and the next question is whether the number of individuals likely to be affected is significant as well.").

128. *See id.* While, at the time, the rough estimate of 43,000 was relatively uncertain, Justice Souter notes that "the State does not argue that these raw data are unreliable," *id.*, and that "empirical precision beyond foregoing numbers has never been demanded for raising a voting rights claim." *Id.* at 221. For a thorough review of the current empirical data regarding the effect of voter identification laws, most of which did not exist at the time of the *Crawford* decision, see *infra* Section II.B.2.

129. *Crawford*, 553 U.S. at 220 (Souter, J., dissenting).

130. *See id.* at 222.

131. *See id.* at 224. Such a review was appropriate as "the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules." *Id.* at 230 n.32.

132. *Id.* at 224.

which there was little to no evidence.¹³³ Moreover, to the extent that in-person voter fraud was a real threat, it was a minimal one given that, “[i]t is simply not worth it for individuals acting alone to commit in person voter impersonation, which is relatively ineffectual for the foolish few who may commit it.”¹³⁴

With respect to the amelioration of the State’s unreliable voter registration lists, Justice Souter held that the State should not be allowed to take advantage of its own dereliction of duty, particularly when the cost of doing so must be suffered by the voter.¹³⁵ Lastly, with regard to the preservation of voter confidence, Justice Souter noted that the State offered no evidence of waning voter confidence in Indiana and that, to the extent such a deficit of confidence existed, its proper remedy was increased diligence on the part of the State, not new voting restrictions for its citizens.¹³⁶

In short, the State’s purported interests in enforcing SEA 483 were insufficient to warrant the burden it imposed. Moreover, its disproportionate economic impact on the “poor and the weak” rendered it “uncomfortably close to the [poll tax] struck down 42 years [prior].”¹³⁷ Thus, Justice Souter concluded that SEA 483 and its photo identification requirement were unconstitutional.

4. *Summarizing the Conclusions of Crawford v. Marion County Election Board*

Both the Stevens plurality and the dissenters in *Crawford* adopted the balancing standard of *Anderson* and *Burdick* but differed in their assessment of the scope and degree of voter burden imposed by SEA 483 and its potential for invidious discrimination. By contrast, Justice Scalia adhered to a far more deferential, and far less rigorous, constitutional standard in considering the validity of SEA 483. What ultimately decided the issue in *Crawford* was the interpretation of the facts in the record. Had the plaintiffs been able to present stronger evidence of voter burden, or had the Stevens plurality been willing to lend more credence to what evidence the plaintiffs could present, there would likely have been a majority willing to strike down SEA 483 and its voter identification requirement. However, the six-justice plurality

133. *See id.* at 225–26 (citations omitted); *see also id.* at 227 (“The State responds to the want of evidence with the assertion that in person voter fraud is hard to detect. But this is like saying the ‘man who wasn’t there is hard to spot.’”) (internal citations omitted).

134. *Id.* at 227–28.

135. *Id.* at 234.

136. *See id.* at 235.

137. *See id.* at 236–37.

was not persuaded by the plaintiffs' evidence of voter burden or invidious discrimination. By contrast, the dissenting opinions gave far more credence to the significance of the underlying economic and practical costs of SEA 483 and were far less willing to concede the significance of the State's abstract interest in the prevention of voter fraud. Four years and a multitude of voter identification laws later, Justice Souter's dissent, including his conclusion with respect to the severity of voter burden, is poised for vindication.

II.

OVERTURNING *CRAWFORD V. MARION COUNTY* *ELECTION BOARD*

The evidentiary gaps that proved decisive in *Crawford* were a product of the relative novelty of voter identification laws and the lack of mainstream scholarly and journalistic attention dedicated to its potential effects. Both the majority opinion of the Seventh Circuit and the plurality opinions of the Supreme Court reflect this lack of evidence and scrutiny. However, the growing number of voter identification laws and growing evidence that these laws impose a burden on voters calls the Court's factual conclusions and doctrinal analysis into question. As such, *Crawford* may be vulnerable to reversal under a number of different approaches. This Part is intended to provide an overview of how these different approaches could ultimately play out, should further voter identification litigation ensue. In brief, the mounting evidence of voter burden may now be strong enough to support a claim of invidious discrimination, which would trigger the heightened level of scrutiny applied in *Harper*. Yet, even under the balancing methodology of *Anderson* and *Burdick*, the *Crawford* decision is also primed for a reversal in light of the evolving legal landscape and evolving empirical data.

A. *Post-Crawford Voter Restriction Laws*

"By far the most widespread legislative development [in 2011] involved bills to impose stricter documentary identification requirements on voters."¹³⁸ Since 2008, no fewer than thirty-four states have introduced voter identification legislation and at least seven states have signed such bills into law.¹³⁹ However, voter identification laws are only one of a wide array of voting restrictions adopted in the wake of the Supreme Court's decision in *Crawford*. Legislatures across the

138. WEISER & NORDEN, *supra* note 14, at 4.

139. *See id.* at 2.

nation¹⁴⁰ have passed not just voter identification laws, but also proof of citizenship laws, laws making it more difficult to register to vote, laws shortening the period for early and absentee voting, and laws making it increasingly difficult to restore the right to vote to those that have lost it as a result of a felony conviction.¹⁴¹

1. *An Overview of Voter Identification Laws*

Eleven states currently require some form of photo identification in order to vote.¹⁴² Of the eleven, four impose strict voter identification requirements, requiring that voters present photo identification at either the polls or at some government office within a fixed period of time following the casting of a provisional ballot.¹⁴³ The remaining seven states ask that voters present some form of photo identification and, if they cannot, allow them to vote so long as they can satisfy some other criteria (e.g. signing an affidavit, verify some form of personal information, etc.).¹⁴⁴ Six other states have enacted strict voter identification laws, but these laws have either yet to go into effect,¹⁴⁵ have been challenged by the Department of Justice under the Voting Rights Act and are thus suspended,¹⁴⁶ or have been struck down.¹⁴⁷

What ultimately constitutes a valid form of photo identification varies from state to state. All voter identification laws accept “an unexpired driver’s license, non-driver’s [identification] issued by a motor vehicle department, U.S. passport, or U.S. Military photo [identification].”¹⁴⁸ South Carolina, Texas, and Tennessee expressly prohibit the use of a student identification card issued by state universities; Wisconsin would have accepted them in theory but imposed criteria that the vast majority of student identifications cannot meet.¹⁴⁹ Kansas expressly permits the use of a student identification

140. *See id.* at 3.

141. *See Voter Identification Requirements*, *supra* note 15.

142. *See id.*

143. *See id.* O.C.G.A. § 21-2-417 (2011); *see also* SEA 483; KAN. STAT. ANN. §§ 25-2908, 25-1122, 25-3002, 8-1324(g)(2)k (2011); TENN. CODE ANN. § 2-7-112 (2011); TEX. ELEC. CODE § 63.001 (West 2011).

144. *See* FLA. STAT. § 101.043 (2011); HAW. REV. STAT. § 11-136 (2011); IDAHO CODE ANN. §§ 34-1106(2), 34-1113, 34-1114 (2011); LA. REV. STAT. ANN. §18:562 (2011); MICH. COMP. LAWS § 168.523 (2011); S. D. CODIFIED LAWS §§ 12-18-6.1, 6.2 (2011); N.H. REVISED STAT. § 659:13 (2011); MICHIGAN CODE OF LAW § 168:523 (2011).

145. *See Voter Identification Requirements*, *supra* note 15 (Virginia and Arkansas).

146. *See id.* (Mississippi, Texas and South Carolina).

147. *See id.* (Wisconsin).

148. *See* WEISER & NORDEN, *supra* note 14, at 5.

