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Constitutional Law - Get the Balance Right: The Supreme Court's Lopsided Balancing Test for Evaluating State Voter-Identification Laws; Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008)

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CASE NOTE

CONSTITUTIONAL LAW—Get the Balance Right: The Supreme Court's Lopsided Balancing Test for Evaluating State Voter-Identification Laws; *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008).

*Aaron J. Lyttle**

Introduction

In 2000 and 2004, the United States experienced two divisive presidential elections giving rise to accusations of widespread voting irregularities.[1] According to many commentators, these elections highlighted the problem of voter fraud.[2] A number of states responded by passing statutes requiring voters to present identification prior to voting.[3] Many critics allege Republican legislatures pass such laws to suppress turnout by groups more likely to vote for Democratic candidates.[4] Others argue voter-identification laws prevent fraud and ensure the integrity of the electoral process.[5] The Indiana legislature passed one such act: Senate Enrolled Act 483 ("SEA 483").[6] It requires citizens who vote in person on election day, or who cast a ballot in person at an office of the circuit court clerk before election day, to present a form of government-issued photo-identification.[7] Voters without

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[1] *See* David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 Wm. Mitchell L. Rev. 483, 493 (2008) (identifying widespread claims of voter intimidation and fraud in the 2000 and 2004 presidential elections).

[2] Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. Times, Sept. 26, 2007, at A24 (describing the Republican push for voter-identification laws following the 2000 election); Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, Wash. Post, May 14, 2007, at A04 (describing a massive Department of Justice effort to uncover evidence of voter fraud).

[3] *Developments in the Law—Voting and Democracy*, 119 Harv. L. Rev. 1127, 1144 (2006) [hereinafter *Developments in the Law*].

[4] John B. Judis, *Can the GOP Convince Blacks Not to Vote?*, New Republic, Nov. 11, 2002, at 12.

[5] *See*, *e.g.*, United States Senate Republican Policy Committee, *Putting an End to Voter Fraud* (Feb. 15, 2005), http://rpc.senate.gov/_files/feb1504Voterfraudsd.pdf (last visited Aug. 10, 2008) (pointing to a plague of fraud).

[6] Ind. Code Ann. § 3-11-8-25.1 (West Supp. 2007).

[7] *Id.*

identification may cast provisional ballots if they bring identification to the circuit court clerk's office within ten days of casting their ballots.[8]

The Indiana Democratic Party sued Indiana state officials in the United States District Court for the Southern District of Indiana, arguing SEA 483 unduly burdened First and Fourteenth Amendment voting rights.[9] The district court granted the defendant's motion for summary judgment, finding SEA 483 a reasonable regulation that did not violate the First or Fourteenth Amendments.[10] According to the court, Indiana had a sufficiently important regulatory interest in combating voter fraud to justify SEA 483's reasonable burden.[11] A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment.[12] Judge Posner, writing for the majority, held SEA 483 did not unduly burden voting rights.[13] According to the court, SEA 483 did not prevent any plaintiffs from voting.[14] The court refused to apply strict scrutiny because it found the state had an interest in preventing fraud, which dilutes legitimate votes.[15] Accordingly, a majority held SEA 483 constituted a reasonable electoral regulation, justified by Indiana's interest in preventing fraud.[16]

In *Crawford v. Marion County Election Board* (*Crawford II*), the United States Supreme Court affirmed the Seventh Circuit's decision, holding SEA 483 could withstand a facial challenge.[17] Although the Court issued no majority opinion,

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[8] *Id.* § 3-11.7-5-2.5(b) (West 2006). Voters who establish their residence and identity may receive free photo-identification from the Department of Motor Vehicles. *Id.* § 9-24-16-10(b) (West Supp. 2007). SEA 483 exempts persons who submit absentee ballots by mail or who live in state licensed facilities like nursing homes. *Id.* § 3-11-8-25.1(e) (West Supp. 2007).

[9] Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008).

[10] *Id.* at 845.

[11] *Id.* at 826.

[12] *Crawford I*, 472 F.3d 949, 954 (7th Cir. 2007), *aff'g Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006). The United States District Court for the Southern District of Indiana and the United States Court of Appeals for the Seventh Circuit consolidated the Democratic Party's suit with a similar suit brought by William Crawford and other parties. Crawford v. Marion County Election Bd. (*Crawford II*), 128 S. Ct. 1610, 1614 (2008). Indiana intervened to defend SEA 483. *Id.*

[13] *Crawford I*, 472 F.3d at 954.

[14] *Id.* at 951–52.

[15] *Id.* at 952.

[16] *Id.* at 954.

[17] *Crawford II*, 128 S. Ct. at 1624. In contrast to challenging the constitutionality of a law's application, a facial challenge must demonstrate "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239–40 (1994) (describing the Rehnquist Court's harsh facial/as-applied division). Plaintiffs often challenge election laws facially

a six Justice plurality found SEA 483 protected the electoral process and did not unduly burden voting rights.[18] Applying the sliding-scale test articulated in *Burdick v. Takushi*, the Court found SEA 483 did not excessively burden any class of voters' rights.[19] Consequently, it refused to apply strict scrutiny and held the state's interest in securing electoral integrity gave Indiana's voter-identification law a plainly legitimate sweep, overcoming the petitioners' facial challenge.[20]

This note examines the United States Supreme Court's attempt to resolve confusion when evaluating the constitutionality of state voter-identification laws. First, it examines the legal background of voter-identification laws.[21] Next, it explains the Court's split decision in *Crawford v. Marion County Election Board* (*Crawford II*).[22] Then, it argues the Court adopted a lopsided balancing test, placing greater emphasis on states' interests in preventing fraud than on the risk of burdening voting rights.[23] Although as-applied challenges showing concrete evidence of disenfranchisement may succeed, the Court's failure to weigh voters' interests against those of the state leaves the prior confusion untouched, thus endangering voting rights.[24] Next, this note proposes that courts should move away from rigid tiers of scrutiny and facially evaluate voter-identification laws, applying *Burdick* in a balanced and flexible manner.[25] Finally, this note presents suggestions for practitioners and legislators.[26]

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because of the difficulty of remedying past elections. L. Paige Whitaker, *The Constitutionality of Requiring Photo Identification for Voting: An Analysis of* Crawford v. Marion County Election Board, CRS REPORTS FOR CONGRESS, May 19, 2008, at CRS-2 n.4, *available at* http://fpc.state.gov/documents/organization/106161.pdf.

[18] *Crawford II*, 128 S. Ct. at 1634; *see also* Daniel P. Tokaji, Crawford*: It Could Have Been Worse*, Election Law @ Moritz, Apr. 29, 2008, http://moritzlaw.osu.edu/electionlaw/commentary/articles.php?ID=411 (last visited Oct. 23, 2008) (describing *Crawford II's* divided result). Justice Stevens announced the Court's judgment, joined by Chief Justice Roberts and Justice Kennedy. *Crawford II*, 128 S. Ct. at 1612. Justice Scalia wrote a concurring opinion, joined by Justices Thomas and Alito. *Id.* Justice Souter dissented, joined by Justice Ginsburg. *Id.* Justice Breyer filed a separate dissent. *Id.*

[19] *Crawford II*, 128 S. Ct. at 1622–23; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (weighing a state ballot access restriction's burden on voting rights against the state's interest in that restriction); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (using a balancing test to evaluate state electoral regulations).

[20] *Crawford II*, 128 S. Ct. at 1623.

[21] *See infra* notes 27–97 and accompanying text.

[22] *See infra* notes 98–142 and accompanying text.

[23] *See infra* notes 143–76 and accompanying text.

[24] *Id.*

[25] *See infra* notes 179–92 and accompanying text.

[26] *See infra* notes 193–200 and accompanying text.

BACKGROUND

This section begins with a discussion of the legal background underlying *Crawford v. Marion County Election Board* (*Crawford II*).[27] First, it discusses the United States Supreme Court's pre-*Crawford II* voting rights jurisprudence, including the situations where it limited state election regulations to protect those rights.[28] It then examines statutes requiring voters to show identification and closes with a review of how lower federal courts have reacted to constitutional challenges to those laws.[29]

Voting Rights Jurisprudence

The United States Constitution gives state governments authority to determine the "times, places, and manner" of holding elections.[30] Federal courts grant states significant latitude in carrying out that role to maintain fair and efficient elections.[31] For much of United States history, the federal judiciary avoided getting involved in electoral disputes, deferring to states' interests.[32] Although the Constitution provides no explicit right to vote, the United States Supreme Court has found a fundamental right to vote implicit in the First Amendment of the Bill of Rights.[33] In spite of deference to state regulations, in most circumstances, states

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[27] *See infra* notes 30–97 and accompanying text.

[28] *See infra* notes 33–65 and accompanying text.

[29] *See infra* notes 66–97 and accompanying text.

[30] U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .").

[31] *See* Storer v. Brown, 415 U.S. 724, 730 (1974) (finding fair elections require substantial state regulation); Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (finding electoral regulations necessary for state independence).

[32] Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 109 (1994) (explaining the United States Supreme Court's history of extreme deference to state electoral regulations); *see also* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959) (noting the states' long-standing power to regulate elections); Pope v. Williams, 193 U.S. 621, 632 (1904) (refusing to find the Fourteenth Amendment made the reasonability of state electoral regulations a federal question). However, the Constitution places explicit limits on the states' power to regulate elections and authorizes judicial intervention in many circumstances. *See* U.S. CONST. amend. XV, § 1 (preventing states from denying suffrage based on race); U.S. CONST. amend. XXIV, § 1 (denying states the ability to levy poll taxes). *But see* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding the Fourteenth Amendment allows states to disenfranchise felons).

[33] Schultz, *supra* note 1, at 487–88; *see also*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (identifying a fundamental right to vote that preserves all other rights); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society.").

cannot place excessive burdens on voting rights, especially if doing so denies equal protection.[34]

The United States Supreme Court now recognizes a robust, fundamental right to vote and often relies on the Equal Protection Clause when evaluating state restrictions on voting rights.[35] In *Harper v. Virginia State Board of Elections*, the Court assessed a Virginia law requiring citizens to pay a $1.50 poll tax before voting.[36] The Court held that once states grant citizens voting rights, they may not qualify them in a manner denying equal protection of the law.[37] It found that Virginia's poll tax made affluence or payment of a fee an electoral standard, which bore no relation to a citizen's qualifications to vote.[38] According to the Court, state regulations conditioning voting rights on wealth constituted invidious discrimination, violating the Equal Protection Clause, regardless of the size of the tax or voters' ability to pay it.[39]

Following *Harper*, the Court subjected state election laws to varying levels of scrutiny.[40] Many early decisions, including *Harper*, seemed to subject such laws to strict scrutiny.[41] Although the Court did not announce strict scrutiny as the proper standard, it required states to narrowly tailor regulations to achieve a compelling interest.[42] In other decisions, often ballot access cases, the Court appeared to apply a rational basis test, presuming the constitutionality of state

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[34] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) (finding a right to vote implicit in the First Amendment and prohibiting states from restricting it on the basis of a tax); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (finding states' electoral authority alone does not justify limiting voting rights).