149. *See id.* at 8.

issued by a state university, and Georgia, Indiana, and Michigan neither endorse nor reject the use of such student identifications.¹⁵⁰ Kansas and Texas, allow for the use of concealed handgun licenses.¹⁵¹ Wisconsin permitted state-issued tribal identification cards with a photo.¹⁵² The availability of free photo identifications was cited favorably by the Stevens plurality and the Scalia plurality in upholding SEA 483¹⁵³ and all states with strict photo identification requirements currently offer some form of identification free of charge.¹⁵⁴

In all strict voter identification states, the photo identification requirement applies to all in-person voters. Moreover, Kansas expressly requires that a copy of a voter's photo identification be enclosed and submitted along with each absentee ballot.¹⁵⁵ However, several states exempt certain individuals from the photo identification requirement: Tennessee, Texas, Kansas, and Wisconsin exempt disabled and/or elderly voters subject to certain state-by-state qualifications.¹⁵⁶

Apart from these subtle distinctions, the requirements of the strict voter identification laws are fairly consistent: they make presentation of photo identification a pre-condition for voting in all elections; voters unable to present identification may cast provisional ballots that will only be counted if some additional steps are taken within a fixed period of time; all states offer some form of free voter identification card but require the presentation of a birth certificate to obtain one; and none of the strict voter identifications states account for the cost of the birth certificate itself.¹⁵⁷

States have also passed a number of other significant voting restrictions, many restricting the scope of voter registration. "At least twelve states introduced legislation that would require proof of citizenship, such as a birth certificate, to register to vote."¹⁵⁸ Proof of

150. See *Voter Identification Requirements*, *supra* note 15, tbl. 2 (Details of Voter Identification Requirements).

151. See WEISER & NORDEN, *supra* note 14, at 6.

152. See *id.*

153. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198, 205 (2008).

154. See WEISER & NORDEN, *supra* note 14, at 7 (noting that no other state has ever required the submission of photo identification with an absentee ballot). Notably, neither *Crawford* nor the voter identification statutes make any reference to the cost of the underlying documents needed to obtain the free photo identification (e.g. birth certificate).

155. See *id.* at 6.

156. See *id.*

157. The cost of a birth certificate varies by state, but can range anywhere from about \$10 to \$25. See *Where to Write for Vital Records*, THE CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/w2w.htm> (last visited Feb. 20, 2013).

158. See WEISER & NORDEN, *supra* note 14, at 2.

citizenship laws were passed in Alabama, Kansas, and Tennessee, more than doubling the total number of such laws nationwide.¹⁵⁹ Thirteen states also introduced legislation eliminating Election Day and same-day voter registration, which allow voters to register and vote in the same location on the same day.¹⁶⁰ Another significant development has been the effort in some states to reduce days for early and absentee voting.¹⁶¹ Taken together, these new laws have drastically increased the difficulty of voting and voter registration.

2. *The Response to New Voting Restrictions*

Due to the sheer volume of voting restrictions passed and signed into law by state governments, the response to the 2011 wave of voting restrictions has been swift and vigorous.¹⁶² In some cases, the response to voting restrictions has come in the form of grass-roots driven ballot initiatives, such as those in Maine and Ohio, designed to restore voting rights.¹⁶³ Other states have seen considerable protest of proposed voter identification legislation.¹⁶⁴ Increased media coverage has also provoked a response from the Department of Justice, as Attorney General Eric Holder has made clear the Department's intent to continually review voting restriction laws, "apply the law," and "object as part of [its] obligation under Section 5 of the Voting Rights

159. *See id.* at 2.

160. *See id.* at 2–3 (Texas and Florida); *see also* Glenn Adams, *Maine Voters Restore Election Day Registration*, ASSOCIATED PRESS, NOV. 8, 2011, available at http://www.boston.com/news/local/maine/articles/2011/11/08/mainers_deciding_on_same_day_voter_registration/; Joe Guillen, *New Ohio Elections Law Put on Hold after Groups Deliver Petitions to Put Issue on Ballot*, CLEVELAND PLAIN DEALER (Sept. 29, 2011), http://www.cleveland.com/open/index.ssf/2011/09/voting_rights_group_says_it_ha.html (Ohio).

161. Florida cut its early voting period from fourteen to eight days. *See* Ari Berman, *The GOP War on Voting*, ROLLING STONE (Aug. 30, 2011, 7:40 PM), <http://www.rollingstone.com/politics/news/the-gop-war-on-voting-20110830>. In Ohio, a new state law reduced the early voting period from thirty-five days to eleven, with only limited hours for those voting on weekends. *See id.* Florida, Georgia, Ohio, Tennessee, and West Virginia also enacted bills reducing the early voting period. *See* WEISER & NORDEN, *supra* note 14, at 3. In all, "at least nine states introduced bills to reduce their early voting period, and four tried to reduce absentee voting opportunities." *Id.*

162. *Id.* at 1 ("Over the past century, our nation expanded the franchise and knocked down myriad barriers to full electoral participation. In 2011, however, that momentum abruptly shifted. State governments across the country enacted an array of new laws making it harder to register or to vote.").

163. *See* Adams, *supra* note 160; *see also* Guillen, *supra* note 160.

164. *See* *Voter ID Law Draws Protest in N.H. Primary*, SEACOAST ONLINE (Sept. 12, 2012), <http://www.seacoastonline.com/articles/20120912-NEWS-209120376>; *see also* Peter Jackson, *Pennsylvania Voter ID Law Hearing Draws Hundreds to Protest Rally*, HUFFINGTON POST (July 24, 2012), http://www.huffingtonpost.com/2012/07/24/pennsylvania-voter-id-hearing_n_1700227.html.

Act.”¹⁶⁵ Subsequently, the Department of Justice challenged South Carolina and Texas’s voter identification laws, alleging that they had a discriminatory impact on minority voters.¹⁶⁶

Yet, the Attorney General’s power to combat discrimination through Section 5 of the Voting Rights Act is limited to covered jurisdictions.¹⁶⁷ As a result, the response to new voting restrictions in uncovered jurisdictions must come in other forms, such as ballot initiatives or lawsuits brought by someone other than the Department of Justice. Where such actions are brought, *Crawford* and its fractured three-justice opinions will determine the fate of the voter identification law in question. Under the weight of increased empirical evidence and mounting public scrutiny and response, *Crawford* and its holding are poised to break.

B. *Overturing Crawford on its own Doctrinal Terms*

The threshold issues in voter identification litigation are whether there is any evidence of invidious discrimination (thus triggering heightened scrutiny) and, if not, how onerously the law burdens voters. In the absence of invidious discrimination, a court will likely proceed with a balancing analysis, where the state justifications will be reviewed and assessed in light of the voter burden. While Justice Scalia’s concurring opinion in *Crawford* makes the case for a more deferential two-track approach, as discussed in Part I.B, the more neutral balancing test articulated by the Stevens plurality and applied by the dissenters is more faithful to Supreme Court precedent.

The three justices of the Stevens plurality and the three dissenting justices endorsed the application of a non-deferential balancing analysis to such restrictions, explicitly repudiating Justice Scalia’s far more deferential interpretation of *Burdick*.¹⁶⁸ Given the fluidity of the facts surrounding the largely unprecedented imposition of voter identification requirements, there is now a fact-based argument to be made that

165. Holder Speech, *supra* note 30.

166. See Markon, *supra* note 21; see also *Texas v. Holder*, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012) (barring implementation of Texas law); *South Carolina v. United States*, No. 12-203, 2012 U.S. Dist. LEXIS 146187, *65–67 (D.D.C. Oct. 10, 2012) (holding that proposed South Carolina law does not violate Voting Rights Act).

167. The Attorney General can only bring Section 5 actions against states covered as a whole: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. See *Section 5 Covered Jurisdictions*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Apr. 3, 2013).

168. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008) (“Contrary to Justice Scalia’s suggestion, our approach remains faithful to *Anderson* and *Burdick*.”) (internal citations omitted).

is at once faithful to the balancing approach of *Anderson* and *Burdick* and strong enough to forge a majority to reverse the judgment in *Crawford*.¹⁶⁹ However, while the result in *Crawford* may eventually be reversed on the strength of more comprehensive empirical data, its analytical paradigm should ultimately be replaced by the bifurcated analysis presented in Part IV.

1. *The Terms of Crawford's Balancing Test*

First, it is necessary to refine one critical doctrinal issue regarding the appropriate measure of voter burden. One factor present in the dissenting analysis, but absent in the plurality opinions, was the *scope* of voter burden. A key component of Justice Souter's dissent is the importance he accorded to the raw number of potential voters impacted by SEA 483 (i.e. its scope).¹⁷⁰ Rather than focus solely on the severity of individual voter burden, Justice Souter first asked whether "[SEA 483] threaten[ed] to impose serious burdens on the voting right, even if not 'severe' ones, and . . . next . . . whether *the number of individuals likely to be affected [was] significant as well.*"¹⁷¹ While the Stevens plurality did not explicitly differ on this important nuance, it also did not openly acknowledge its legitimacy. In contrast, the Scalia plurality disregards the importance of the scope of voter burden in its interpretation of the *Burdick* balancing test. Whether the *Burdick* test allows for the consideration of the scope of voter burden is critical to reversing the determination of voter burden, and the ultimate outcome, in *Crawford*. This Part reviews the *Burdick* test to determine whether the scope of voter identification burden is a relevant inquiry in the balancing test and concludes that the scope of burden is an appropriate consideration.

First, both the Stevens plurality and the dissenting opinions highlighted the flexibility of the balancing test applied in *Burdick* and *Anderson*.¹⁷² Justice Souter did not directly support his assertion that *Burdick* required the consideration of both the scope and degree of voter burden, but the flexibility of the standard, as well as the *Burdick* Court's reference to measuring the "character and magnitude" of voter

169. This point assumes that Justices Sotomayor and Kagan, who have since replaced Justices Stevens and Souter, respectively, would also endorse the non-deferential balancing approach adopted by the Stevens plurality and the dissenters in *Crawford*.

170. See *Crawford*, 553 U.S. at 218 (Souter, J., dissenting).

171. *Id.* (emphasis added).

172. *Id.* at 190 n.8.

burden allows space for Justice Souter to infer such a requirement.¹⁷³ Therefore, consideration of both the degree and scope of voter burden appears to be consistent with prior Supreme Court doctrine.

In contrast, Justice Scalia's interpretation of *Burdick* and *Anderson* is more of an attempt at advocacy than faithful interpretation. Justice Scalia writes: "Although *Burdick* liberally quoted *Anderson*,¹⁷⁴ *Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrative rule."¹⁷⁵ According to Justice Scalia, neutral laws that imposed anything short of a severe voter burden are entitled to a presumption of legitimacy.¹⁷⁶ Yet, *Burdick* provides little to no support for the application of such a deferential standard to voting restrictions and, furthermore, the *Burdick* Court's emphasis on flexibility seems to undermine Justice Scalia's advocacy for an ostensibly rigid "two-track approach." Thus, the flexible balancing test applied by the Stevens plurality, and accepted by the dissenters in *Crawford*, is a better interpretation of the *Burdick* decision, and allows for the consideration of both the severity and scope of voter burden when considering the constitutional legitimacy of neutral voting restrictions.¹⁷⁷

173. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[A] more flexible standard . . . applies [to voting restrictions]. A court considering a challenge to a state election law must weigh the *character and magnitude* of the asserted injury to [voting rights] against the precise interests put forward by the state as justifications for the burden imposed by its rule.") (emphasis added) (internal citations omitted). The terms "character" and "magnitude," could be interpreted as two distinct inquiries, with "character" referring to the nature of the burden itself and "magnitude" referring to the number of voters impacted. Justice Stevens' interpretation of the *Burdick* balancing test also supports a flexible approach in reviewing any number of factors to determine whether there is a burden on a "discrete class of voters." Furthermore, Justice Stevens' reference to a "discrete class of voters" necessitates the consideration of the macro-effect of voting restrictions on a large group of voters. Thus, the importance of the scope of voter burden to the balancing test is supported on firm doctrinal ground under *Burdick* and *Anderson*.

174. The balancing test endorsed in *Burdick* and applied by the Stevens plurality and the dissenters in *Crawford* originated in the *Anderson* decision. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982).

175. See *Crawford*, 553 U.S. at 205 (Scalia, J., concurring).

176. *Id.* at 208 ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote.")

177. See *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (finding that Plaintiffs challenging the reduction of early voting days presented "extensive evidence that a *significant number* of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting") (emphasis added).

2. *Weighing the Evidence of Voter Burden*

Now that the doctrinal terms of the balancing test have been established, the first step in assessing the constitutionality of a voter identification law is weighing the evidence of voter burden. According to the Brennan Center for Justice: “The number of states with laws requiring voters to show government issued photo identification . . . quadrupled in 2011. To put this in context, 11% of American citizens do not possess a government-issued photo ID; that is over 21 million citizens.”¹⁷⁸ A 2007 academic study of registered Indiana voters found that approximately twenty percent of registered voters ages eighteen to thirty-four lacked the necessary photo identification required by SEA 483.¹⁷⁹ A similar study of Wisconsin voters determined that “[m]any adults do not have either a driver’s license or a photo ID.”¹⁸⁰ The study determined that “[a]n estimated 98,247 Wisconsin residents ages 35 through 64” and approximately thirty-four percent of Milwaukee County residents lacked any form of state-issued photo identification.¹⁸¹ Studies have also shown that the poor and the elderly are the least likely to have photo identification, because the most common form of photo identification is a driver’s license and poor and elderly people typically do not drive.¹⁸² Evidence of the widespread impact of voter identification laws has also been introduced by members of Congress with the stated purpose of showing how many Americans of voting age lack the type of identification required by these laws.¹⁸³ With this emerging empirical evidence, the lack of “evidence in the

178. See WEISER & NORDEN, *supra* note 14, at 2.

179. See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, FAST FACTS ON THE IMPACT OF PHOTO ID: THE DATA 1 (2008), available at http://www.brennancenter.org/page/-/Democracy/_%20ID-related%20stats.pdf.

180. See JOHN PAWASARAT, UNIV. OF WIS.-MILWAUKEE, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN, 1 (2005), available at <http://www4.uwm.edu/eti/barriers/DriversLicense.pdf>.

181. *Id.* at 1, 9. On March 12, a Dane County Circuit Judge issued a permanent injunction prohibiting the enforcement of Wisconsin’s voter identification law, finding it unconstitutional under Section III of the Wisconsin State Constitution. See Amanda Terkel, *Wisconsin Voter ID Law Ruled Unconstitutional*, HUFFINGTON POST (Mar. 12, 2012), http://www.huffingtonpost.com/2012/03/12/wisconsin-voter-id-law-unconstitutional_n_1339830.html.

182. See Cory Dade, *Why New Photo ID Laws Mean Some Won’t Vote*, NPR.ORG (Jan. 28, 2012), <http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote>.

183. See CHARLES A. GONZALEZ, VOTER ID LAWS LEAD TO LESS VOTING, NOT LESS FRAUD 1–4 (2011), available at <http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Gonzalez111114.pdf>.

record [to] provide [the Stevens plurality] with the number of voters without photo identification”¹⁸⁴ may now be remedied.