[35] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 842–43 (2d ed. 2002).

[36] *Harper*, 383 U.S. at 664 n.1.

[37] *Id.* at 665.

[38] *Id.* at 667.

[39] *Id.* at 668–69.

[40] *See* Zywicki, *supra* note 32, at 88–89 (discussing federal courts' "scatter-shot" election jurisprudence).

[41] Schultz, *supra* note 1, at 490 (citing cases subjecting voting restrictions to strict scrutiny); *see also Harper*, 383 U.S. at 670 (subjecting a state poll tax to strict scrutiny); Williams v. Rhodes, 393 U.S. 23, 24 (1968) (finding the state lacked a compelling interest in requiring third party candidates to acquire a large number of signatures in a short time); Bullock v. Carter, 405 U.S. 134, 145 (1972) (finding a state's ballot filing fee required close scrutiny). When courts strictly scrutinize a statute, they require a compelling governmental interest necessitating that statute and refuse to presume its constitutionality. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 619 (2d ed. 2005).

[42] *See* Lubin v. Panish, 415 U.S. 709, 716–19 (1974) (finding a fixed filing fee unnecessary to achieve the state's interest of limiting ballot size).

regulations and deferring to their proffered rationale.[43] In *Storer v. Brown*, the Court considered a California statute barring primary election voters from running for office as independent candidates in the subsequent general election.[44] The Court refused to apply strict scrutiny or rational basis review because of the necessity of substantial state regulation to maintain effective elections.[45] The Court said evaluating regulations requires comparison of the facts and circumstances behind the law.[46] It refrained from applying a traditional strict scrutiny analysis, finding the state had a compelling interest in stable elections, but not requiring the state to narrowly tailor its regulation to that end.[47]

Anderson v. Celebrezze went a step beyond *Storer* and articulated a balancing test for determining the constitutionality of electoral regulations.[48] *Anderson* involved an Ohio statute requiring independent Presidential candidates to file a nominating petition eight months before the general election.[49] According to the *Anderson* Court, states must inevitably regulate elections to maintain electoral integrity.[50] The Court articulated a balancing test, which begins by assessing the character and magnitude of an electoral regulation's burden on First and Fourteenth Amendment rights.[51] Courts should then determine the legitimacy and strength of each state interest and whether those interests necessitate burdening voting rights.[52] Ohio's statute imposed a severe burden because it set a deadline far in advance of the general election, making it difficult for independent candidates to gather sufficient signatures to obtain ballot access.[53] Although Ohio had a

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[43] *See* Munro v. Socialist Workers Party, 479 U.S. 189, 194–95 (1986) (declining to require Washington to show specific evidence of confusion or ballot overcrowding to justify a statute requiring minor party candidates to receive at least one percent of primary election votes to appear on the general election ballot); Clements v. Fashing, 457 U.S. 957, 968–69 (1982) (holding a Texas constitutional provision limiting government office holders' ballot access need only be related to a rational end and need not be the least restrictive means available).

[44] *Storer*, 415 U.S. at 726.

[45] *Id.* at 729–30.

[46] *Id.* at 730.

[47] *See id.* at 729–30; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1107 (2d ed. 1988).

[48] Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[49] *Id.* at 782–83. The early filing deadline posed difficulties for independent candidates because it required them to submit a requisite number of registered voters' signatures with their nominating petitions. *See id.*; OHIO REV. CODE ANN. § 3513.257 (Baldwin 2008). Anderson sued after submitting a nominating petition to run as an independent candidate for President of the United States after the filing deadline. *Anderson*, 460 U.S. at 782.

[50] *Anderson*, 460 U.S. at 789.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 792.

legitimate interest in voter education and political stability, it failed to show those ends necessitated an early filing period.[54]

Although *Anderson* began as a test for assessing ballot access laws, it evolved into a general test for assessing electoral regulations.[55] For instance, in *Burdick v. Takushi*, the United States Supreme Court assessed a claim that Hawaii's prohibition on write-in voting unduly burdened voting rights.[56] The Court stated it would not subject every state electoral regulation to strict scrutiny because that would hamper states' ability to ensure equitable and efficient elections.[57] The Court transformed *Anderson's* rule into a flexible test, adjusting its degree of scrutiny based on an electoral regulation's severity.[58] The test requires states to narrowly tailor laws severely burdening voting rights to serve a compelling governmental purpose.[59] Statutes imposing reasonable and non-discriminatory burdens only require states to show important regulatory interests justify their statutes.[60] Hawaii's write-in ban imposed a slight burden on voting rights.[61] Thus, Hawaii did not need to demonstrate its law served a compelling interest, and the State's interest in preventing divisive "sore loser" elections justified its statute.[62] Some lower federal courts followed *Burdick* by applying rational basis or strict scrutiny review in a binary fashion, while others used a more flexible standard.[63]

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[54] *Id.* at 800–01, 805–06. *Anderson* based its analysis on a fundamental right to vote and did not engage in separate Equal Protection analysis. *Id.* at 786–87 n.7.