The degree of individual voter burden (e.g., the burden on any one individual to comply with the law) is a far more subjective inquiry, making it more difficult to assess through empirical study. Although there have been few studies dedicated to determining the extent to which voter identification laws impact voter turnout, one empirical, non-partisan study has shown that strict voter identification laws depress overall voter participation.¹⁸⁵ The report set out to determine the extent to which voter identification requirements impact voter participation, based on four election cycles from 2000 to 2006. It concluded that “requiring a photo identification card [does] have a more negative effect on participation than suggested by [simpler analytical models.]”¹⁸⁶ Moreover, “the stricter requirements—requirements more than merely presenting a non-photo identification card—are significant negative burdens on voters, relative to a weaker requirement as merely signing a poll book.”¹⁸⁷

In addition, examples illustrating the burden alluded to in the study have already gained nationwide attention and inspired focus on the actual effect of voter identification laws on elderly voters.¹⁸⁸ Indeed, Justice Souter’s dissent has proven prescient in light of the emerging stories of elderly voters unable to secure the necessary identification required to vote. Just as Souter predicted, “Poor, old, and disabled voters who do not drive a car, however, may find the trip [to secure a photo identification] prohibitive.”¹⁸⁹ Now, opponents of voter identification laws have the necessary empirical and testimonial evidence to distinguish their circumstances from the factual assumptions of *Crawford* and establish the existence of meaningful and widespread voter burden stemming directly from the strict voter identification requirements implemented in 2011.¹⁹⁰

184. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008).

185. See R. Michael Alvarez et al., *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 *POL. ANALYSIS* 20 (2010).

186. *Id.* at 29.

187. *Id.*

188. See Bill Glauber, *At 84, She Lacks Identification, but Not Will to Fight Voter ID Law*, *MILWAUKEE J. SENTINEL*, Dec. 14, 2011, <http://www.jsonline.com/news/state-politics/at-84-she-lacks-identification-but-not-will-to-fight-voter-id-law-f03eqti-135635733.html>; Nsenga Burton, *Woman, 93, Who Cleaned State Capitol Denied Voter ID*, *ROOT* (Dec. 29, 2011, 11:25 AM), <http://www.theroot.com/buzz/93-year-old-woman-who-cleaned-state-capitol-denied-voter-id>; see also Haman, *supra* note 73.

189. See *Crawford*, 553 U.S. at 212 (Souter, J., dissenting).

190. Those attempting to overturn other voter identification laws would do well to avoid the tactical error of the plaintiffs in *Crawford* who, by mounting a facial attack

3. *Measuring the State Interest: The Continuing Absence of In-Person Voter Fraud*

Under the balancing methodology applied in *Crawford*, a state must justify the imposition of voter burden by presenting correspondingly weighty evidence of “precise interests . . . as justifications for the burden imposed by its rule.”¹⁹¹ In *Crawford*, the State sought to justify SEA 483 by citing its interest in election modernization, winnowing down their bloated voter registration rolls, safeguarding voter confidence, and preventing in person voter fraud. While the Stevens plurality purportedly applied the non-deferential balancing analysis of *Burdick*, its review of the State’s justifications for SEA 483 was deferential, allowing for the assertion of four overlapping interests and legitimizing them almost exclusively in the abstract without requiring the sort of concrete evidence it required of the *Crawford* plaintiffs. As Justice Souter put it, the Stevens plurality “avoid[ed] a hard look at the State’s claimed interests.”¹⁹²

The State’s primary interest, and indeed the nearly universal justification for voter identification legislation across the country, is the prevention of in-person voter fraud.¹⁹³ Yet, the *Rokita* court,¹⁹⁴ the Seventh Circuit,¹⁹⁵ and the *Crawford* Court all acknowledged the absence of any credible evidence of in-person voter fraud in Indiana in reaching their conclusions.¹⁹⁶ The report issued by the Commission on Federal Election Reform, which was relied on heavily by the Stevens plurality, also conceded that “there is no evidence of extensive voter fraud in U.S. elections or of multiple voting”¹⁹⁷

Since the *Crawford* decision in 2008, no new evidence of in-person voter fraud has emerged. Apart from the fact that impersonating another individual is a highly inefficient, if not completely feck-

to SEA 483, saddled themselves with a heavy evidentiary burden. This burden figured subtly, but significantly, into the Court’s decision. *See id.* at 200. The less onerous evidentiary burden of an “as applied” case-by-case challenge to voter identification laws, combined with improved evidence of voter burden, is key to any attempt to avoid the result in *Crawford*.

191. *Id.* at 190 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

192. *Id.* at 223. (Souter, J., dissenting).

193. Kansas Secretary of State Kris Kobach has emerged as the chief advocate for voter identification laws, and has cited the need to prevent voter fraud as their primary justification. *See* Kris Kobach, *Voter Photo ID Laws are Good Protection Against Fraud*, WASH. POST, July 13, 2011, at A15.

194. *See* *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 792 (S.D. Ind. 2006).

195. *See* *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).

196. *See* *Crawford*, 553 U.S. at 194.

197. *See id.* at 194 (quoting *Building Confidence in U.S. Elections* § 2.5 (Sept. 2005), App. 136–137 (Carter-Baker Report) (footnote omitted)).

less, means by which to commit election fraud, extensive investigations by the Justice Department under President Bush revealed little to no evidence of in-person voter fraud.¹⁹⁸ Other investigations have revealed a similar paucity of in-person voter fraud.¹⁹⁹ As one commentator put it: “[In *Crawford*], photo ID proponents brought out the fraud best-in-show: Since 2000, nine suspected votes—perhaps impersonation, perhaps not—that required ID could have been stopped. During that same period, 400 million votes were cast in general elections alone. That’s an alleged fraud rate of .000002 percent.”²⁰⁰ The absence of such evidence, and the continuing absence of such evidence, renders the Supreme Court’s reliance on the importance of preventing in-person voter fraud untenable given the severity of voter burden.

With respect to the other purported state justifications, outdated election procedures and bloated voter registration lists are chiefly a product of a state’s own dereliction of duty, and allowing such interests to form the basis of imposing a significant voter burden would perversely incentivize states to allow their election infrastructure to deteriorate in the hopes of justifying new voting regulations. Lastly, as Justice Souter observed, the preservation of voter confidence is merely the logical result of preventing voter fraud and thus should not be asserted as its own independent state interest.²⁰¹

Yet, whether a state can sustain its voter identification requirements with a purely abstract state interest that amounts to little more than a phantom menace given the increasing evidence of voter burden, is subject to judicial interpretation under the balancing test.²⁰² The Supreme Court has accepted abstract interests as justification for minor voter burdens. For example, the Court in *Burdick* accepted an abstract interest in avoiding the possibility of “unrestrained factionalism” in general elections as a justification for its prohibition of write-in voting. However, the Court also noted that it reached this conclusion in light of a very slight countervailing burden on those who wished to cast write-in ballots.²⁰³ In contrast, the Court in *Anderson*

198. See Lipton & Urbina, *supra* note 19.

199. See Russell, *supra* note 19.

200. Justin Levitt, *The Real Victims of Election ID Laws*, POLITICO (June 14, 2011, 9:29 PM), <http://www.politico.com/news/stories/0611/56939.html>.

201. See *Crawford*, 553 U.S. at 224 (Souter, J., dissenting).

202. *Crawford* was decided under the dual assumptions that voter burden was minimal and voter fraud was real. Both assumptions have since been undermined, leaving only a concrete voter burden and an almost entirely hypothetical state interest in preventing voter fraud.

203. See *Burdick v. Takushi*, 504 U.S. 438, 438–39 (1992).

held that voter burden must be justified by a “*precise* interest put forward by the state”²⁰⁴ because there was a substantial amount of voter burden. “Precise” implies some level of specificity, and abstract interests are, by nature, incompatible with such a requirement. Thus, the *Anderson* Court struck down an early filing deadline for presidential candidates because it had a “substantial impact on independent minded voters” and the state’s weak and abstract interest could not sustain such an impact.²⁰⁵ Ultimately, the Court’s willingness to accept an abstract interest as an adequate justification for voter burden has everything to do with the degree of voter burden, since the level of scrutiny applied should correspond to the level of voter burden evinced.²⁰⁶

Given the increased evidence of voter burden inflicted by voter identification laws, the conclusions of the Stevens plurality with respect to the ability of the State’s abstract interest in preventing voter fraud in order to justify that burden have become unsustainable. As Justice Souter aptly noted, “The state responds to the want of evidence with the assertion that in person voter impersonation fraud is hard to detect. But this is like saying the ‘man who wasn’t there’ is hard to spot”²⁰⁷ The opinions of the dissenting justices, and Justice Souter in particular, have proven to be a far more accurate assessment of both the severity of voter burden and the fragility of the State’s countervailing interest in the prevention of voter fraud.