[55] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997) (applying *Anderson* to Minnesota's prohibition on cross-party candidate nominations); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (applying *Anderson* to California's prohibition on party endorsement of election candidates).

[56] 504 U.S. 428, 430 (1992). Burdick sued Hawaii because its statute prevented him from casting a write-in protest vote for Donald Duck. *Id.* at 438.

[57] *Id.* at 433.

[58] *Id.* at 434. The Court explained:

> [W]hen [First and Fourteenth Amendment] rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" . . . "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id. (citations omitted); *see also* McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995) (stating *Burdick* modified *Anderson* by subjecting severe burdens to strict scrutiny).

[59] *Burdick*, 504 U.S. at 434.

[60] *Id.*; *see also* Norman v. Reed, 502 U.S. 279, 288–89 (1992) (requiring states to show a corresponding interest sufficient to justify electoral regulations and subjecting severe regulations to strict scrutiny).

[61] *Burdick*, 504 U.S. at 438–49.

[62] *Id.* at 439. Hawaii feared losing primary candidates would disrupt general elections with intraparty disputes. *Id.*

[63] Darla L. Shaffer, *Tenth Circuit Survey: Ballot Access Laws*, 74 DENV. U. L. REV. 657, 665–66 (1996). While some courts interpreted *Burdick* as requiring either the application of strict scrutiny

Although *Burdick* professed to establish a flexible test, it remained unclear whether *Burdick* superseded the Court's traditional tiers of scrutiny.[64] Confusion also remained because the Court failed to articulate a method for determining a statute's severity.[65]

Voter-Identification Laws

Several states complicated the judiciary's approach to voting rights by passing controversial laws requiring citizens to show identification before voting.[66] Voter-identification statutes stem from Congress' attempt to modernize election administration: the Help America Vote Act of 2002 ("HAVA").[67] Among other provisions, HAVA sets forth minimum identification requirements for state elections.[68] HAVA resulted from political compromise and contained less strict

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or rational basis, others disagreed. *See* Citizens for Legislative Choice v. Miller, 144 F.3d 916, 921 (6th Cir. 1998) (imposing rational basis review on regulations imposing incidental or "reasonable, nondiscriminatory restrictions"); League of Women Voters v. Diamond, 965 F. Supp. 96, 100 (D. Me. 1997) (interpreting *Burdick* as subjecting severe restrictions to strict scrutiny and reasonable restrictions to rational basis review). *But see* Rogers v. Corbett, 468 F.3d 188, 194 (3d Cir. 2006) ("[B]allot access cases should not be pegged into the three aforementioned categories."); Reform Party of Allegheny County v. Allegheny County Dep't of Elections, 174 F.3d 305, 314 (3d Cir. 1999) (applying intermediate scrutiny to a law prohibiting minor party cross-nominations). For an in-depth analysis of standards of review following *Burdick*, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 330 n.66 (2007).

[64] *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L. J. 867, 917 (1994) (arguing *Burdick* left the Court's traditional, discrete tiers of scrutiny unchanged); Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 386–87 (1996) (arguing the *Burdick* sliding-scale created covert tiered scrutiny). The balancing approach in *Anderson* and *Burdick* mirrors the undue burden analysis in *Planned Parenthood v. Casey*. Brownstein, *supra* note 64, at 918; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–74 (1992) (comparing the Court's undue burden analysis in ballot access cases to women's reproductive autonomy cases).

[65] *See* Buckley v. Am. Constitutional Law Found. Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (arguing courts applying *Burdick* failed to coherently distinguish severe and lesser burdens); Schultz, *supra* note 1, at 492 (arguing *Burdick* created confusion by failing to define severe burdens).

[66] Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006, at A1.

[67] 42 U.S.C. § 15483 (2000, Supp. 2008). The United States House of Representatives passed a national voter-identification act, but it died in the Senate. *See* Federal Election Integrity Act of 2006, H.R. 4844, 109th Cong., 152 CONG. REC. H. 6765 (2006) (amending HAVA to require voters to show photo-identification before voting); David Mikhail, *GOP Voter-ID Legislation May Be Casualty of Dems' Takeover*, THE HILL (Wash. D.C.), Nov. 15, 2006, at 6 (describing H.R. 4844's probable demise).

[68] *See* Center for Democracy and Election Management, American University, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 2–3 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Oct. 23,

voter-identification requirements than many subsequent state regulations.[69] It mandates that states require first-time voters who register by mail and do not verify their identity with their mail-in registration to provide identification before voting.[70] The statute allows voters to present non-photo forms of identification.[71] HAVA sets the ground floor for states' voter-identification laws and allows states to establish more strict standards.[72] States responded to HAVA by passing a variety of voting regulations, some of which required voters to provide photo identification before voting.[73]

Several parties sued state governments on the theory that voter-identification laws unduly burdened voting rights, forcing courts to address voting rights in new circumstances.[74] Lower federal courts diverged in responding to challenges

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2008) [hereinafter Carter-Baker] (outlining the components of HAVA); Robert S. Montjoy, *HAVA and the State*, *in* ELECTION REFORM: POLITICS AND POLICY 16–31 (Daniel J. Palazzolo & James W. Ceaser eds., 2005) (detailing HAVA requirements).

[69] Carter-Baker, *supra* note 68, at 4. The Carter-Baker Commission criticized HAVA for providing vague provisions and not adequately addressing voter fraud. *Id.*

[70] 42 U.S.C. § 15483(b).

[71] *Id.*

[72] *Id.* § 15484; *Developments in the Law, supra* note 3, at 1148–49. HAVA also gives states discretion in how to carry out its requirements. 42 U.S.C. § 15485.

[73] *Developments in the Law, supra* note 3, at 1148–49. Some states, such as North Dakota, declared themselves exempt from HAVA and have not yet been challenged. *Id.* at 1148 n.23. Many states follow HAVA guidelines, but do not require photo-identification. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 640 (2007). Seventeen states accept non-photo identification. *See* Nat'l Conference of State Legislatures, *State Requirements for Voter ID*, Oct. 23, 2008, http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterIDReq.htm (last visited Oct. 24, 2008) (noting Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington require identification, but accept non-photo identification). Seven states went beyond HAVA guidelines and require voters to show photo-identification before voting. *See id.* (noting Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan, and South Dakota require photo identification). One local government, Albuquerque, New Mexico, also established identification requirements. ACLU of N.M. v. Santillanes (*Santillanes I*), 506 F. Supp. 2d 598, 605–06 (D.N.M. 2007). Other states continue to debate voter-identification statutes. Editorial, *The Myth of Voter Fraud*, N.Y. TIMES, May 13, 2008, at A20 (stating many state legislatures assume *Crawford II* vindicated all voter-identification laws and noting twenty states considering new voter-identification statutes).

[74] Ohio State University: Election Law @ Moritz, *2006 Voter ID Litigation Chart*, May 15, 2008, http://moritzlaw.osu.edu/electionlaw/news/2006VoterIDLitigationChart4.php (last visited Oct. 24, 2008) [hereinafter Moritz] (noting suits filed in Ohio, Michigan, Georgia, Arizona, New Mexico, Indiana, and Missouri). Michigan, Indiana, and Missouri litigation has concluded; parties are settling in Ohio; litigation is pending in Arizona; and Georgia and Indiana litigation is on appeal. *Id.* Missouri litigation involved a challenge to a state law ("SB 1014") requiring voters to present photo-identification, alleging it violated voting rights under the Missouri Constitution. Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006). The *Weinschenk* court subjected SB 1014 to strict scrutiny and held Missouri had a compelling interest in stopping voter fraud, but found the state failed to narrowly tailor its statute, violating the Missouri Constitution. *Id.* at 221; *see also* MO. CONST. art. I, § 25 (guaranteeing the right of suffrage).

to photo-identification laws.[75] Courts struggled to find analogous laws assessed by the United States Supreme Court, leading to disparate outcomes.[76] Three decisions illustrate how federal courts assessed voter-identification laws prior to *Crawford II*: *Common Cause/Georgia v. Billups* (*Billups I*), *Indiana Democratic Party v. Rokita*, and *ACLU of New Mexico v. Santillanes* (*Santillanes I*).[77]

In *Common Cause/Georgia v. Billups* (*Billups I*), plaintiffs challenged Georgia's photo-identification statute, arguing it imposed an undue burden on voting rights.[78] House Bill 244 ("HB 244") required all in-person voters in Georgia to present government-issued photo-identification.[79] Although the United States District Court for the Northern District of Georgia applied the *Burdick* sliding-scale test to HB 244, it engaged in a separate strict scrutiny analysis and held HB 244 unconstitutional under both approaches.[80] Although Georgia had an important state interest in preventing fraud, it failed to narrowly tailor HB 244 because the statute addressed in-person fraud instead of absentee ballot fraud, which posed a greater threat to electoral integrity.[81] When the district court examined HB 244 under *Burdick*, it determined the law imposed a severe burden because many voters lacked identification and would likely find sufficient identification difficult to obtain.[82] The district court found HB 244 lacked a rational relation, much

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[75] *See* Overton, *supra* note 73, at 665–66 (noting that, lacking guidance, federal courts engage in ad hoc analysis of voter-identification cases and justify different results from similar facts).

[76] *See* Schultz, *supra* note 1, at 492 (arguing the Court failed to define severe burdens, leaving confusion); Elmendorf, *supra* note 63, at 319 ("[C]ourts have not been able to locate [United States] Supreme Court precedents addressing formally similar laws. For example, most courts have thought it strained to analogize ID requirements to poll taxes if the state charges no fee for its voter ID."); Kelly T. Brewer, Note, *Disenfranchise This: State Voter ID Laws and their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 217–18 (2007) (describing the non-uniform approach of federal courts). Despite different outcomes, a clear circuit split did not exist prior to *Crawford II*. *See* Edward B. Foley, Crawford v. Marion County Election Board: *Voter ID, 5-4? If So, So What?*, 7 ELECTION L.J. 63, 63 (2008) (suggesting the Court granted certiorari to stave off a voter-identification suit related to the 2008 election).