4. *Summarizing the Balancing Argument Against Crawford and its Conclusions*

The balancing test applied by the Court in *Anderson*, *Burdick*, and *Crawford* starts with a realistic assessment of voter burden and ends with a determination of the adequacy of the state’s countervailing justifications. The test is a flexible one, and may be expanded to allow for a consideration of both the degree and breadth of the burden imposed on voters by the voting restriction in question. Far more Americans are affected by voter identification requirements than initially

204. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

205. See *id.* at 796, 799–801.

206. This inference is borne out by the divide separating the Stevens plurality, which finds the burden of SEA 483 to be minimal and was thus willing to take the State’s proffered justification at face value, and Justice Souter, who concludes SEA 483 imposes a substantial voter burden and is thus unwilling to accept the validity of abstract state interests.

207. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 226–27 (Souter, J., dissenting) (quoting H. MEARN’S, *ANTIGONISH*, reprinted in *BEST REMEMBERED POEMS* 107 (M. Gardner ed., 1992)).

thought and those that are most vulnerable have found the requirements of photo identification laws prohibitive. By contrast, the purported state interest in the prevention of in-person voter fraud has been delegitimized even further, with study after study showing that no such thing exists.²⁰⁸ Put simply, the clash over voter identification legislation is a clash between manifestly provable voter burdens, and unsubstantiated state interests. Given the parameters of the balancing test put forth in *Anderson* and *Burdick*, and given its applications to date, one may now convincingly argue that voter identification laws will be unable to survive *Crawford*'s balancing test analysis in light of the current evidence of voter burden and the absence of evidence of in-person voter fraud. While voter identification laws must be assessed on a case by case basis under the *Crawford* framework, the evidentiary building blocks of such an argument are in place, making it unlikely that the voter identification laws currently in effect can be justified on the facts currently available.

C. *An Alternative Route: An Invidious Discrimination Argument Against Voter Identification Laws*

In *Crawford*, the Stevens plurality alluded to, but largely bypassed, *Harper* and its application of heightened scrutiny to certain types of voting restrictions that “invidiously discriminate” by targeting a discrete class of voters or instituting voting restrictions that are unrelated to voter qualifications.²⁰⁹ In *Harper*, a unanimous Court invalidated an annual Virginia poll tax of \$1.50 on Equal Protection grounds.²¹⁰ The Court concluded that principles of the Equal Protection Clause of the Fourteenth Amendment prohibit states “from fixing voter qualifications which invidiously discriminate,” or, “dilut[ing] a citizen’s vote on account of his economic status”²¹¹ The Court reasoned that because a state’s power was limited to the fixing of voting qualifications, any regulation unrelated to one’s ability to “participate intelligently in the electoral process” created an impermissible basis for distinguishing between voters and was thus *invidiously discriminatory*, despite the fact that the regulation itself might be facially neutral.²¹² The Court refused to articulate a black letter standard for

208. See GONZALEZ, *supra* note 183; see also John Wasik, *Voter Fraud: A Massive Anti-Democratic Deception*, FORBES (Nov. 6, 2012), <http://www.forbes.com/sites/johnwasik/2012/11/06/voter-fraud-a-massive-anti-democratic-deception/>.

209. See *Crawford*, 553 U.S. at 189–90 (Opinion of Stevens, J.).

210. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

211. *Id.* at 667.

212. See *id.* at 667–68 (emphasis added).

what may constitute true voter equality, stating instead that the degree of the discrimination was irrelevant, since the Court had “never been confined to [any] historic notions of equality”²¹³

As shown in Part II.B.2, there is increasing evidence of the onerous impact of voter identification laws. Thus, although the district court in *Rokita* expressly rejected the plaintiffs’ argument for heightened scrutiny based on their analogy between the poll tax in *Harper* and the photo identification requirement in SEA 483, this increasing evidence makes the argument for heightened scrutiny based on invidious discrimination more tenable. If challengers of voter identification laws can show actual voters that are forced to incur the incidental expense of obtaining secondary documentation (i.e. an original birth certificate) as a necessary precursor to obtaining the otherwise free state identification, the poll tax comparison becomes more evident. Such evidence is proven with the use of qualified voter testimony. Moreover, the *Rokita* court rejected the plaintiffs’ argument because SEA 483 also allowed for the use of other federal identifications such as a passport, the cost of which was determined by the federal government.²¹⁴ Yet, challengers can easily argue that this contention is flawed. First, any individual obtaining a passport must also obtain a birth certificate or a naturalization certificate (which is more difficult to obtain²¹⁵) in order to do so.²¹⁶ Thus, the reliance on the acceptability of a passport merely inserts a degree of separation between obtaining free photo identification and the underlying cost of a birth certificate. Second, the *Rokita* court’s reasoning is flawed because, while the underlying cost of the birth certificate is out of the State’s control, the State can *still* exploit that reality, amounting to the kind of discrimination, i.e., a poll tax, that was ruled unconstitutional in *Harper*.²¹⁷ Thus, just like the poll tax in *Harper*, voter identification

213. See *id.* at 668–69.

214. See *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827–28 (S.D. Ind. 2006).

215. See Iona Bray, *Obtaining Proof of Citizenship*, NOLO LEGAL ENCYCLOPEDIA, <http://www.nolo.com/legal-encyclopedia/obtaining-proof-of-us-citizenship-30116.html> (“In most cases it is more difficult to prove your citizenship through a certificate of citizenship application than by applying for a U.S. passport, mostly because it takes more time.”).

216. See *Apply for A Passport: First Time Applicants*, U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/passport/get/first/first_830.html (last visited Mar. 30, 2013).

217. For the sake of comparison, \$1.50 in income in 1966 (when *Harper* was decided) was the equivalent of \$10.40 in income in 2013, or roughly the minimum cost of obtaining an original birth certificate. See MEASURING WORTH, <http://www.measuringworth.com/uscompare/> (last visited Jan. 1, 2013).

laws erect a financial hurdle to the exercising of the right to vote; voter identification laws are a de facto poll tax.²¹⁸

Supporters of voter identification may distinguish voter identification laws from poll taxes by arguing that the financial cost of a birth certificate is merely an incidental expense to obtaining photo identification, whereas the poll tax is a direct and uncompromising financial pre-condition of voting.²¹⁹ Yet, supporters cannot offer a meaningful reason for why the insertion of one degree of separation between what is required by the law in question and the necessary financial cost to meet that requirement ameliorates the constitutional infirmity of a poll tax. Thus, under *Harper's* heightened scrutiny, voter identification laws amount to a de facto poll tax and are unconstitutional.

Moreover, in the heightened scrutiny framework, it is appropriate to consider the historical context of the restriction in question. In *Harper*, historical context had just as significant an effect upon its outcome as the Supreme Court doctrine applied.²²⁰ The poll tax was part of a broader discriminatory framework in place at the time, designed to deter and dilute the African American vote in certain parts of the south.²²¹ The poll tax was a facially neutral voting requirement designed to obfuscate underlying racially discriminatory motives.²²² Similarly, the wave of ostensibly coordinated voter identification legislation has been criticized as a modern-day method of marginalizing minority voters, who are less likely to have a photo identification and more likely to lack the resources that would allow them to obtain one.²²³ These individuals are also more likely to vote Democratic.²²⁴ The NAACP estimates that approximately twenty-five percent of all African American voters and sixteen percent of all Hispanic American voters lack the necessary photo identification to satisfy the require-

218. See Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1035–51 (2009) (arguing that voter identification laws may be a mechanism for deterring voting based on socioeconomic status).