[77] *See generally Santillanes I*, 506 F. Supp. 2d at 598; Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2007), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007); *Billups I*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *infra* notes 78–97.

[78] *Billups I*, 406 F. Supp. 2d at 1328–29. The plaintiffs alleged Georgia's requirement violated the Georgia Constitution, the U.S. Constitution, and federal civil rights and voting rights statutes. *Id.*

[79] *Id.* at 1331. The requirement exempted non-first time absentee voters. *Id.* at 1337–38.

[80] *Id.* at 1361–62.

[81] *Id.* at 1361; *see also* Cathy Cox, *Letter from Cathy Cox, Ga. Sec'y of State, to Sonny Perdue, Governor of Ga.* (Apr. 8, 2005), *available at* http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168 (last visited Oct. 24, 2008) (stating HB 244 enhanced opportunities for absentee ballot fraud while focusing on non-existent in-person voter fraud).

[82] *Billups I*, 406 F. Supp. 2d at 1365.

less a narrow tailoring, to Georgia's stated purpose of fighting voter fraud because the State lacked evidence of in-person voter fraud.[83] The district court granted a preliminary injunction because it held the plaintiffs could likely succeed in their Fourteenth Amendment challenge.[84]

In *Indiana Democratic Party v. Rokita*, the United States District Court for the Southern District of Indiana evaluated the constitutionality of Indiana's voter-identification law, SEA 483.[85] The *Rokita* court applied the *Burdick* sliding-scale test, but in a different manner than *Billups I*.[86] It refused to apply strict scrutiny because the plaintiffs presented no evidence of voters or groups having been prevented from voting or facing significant barriers in doing so.[87] The court subjected SEA 483 to something akin to a rational basis test, holding Indiana's important regulatory interests justified SEA 483's reasonable, nondiscriminatory burden.[88] *Rokita* suggested a trend of federal courts using *Burdick* to analyze voter-identification laws, breaking from the *Billups I* court's suggestion that strict scrutiny may be appropriate.[89]

ACLU v. Santillanes (*Santillanes I*) differed from other voter-identification cases because it involved a city, rather than a state, voter-identification law.[90] The United States District Court for the District of New Mexico assessed whether an amendment to the Election Code of the Albuquerque City Charter requiring Albuquerque voters to present photo-identification violated the United States

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[83] *Id.*

[84] *Id.* Georgia adjusted its statute to allow more kinds of identification, but the district court granted a preliminary injunction barring its enforcement prior to the July 2006 election. Common Cause/Ga. v. Billups (*Billups II*), 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006). After another sequence of litigation, the district court held the statute did not constitute an undue burden on voting rights. Common Cause/Ga. v. Billups (*Billups III*), 504 F. Supp. 2d 1333, 1382 (N.D. Ga. 2007). Although *Billups III* considered identical facts to *Billups I*, it likely arrived at a contrary result because it modeled its reasoning on the intervening decision in *Indiana Democratic Party v. Rokita*. Brewer, *supra* note 76, at 217–18; *see also infra* notes 85–89 and accompanying text. Plaintiffs appealed *Billups III* to the United States Court of Appeals for the Seventh Circuit where litigation is pending. Moritz, *supra* note 74.

[85] *Rokita*, 458 F. Supp. 2d at 786.

[86] *Id.* at 821.

[87] *Id.* at 822, 823–24.

[88] *Id.* at 826. The *Rokita* court distinguished *Billups I* because it involved a non-publicized absentee ballot law, a decision in a different jurisdiction, and a ruling on a preliminary injunction. *Id.* at 831–32.

[89] *See id.* at 822 (applying *Burdick* as the proper standard for evaluating voter-identification laws); Brewer, *supra* note 76, at 217–18 (arguing *Rokita* demonstrated a trend of federal courts applying *Burdick* to voter-identification laws). In *Purcell v. Gonzalez*, the United States Supreme Court suggested in dicta it may take a balancing approach to voter identification, acknowledging the competing concerns of voting rights and fraud. 549 U.S. 1, 5 (2006).

[90] *Santillanes I*, 506 F. Supp. 2d at 605–06.

Constitution.[91] The district court applied the *Burdick* sliding-scale test, noting the severity of the regulation would determine the correct standard of review.[92] It found the amendment severely burdened voting rights because it surprised voters and introduced obstacles likely to discourage many citizens from voting.[93] Although the city had a compelling interest in preventing fraud, it failed to narrowly tailor the amendment because little in-person fraud existed, the statute's vagueness enabled arbitrary enforcement, and the city failed to implement less restrictive alternatives.[94] Thus, the *Santillanes I* court concluded Albuquerque's voter-identification law violated the Fourteenth Amendment.[95] *Santillanes I*, *Rokita*, and *Billups I* demonstrate the pre-*Crawford II* confusion about how to apply *Burdick* to voter-identification laws.[96] Each case weighed the benefits and burdens of such laws in different ways due to the lack of a clear standard, thus setting the stage for *Crawford II*.[97]

PRINCIPAL CASE

In *Crawford v. Marion County Election Board* (*Crawford II*), the United States Supreme Court considered the constitutionality of Indiana's voter-identification law ("SEA 483").[98] On appeal from *Indiana Democratic Party v. Rokita*, the Indiana Democratic Party argued the district court erred in finding Indiana's photo-identification law imposed a non-severe burden.[99] According to the petitioners, the United States Court of Appeals for the Seventh Circuit focused on the ease of voter compliance with SEA 483, rather than the nature of the burden it imposed on voting rights by creating hurdles for prospective voters.[100] The Democratic

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[91] *Id.* at 605–06.

[92] *Id.* at 628–29.

[93] *Id.* at 636. The district court distinguished *Rokita* because SEA 483 made absentee voting available to more voters than did Albuquerque's amendment. *Id.* at 639.

[94] *Id.* at 637, 640–41.

[95] *Santillanes I*, 506 F. Supp. 2d at 641–42. The United States Court of Appeals for the Tenth Circuit reversed the district court's judgment, applying *Crawford II* and holding that Albuquerque's amendment could withstand a facial challenge. ACLU of N.M. v. Santillanes (*Santillanes II*), No. 07-2067, 2008 U.S. App. LEXIS 23548, at *2 (10th Cir. Nov. 17, 2008).

[96] *See* Schultz, *supra* note 1, at 492 (describing confusion among federal courts in applying *Burdick*).

[97] *Id.*

[98] 128 S. Ct. 1610 (2008); *see supra* notes 84–89 and accompanying text.

[99] Brief for Petitioners, at 40–42, 47, *Crawford II*, 128 S. Ct. 1610 (No. 07-21), 2006 WL 1786073; *see also* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007) (upholding the constitutionality of SEA 483). Other organizations and officials, including Crawford, joined the Democratic Party. *Crawford II*, 128 S. Ct. at 1614.

[100] Brief for Petitioners, *supra* note 99, at 35–36. According to the petitioners, the Seventh Circuit determined SEA 483's severity based on the number of voters it disenfranchised, rather than based on whether it made voting more difficult for affected individuals. *Id.* at 27–28.

Party argued such a restriction was severe by nature, requiring strict scrutiny.[101] The petitioners also argued SEA 483 would interfere with the voting rights of thousands of Indiana voters, with a disproportionate impact on the elderly, racial minorities, the poor, and the disabled.[102] The petitioners conceded that Indiana had a compelling interest in preventing fraud, but argued no evidence of in-person voter fraud existed in Indiana.[103] Consequently, the petitioners argued Indiana failed to narrowly tailor SEA 483, making it an unconstitutional burden on voting rights.[104]

The respondents argued the petitioners failed to show SEA 483 prevented citizens from voting and suggested the Court should not apply strict scrutiny.[105] They pointed to a lack of evidence showing SEA 483 discriminated against different classes of voters.[106] The respondents further argued Indiana had a compelling interest in stopping fraud and referenced evidence of voter fraud.[107] Finally, they argued SEA 483 reasonably restricted voting rights and provided safeguards to prevent disenfranchisement.[108]

In a 3-3-2-1 decision, the United States Supreme Court affirmed the Seventh Circuit's decision.[109] Despite the lack of a majority opinion, a plurality held SEA 483 could withstand a facial challenge.[110] When the Court produces no majority rationale, its holding may be interpreted as the approach of the Justices who concurred with the judgment on the narrowest grounds.[111] Although the Court has done little to define "narrowest grounds," that phrase may refer to the opinion that is most confined to the issues and facts necessary to resolve the case at hand.[112] Justice Stevens' opinion may constitute *Crawford II's* holding because it limits the

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[101] *Id.*

[102] *Id.* at 39.

[103] *Id.* at 46–47.

[104] *Id.* at 54–55, 60–61.

[105] Brief for Respondent Marion County Election Board, at 19–22, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2006 WL 2180191. The respondents included Marion County Election Board and Todd Rokita, Indiana's Secretary of State. *Id.*

[106] *Id.* at 30–31.

[107] *Id.* at 47–49.

[108] *Id.* at 56–59.

[109] *Crawford II*, 128 S. Ct. at 1624.

[110] *Id.*

[111] Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

[112] United States v. Martino, 664 F.2d 860, 872–73 (2d Cir. 1981) (interpreting "narrowest grounds" as those confining themselves to the present case and affecting fewer future cases); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 761–63, 767 (1980).

scope of its conclusion based on its SEA-specific findings regarding fraud and disenfranchisement.[113]

Justice Stevens' Opinion (Joined by Chief Justice Roberts and Justice Kennedy)

Justice Stevens' opinion likely constitutes the Court's holding because it uses the narrowest reasoning.[114] It applied the *Burdick* sliding-scale test to determine whether SEA 483 imposed a severe burden on voting rights, justifying strict scrutiny.[115] The opinion noted the lack of a litmus test for determining which level of scrutiny to use and stated it would weigh the injury to voting rights against the State's interests in favor of the regulation.[116] Due to the lack of concrete evidence of disenfranchisement, Justice Stevens' opinion found the statute did not excessively burden the rights of any class of voters.[117] It refused to apply strict scrutiny and found the State's interest in securing electoral integrity gave the statute a plainly legitimate sweep, overcoming the plaintiffs' facial challenge.[118] Indiana's interests in modernizing elections, maintaining voter confidence, and detecting and deterring voter fraud justified the minimal burden posed by SEA 483.[119] Although the statute imposed a special burden on the elderly and poor, provisional ballots solved those problems.[120] The petitioners failed to demonstrate the act's invalidity in all circumstances, so the Court rejected the facial challenge to