219. See *Rokita*, 458 F. Supp. 2d at 827–28 (classifying the costs associated with SEA 483 as “tangential burdens”).

220. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 682 n.3 (1966) (discussing the historical origins of racial discrimination addressed in prior Supreme Court case law).

221. See DEFENDING DEMOCRACY, *supra* note 18, at 5.

222. See *id.*

223. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (“[T]he Indiana voter ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”).

224. See Alexander Keyser, *Voter Suppression Returns*, HARVARD MAGAZINE, July–August 2012, at 28 (finding that voters affected by voter identification laws are more likely to vote Democratic).

ments of a strict voter identification law.²²⁵ By contrast, only eight percent of white voters lack photo identification.²²⁶ Moreover, the states with the most rigid voter identification laws also happen to be states with substantial minority populations and a history of Jim Crow-style discrimination at the polls.²²⁷ In fact, the Justice Department's decisions to challenge the voter identification laws in Texas and South Carolina were expressly based on the invidious discriminatory impact of those laws on minority voters.²²⁸ Mounting evidence of these laws' disparate impacts should indicate the need for a heightened level of scrutiny and the striking down of voter identification laws on a case by case basis.

III.

A NEW CONSTITUTIONAL PARADIGM: VOTING AS A STRUCTURAL RIGHT

As noted by Chief Justice Warren in *Reynolds v. Sims*, and reinforced by numerous enlightenment theorists, the right to vote is “preservative of other basic civil and political rights” and therefore functions as a constitutional keystone, forming the foundation of all other constitutional rights.²²⁹ Voting is therefore “structural” in that it is of such foundational importance to the function of democratic governance. Voting is the means by which citizens check and balance the acts of their legislators, whom also possess the power to dilute or otherwise interfere with the right to vote. For these reasons, the right to vote is not only constitutional, but structural in the sense that it is the right upon which all other constitutional rights are built. Thus, as the right of singular importance and singular vulnerability, laws restricting the right to vote demand the most exacting form of judicial scrutiny.

In recent years, the Supreme Court has lowered its doctrinal defenses of the right to vote, according states too much authority to regulate the time, place, and manner of elections under Article 1, Section 4 of the U.S. Constitution. In *Crawford*, the Court sought to balance the

225. See DEFENDING DEMOCRACY, *supra* note 18, at 5.

226. See *id.*

227. *Id.* at 3 (“Several of the very states that experienced both historic participation of people of color in the 2008 Presidential Election and substantial minority population growth according to the 2010 Census are the ones mounting an assault to prevent similar political participation in 2012. These states include those that experienced the largest growth in total African American population during the last decade (Florida, Georgia, Texas, and North Carolina), and three states that saw the highest growth rates in Latino population (South Carolina, Alabama, and Tennessee).”).

228. See *supra* note 21 and accompanying text.

229. See 377 U.S. 533, 562 (1964); see also *infra* Part III.A.

competing interests of voters and the state and, in doing so, allowed the scales to tip too far in favor of the state. In the process, the Court lost sight of the structural importance of the right to vote and its vulnerability to manipulation by legislators that stand to benefit from such manipulation. In short, the balancing test applied in *Anderson*, *Burdick*, and *Crawford* fails to adequately protect the fundamental right to vote by according the states unwarranted and unnecessary deference in designing their voter qualification laws.

This Part argues that the balancing methodology of the past must be displaced as the principal analytical model for scrutinizing state laws that directly impact the substantive right of individuals to vote (i.e. those that regulate who may vote). In its place, the Court must apply strict scrutiny to laws that set the boundaries of who may vote. The balancing methodology should be reserved for state laws regulating the time, place, and manner in which the vote is cast.²³⁰ Although the Supreme Court has never explicitly adopted strict scrutiny in the voting rights context, its influence is evident in the Court's prior rulings. Absent a doctrinal shift, the right to vote will remain vulnerable to erosion and manipulation.

A. *Historical Underpinnings of the Singular and Structural Importance of the Right to Vote*

Enlightenment theorists espoused the virtues of democracy and the importance of the right to vote. In *Common Sense*, Thomas Paine articulated the fundamental principles of democratic government, including, most significantly, the appropriate distribution of power between the government and its citizens. “[The public] leave[s] the legislative part to be managed by a select number chosen from the whole body, *who are supposed to have the same concerns at stake with those who appointed them, and who will act in the same manner as the whole body would act were they present.*”²³¹ Paine argued that it was the duty of the representative to align his interests with those he represented: “the elected [must] never form to themselves an interest separate from the electors”²³² Paine believed in the importance of frequent elections as a means of ensuring the consistency of interest between elected officials and their representatives “because as the elected might by that means return and mix again with the general body of the electors in a few months, their fidelity to the public will be

230. For example, laws affecting the number of early voting days or the window for submitting absentee ballots.

231. PAINE, *COMMON SENSE*, *supra* note 28, at 8 (emphasis added).

232. *Id.*

secured by the prudent reflection of not making a rod for themselves.”²³³

Furthermore, Paine believed that the legitimacy of government was based on the delegation of individual sovereignty,²³⁴ and, thus, suffrage was the keystone of democracy.²³⁵ Without voting, government was bereft of all legitimate authority. A system of checks and balances exists in our government, and Paine argued that electoral participation is the primary means by which the “electors” may hold the “elected” accountable and ensure that their collective interests were preserved and pursued.²³⁶ Only by this sort of free and legitimate delegation of authority could a representative government serve its proper function, and have true legal authority.²³⁷ Both the “strength of the government, and the happiness of the governed”²³⁸ depend upon this legitimate delegation of power—only a government “empowered by the people, will have a truly legal authority.”²³⁹ Any individual who has been deprived of the right to elect the government is thus subject to the exercise of illegitimate authority by whatever institution presides over her.²⁴⁰

John Locke also argued that suffrage was the sole source of legislative legitimacy. Locke believed that those who legislate without the consent of those who they purport to govern may do so only to the extent possible in a state of nature and not within the confines of any true form of civil government.²⁴¹ By contrast, when an individual con-

233. *Id.*

234. *See id.* at 32–34 (explaining that the colonies should be divided into districts to elect a president and that members of Congress represent their corresponding colonies in election and other government matters).

235. THOMAS PAINE, RIGHTS OF MAN: PART ONE (1791), reprinted in COLLECTED WRITINGS 467 (Eric Foner ed., 1995) (“[I]ndividuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.”) [hereinafter PAINE, RIGHTS OF MAN].

236. *See* PAINE, COMMON SENSE, *supra* note 28, at 32–34.

237. PAINE, RIGHTS OF MAN, *supra* note 235, at 467.

238. PAINE, COMMON SENSE, *supra* note 28, at 8.

239. *Id.* at 33.

240. *See* PAINE, RIGHTS OF MAN, *supra* note 235, at 485 (“The representatives of the nation . . . who are the legislative power, originate in and from the people by *election*, an inherent right in the people, as an inherent right of the people. In England it is otherwise; and this arises from . . . its monarchy” (emphasis added)).

241. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690), reprinted in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE 20 (Paul E. Sigmund ed., 2005) (“Those who have the supreme power of making laws in England, France, or Holland are, to an Indian, but like the rest of the world—men without authority . . . I see not how the magistrates of any community can punish an alien of another country, since,

sents to a form of representative government and transfers a corresponding portion of his consent to the elected, he has “authorize[d] the society . . . to make laws for [him] as the public good of the society shall require”²⁴² Like Paine, Locke argued that the consent of the governed was the necessary bedrock of any legitimate representative government and that without such consent, the legislature could wield only the authority of a state of nature, which true representative government was designed to subjugate. “[A]ny political society is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world.”²⁴³

This same argument, that suffrage is the exclusive means by which a lawful government may arise, is also found in James Harrington’s utopian description of government in *Oceana*: “where suffrage of the people goes for nothing, it is no commonwealth.”²⁴⁴ According to Harrington, it was beyond the scope of civil government for a legislator to “deny or evade the power of the people.”²⁴⁵ Rather, at all times, a commonwealth was to be arising out of and subject to the authority of its members. Harrington emphasized the importance of equality in the ability of people to exercise their right of suffrage, so as to secure “equal rotation” of representatives.²⁴⁶ Ultimately, voting is the means by which the elected people delegate their inherent right of self-governance to their representative mediums, and is of unique structural significance, as shown by Paine, Locke, and Harrington.

The principles underlying the arguments of Paine, Locke, and Harrington emerge intermittently in the Supreme Court’s description of the fundamental right to vote and its structural significance in the broader constitutional scheme. Such analysis can be found in earlier Supreme Court opinions, which explicitly emphasized the democratic structural significance of the right to vote. For example, in *Yick Wo v. Hopkins*²⁴⁷ the Court struck down a racially discriminatory enforcement of a city ordinance,²⁴⁸ highlighting the significance of the right

in reference to him, they can have no more power than what every man naturally may have over another.”).

242. *Id.* at 55.

243. *Id.* at 60

244. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 26 (J.G.A. Pocock ed., 1992).

245. *Id.*

246. *See id.* at 34.

247. 118 U.S. 356 (1886).

248. *Id.* at 374.

to vote, and how its preservation was integral to the proper distribution of the aforementioned sovereignty of the people and the preservation of all other rights.²⁴⁹ The Court described the role of the government relative to the people and the distribution of sovereignty: “[the] sovereign powers are delegated to the agencies of government, [while] sovereignty itself remains with the people, by whom and for whom all government exists and acts.”²⁵⁰ Similar significance is accorded to the right to vote in the Court’s decision in *Reynolds v. Sims*,²⁵¹ where the Court noted that “undoubtedly the right of suffrage is a fundamental matter in a free and democratic society” and is “preservative of all other rights.”²⁵² In responding to gerrymandered state congressional districts designed to dilute the vote of certain segments of the Alabama population, the Court stated that “representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his state’s legislative bodies.”²⁵³ The Court thus portrayed the right to vote not only as fundamental, but also of singular structural importance to the democratic system. The Supreme Court’s language in *Yick Wo* and *Reynolds* reflects the enlightenment tradition and mount a far greater rhetorical and doctrinal defense of the right to vote than *Crawford* and *Burdick*. Although both *Yick Wo* and *Reynolds* were decided within the context of severe racial discrimination by state and local governments, the principles that underlie the Court’s vigorous rhetoric in both cases are more clearly drawn from a deep well of legal and political theory.

Later Supreme Court opinions also clearly allude to the structural significance of the right to vote. For example, in comparing the importance of safeguarding this right against infringement justified by countervailing state interests, the Supreme Court in *Anderson* wrote that “the pervasive national interest in the selection of candidates for national office [is] greater than any interest of an individual state.”²⁵⁴ In *Harper*, the Court held that “any alleged infringement of the right of citizens to vote must be *carefully and meticulously scrutinized*.”²⁵⁵ While falling short of a direct endorsement of strict scrutiny, this

249. *See id.* at 370–71.

250. *Id.* at 369–70 (emphasis added).

251. 377 U.S. 533 (1964).

252. *Id.* at 561–62.

253. *Id.* at 565.

254. *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)).

255. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (emphasis added).

statement of doctrine implies some level of scrutiny greater than that applied by the Court in *Crawford* and is not necessarily conditioned on the presence of “invidious discrimination.” Instead, the Court in *Harper* mounted an unequivocal and vigorous defense of all laws that abridged the right to vote.

The vigorous language in *Yick Wo* and *Reynolds* stands in stark contrast to the relatively timid response of the Court in *Crawford* to the potential erosion of voting rights in Indiana. Moreover, in *Harper*, *Yick Wo*, *Anderson*, and *Reynolds*, the Court’s description and doctrinal protection of voting rights differ remarkably in tone from *Crawford* and are in direct conflict with its application of a neutral balancing test to laws burdening the substantive right to vote. *Harper*, *Yick Wo*, *Anderson*, and *Reynolds* all track the arguments of Paine, Locke, and Harrington far more than the tepid defense of that right by the Court in *Crawford*. By contrast, the interests of the state in regulating the manner in which people exercise their right to vote is the overwhelming focus of both the Stevens plurality and the Scalia plurality opinions. Both evince a “top-down” examination of voting restrictions and make the State’s purported interests in support of these restrictions the primary focus of their analysis. This approach stands in stark contrast to that of Paine, Locke, and Harrington—all of whom focus, first and foremost, on the importance and origins of representative government and discuss the entity of the legislature only within the context of its fealty to those that it governs. By straying from these otherwise immutable democratic principles, the Court in *Crawford* fails to make a full-throated defense of voting rights and its failure to do so has facilitated the rolling back of voting rights across the country.

B. The Reason for Strict Scrutiny: The Unique Vulnerability of Voting Rights

The regulation of the right to vote rests in the hands of those subject to its exercise, and is thus uniquely vulnerable. Purportedly neutral voting regulations were often used as a proxy for racial animus. For example, Jim Crow laws deployed a multitude of devices designed to deter the African American vote, such as literacy tests and poll taxes, later invalidated in *Harper*. Keenly aware of the obvious incentives for representatives to meddle with the sole means by which they could be held accountable by their constituents, Thomas Paine stated:

But as it is more than probable that we shall never be without a Congress, every well-wisher to good order must own, that the mode

for choosing members of that body, deserves consideration. And I put it as a question to those, who make a study of mankind, whether *representation and election is not too great a power for one and the same body to possess?* When we are planning for posterity, we ought to remember, that virtue is not hereditary.²⁵⁶

Paine thus openly questioned whether electoral authority should be displaced from the legislature, for fear that elected representatives would ultimately seek to manipulate voting legislation for their own personal benefit.

Alexander Hamilton addressed the allocation of electoral authority and how best to balance such authority between the states and the federal government in the Federalist papers Numbers 59 through 61. Hamilton was wary of the potential for abuse of electoral regulatory power by the states, as “[n]othing can be more evidence, than that an exclusive power of regulating elections for the national government, in the hands of the state legislatures, would leave the existence of the Union entirely at their mercy.”²⁵⁷ Hamilton instead envisioned the sharing of election authority between the federal government and the states.²⁵⁸ Hamilton’s proposed compromise, designed to delegate procedural regulatory power to the states without granting them absolute electoral authority, ultimately manifested itself in Article 1, Section 4 of the U.S. Constitution. “[I]t is impossible that any regulation of ‘time and manner,’ which is all that is proposed to be submitted to the national government in respect to that body, can affect the spirit which will direct the choice of its members . . . [State] Authority would be expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections.”²⁵⁹ Only by limiting state authority to the determination of these purely procedural matters could the integrity of national elections be preserved.

The potential for state manipulation of voting rights expressed by Hamilton and foreshadowed by Paine have motivated some of the strongest defenses of voting rights by the Supreme Court. In *Anderson*, the Court observed that “state-imposed [voting] restrictions implicate a uniquely important national interest.”²⁶⁰ In *Yick Wo*, the Court stated that while states had a proper interest in the regulation of the time and mode of the exercise of voting rights, that this alone “afford[ed] no warrant for such an exercise of legislative power, as,

256. PAINE, COMMON SENSE, *supra* note 28, at 44 (emphasis added).

257. THE FEDERALIST NO. 59, 150 (Alexander Hamilton).

258. *Id.*

259. THE FEDERALIST NO. 60, 155 (Alexander Hamilton).

260. *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983).

under the pretense and color of regulating, should subvert or injuriously restrain the right itself.”²⁶¹ In *Reynolds*, the Court held that “arbitrary and capricious” voting restrictions were in direct violation of the Equal Protection Clause of the Fourteenth Amendment.²⁶² Thus, the Court has always been keenly aware of the potential for nefarious legislative deeds with respect to voting rights and has been more than willing to look beyond the ostensibly neutral language of a voting law in order to ensure the preservation of the right to vote given its unique vulnerability.

Yet, this awareness is largely absent from the Court’s opinion in *Crawford*, where the Court fails to pierce the veil and probe the true depths of Indiana’s voter identification legislation. This may have been due, in part, to the fact that SEA 483 was an outlier, one of only two strict voter identification laws. That is no longer the case and SEA 483 has proven to be just one of what is now an entire gaggle of new voting restrictions that threaten to burden the voting rights of millions of otherwise qualified American voters in a manner inconsistent with the fundamental democratic principles that underlie prior Supreme Court decisions. *Crawford* and its balancing test provide insufficient protection for the most fundamental and structurally significant of constitutional rights, and a new analytical paradigm is necessary in order to ensure that the right to vote remains robust and ubiquitous.

C. *Strict Scrutiny and a New Constitutional Paradigm*

As I have argued, the *Crawford* Court strayed from both historical and judicial precedent in failing to accord the right to vote its appropriate structural significance. In applying its balancing test, the *Crawford* Court essentially devalued the constitutional importance of a substantive restriction on the right to vote based on a mere lack of empirical data. While the *Rokita* court, the Seventh Circuit, and Supreme Court in *Crawford* stated that the right to vote is important, they all failed to consider its importance when deciding which *standard of review* to utilize when reviewing the voter identification laws, merely paying lip service to this basic ideal. Yet, voter identification laws substantively restrict a fundamental right—these laws have a direct impact on *who* may exercise their right to vote. Even the *Anderson* Court, when applying a balancing methodology, recognized the appropriate structural significance of the right to vote and thus (unsur-

261. *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886) (quoting *Capen v. Foster*, 12 Pick. 475, 489 (Mass. 1832)).

262. *Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)).

prisingly) held that the state justifications could not possibly justify burdening a fundamental right. Yet, the *Crawford* Court failed to implement any such rhetoric in its own balancing analysis, allowing a substantive voting restriction to easily pass constitutional muster. The consequence: because of a mere lack of empirical evidence, the *Crawford* Court validated a substantive restriction on *who* may exercise their right to vote. Such a result is inexcusable. The balancing methodology of *Crawford* must be reserved for voting regulations that address the procedural aspects of voting, with respect to the “time, place, and manner” authority delegated to the states by Article 1, Section 4 of the U.S. Constitution. Strict scrutiny must be applied unequivocally to all voter identification legislation because it affects *who* may exercise their right. In other words, I am suggesting that voter identification laws do not fall within the state’s Article 1, Section 4 authority. Strict scrutiny will preserve the integrity of the structural right to vote.

This article argues for a bifurcated approach to voter identification law jurisprudence. In *Crawford*, the Court first distinguished between discriminatory and neutral voting regulations, and applied a balancing test to determine the level of scrutiny for neutral voting regulations. Instead, when presented with a constitutional challenge to voter qualification laws, courts should first determine whether the law seeks to regulate *who* may vote (i.e., whether the law impacts the substantive right to vote),²⁶³ or the *time, place, or manner* in which that right is carried out. The former will be subject to strict scrutiny, and the latter will be subject to the balancing test of *Crawford* and *Burdick*. Strict scrutiny would then be applied as such: the State must present concrete and precise evidence of a compelling government interest that is narrowly tailored to achieve its goals to justify a substantive regulation of a voting right, provided the plaintiff can establish that the law in question restricts the substantive right to vote. The State must not be allowed to escape constitutional scrutiny by postulating an abstract interest to support such a restriction. Because voter identification laws erect a hurdle that voters must surpass in order to exercise their fundamental and structural right to vote, states must present evidence that the burden is justified.²⁶⁴ Indiana failed to do so in

263. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 182–83 (2008) (arguing somewhat more broadly that strict scrutiny should be applied to laws, such as voter identification laws, that regulate voters as individuals as opposed to political parties).

264. The requirement that voters register before being allowed to vote is also a substantive restriction of the right to vote. However, states would have no trouble presenting compelling historical and logistical evidence of the need to organize its elections by having voters register. Such a requirement is sensible and consistent with

Crawford and, given the abject absence of any evidence of widespread voter fraud, states are unlikely to be able to satisfy this burden with respect to voter identification laws moving forward. Indeed, if the State in *Crawford* had been required to present concrete evidence of voter burden, SEA 483 would likely have been struck down.²⁶⁵ But the State was not required to do so.²⁶⁶ Rather, the State was allowed to proffer highly speculative and unsubstantiated interests in justifying the burden imposed by SEA 483.²⁶⁷ Such interests would not withstand the weight of the strict scrutiny advocated for herein, which would demand acute, concrete and compelling justifications for the voter burden imposed.

In contrast, because the time, place, and manner of voting does not directly and completely infringe on the rights of any class of people to vote, and because the Constitution grants states the power to regulate the right, the balancing test applied in *Crawford* should be reserved for procedural voting regulations. The balancing test would be deferential to the interests of the state and could be satisfied by the presentation of reasonable, albeit abstract, state interests in regulating the time, place, and manner of its elections.²⁶⁸ For example, laws regulating the length of early voting periods, and the terms of when and where voting registration may occur address the time, place and manner of elections and thus may be properly subject to the balancing analysis. Courts applying such an analysis would have to choose between the balancing formulation of the Stevens and Scalia pluralities. The less-deferential approach of the Stevens plurality is more consistent with Supreme Court precedent,²⁶⁹ and should thus be adopted as the appropriate standard for procedural voting restrictions. However, state authority under Article 1, Section 4 is limited to the procedural regulation of elections, and should not allow for states to burden the substantive right to vote in the absence of compelling and *provable* state interests.

Those in favor of the current standards may argue that the line between what is “substantive” and what is “procedural” will not always be clear. But a bifurcated approach based upon delineation between laws that impact whether a person can vote and laws that determine when and how a person can vote is workable. Courts will

past historical practices, as opposed to voter identification legislation, which can be supported only by unsubstantiated claims of in person voter fraud.

265. See *supra* Part II.B.3.

266. See *supra* Parts I.B.1 and I.B.2.

267. See *supra* Parts I.B.1 and I.B.2.

268. See *supra* Part II.A.2.

269. See *supra* Parts I.B.1 and I.B.2.

have to make the “hard judgment that our adversary system demands.”²⁷⁰ It will require courts to consider more than the mere language of the law, as substantive restrictions may be cloaked in procedural garb. Such an approach would prevent states from unduly burdening the substantive right to vote, as opposed to the current analytical framework, which grants the states unwarranted discretion that may then be used to manipulate the rights of voters. Any inefficiencies caused by the application of such a standard are necessary to ensure that the preservation of the fundamental and structurally indispensable right to vote.

CONCLUSION

What began as an ostensibly neutral voting regulation has become just one part of a broader national movement to erode the voting rights of American citizens. As the last line of constitutional defense, the Supreme Court must answer the call and step to the defense of the fundamental right to vote whose preservation is integral to the continued legitimacy of representative government in America. Its response in *Crawford* was insufficient. However, there are a number of doctrinal and factual bases that would allow the Court to reverse course, amend its conclusions in *Crawford*, and strike down voter identification laws as an unjustified and unconstitutional burden on the fundamental right to vote. Moreover, the Court should re-forge its voting rights jurisprudence in the principled mold of Thomas Paine, John Locke, Alexander Hamilton, and its own civil-rights-era decisions. The Court must apply strict scrutiny to substantive voting restrictions and ensure that voting rights will continue to flourish for as long as America shall endure.

270. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008).