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[113] *See* Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2d 427, 428, 440 (2008) (noting how Justice Stevens' opinion was largely based on the record before the Court, leaving the possibility of a different result with a more thorough record); *Crawford II*, 128 S. Ct. at 1623–24 (noting how different evidence may demonstrate that a voter-identification statute is unconstitutional as applied). In contrast, the concurring opinion announces a broader rule whereby courts defer to state interests whenever an electoral regulation imposes a uniform burden. *See Crawford II*, 128 S. Ct. at 1624 (Scalia, J., concurring). The United States Court of Appeals for the Tenth Circuit has interpreted the balancing test articulated in Justice Stevens' opinion as the Court's holding. *See* ACLU of N.M. v. Santillanes (*Santillanes II*), No. 07-2067, 2008 U.S. App. LEXIS 23548, at *18-19 (10th Cir. Nov. 17, 2008); *see also* Fla. State Conference of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1249–51 (N.D. Fla. 2008) (applying Justice Stevens' opinion as the holding of *Crawford II*).

[114] *See supra* notes 111–13 and accompanying text.

[115] *Crawford II*, 128 S. Ct. at 1616.

[116] *Id.*; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding courts should compare the asserted injury to voting rights against the state's interest in a regulation).

[117] *Crawford II*, 128 S. Ct. at 1622–23.

[118] *Id.* at 1623.

[119] *Id.* at 1617–20.

[120] *Id.* at 1620–21. Indiana allows voters lacking identification on election day to cast provisional ballots, which the State counts if the voters present valid identification within ten days. *Id.* According to the Court, these ballots safeguarded the rights of the few who lack identification on election day because of "life's vagaries." *Id.* at 1620.

SEA 483.[121] Although Justice Stevens' opinion found evidence of partisanship in SEA 483's passage, partisanship alone failed to demonstrate an Equal Protection violation, especially when assessing a nondiscriminatory law with valid neutral justifications.[122]

Concurring Opinion (Justice Scalia, joined by Justices Thomas and Alito)

Justices Scalia, Thomas, and Alito concurred in the judgment, but disagreed with Justice Stevens' reliance on a sliding-scale test.[123] The concurrence's rationale was less narrow than that of the lead opinion and, therefore, is not the Court's holding.[124] Under the concurrence's broader rationale, *Burdick* required the Court to apply an important regulatory interests standard, deferring to the State's interest in maintaining effective elections when evaluating non-severe, non-discriminatory regulations.[125] According to the concurrence, *Burdick* transformed *Anderson's* flexible standard into an administrable rule.[126] The concurrence noted SEA 483 did not impose a special burden on any group of voters.[127] Rather, it imposed a uniform burden on all voters, but had different impacts on specific groups of voters.[128] All voters, regardless of their economic status, faced the same burden in voting, making SEA 483 non-discriminatory.[129] Disparate impact, absent evidence of discriminatory intent, failed to demonstrate a neutral law violated equal protection or required strict scrutiny.[130] Applying an important regulatory interests standard, the concurrence concluded SEA 483 constituted a reasonable electoral regulation, and Indiana's interest in preventing voter fraud justified SEA 483's minimal burden.[131] The concurrence also argued Justice Stevens' case-by-case application of *Anderson* would invite future challenges, producing electoral instability and infringing upon states' rights.[132]

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[121] *Id.* at 1621–22; *see also, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008) (holding a facial challenge only succeeds if all applications of a law violate the Constitution).

[122] *Crawford II*, 128 S. Ct. at 1624.

[123] *Id.* at 1624 (Scalia, J., concurring).

[124] *See supra* notes 113–15 and accompanying text.

[125] *Crawford II*, 128 S. Ct. at 1624 (Scalia, J., concurring).

[126] *Id.*

[127] *Id.* at 1625.

[128] *Id.* at 1625; *see also Burdick*, 504 U.S. at 436–37 (examining the effect of a law on voters in general, not particular individuals).

[129] *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring).

[130] *Id.*; *see also* Clingman v. Beaver, 544 U.S. 581, 593 (2005) (finding easy to overcome, generalized, and non-discriminatory restrictions insufficiently severe to trigger strict scrutiny); Washington v. Davis, 426 U.S. 229, 248 (1976) (holding generally applicable, non-discriminatory laws do not violate Equal Protection absent discriminatory intent).

[131] *Crawford II*, 128 S. Ct. at 1627 (Scalia, J., concurring).

[132] *Id.* at 1626–27.

Dissenting Opinion (Justice Souter, joined by Justice Ginsburg)

Justices Souter and Ginsburg agreed the *Burdick* sliding-scale test provided the proper test for evaluating electoral restrictions, but took issue with how Justice Stevens' opinion applied that test.[133] The dissent argued the Court must apply *Burdick* to the specific benefits and burdens of the present case.[134] The dissenters found Indiana's reference to abstract interests in electoral integrity failed to sufficiently justify its restriction on voting rights.[135] According to the dissent, states must provide a factual showing that specific threats outweigh the burden on voting.[136] It found SEA 483's burden had a large and disparate enough of an impact to justify comparing it to the state interest.[137] The dissent found Indiana failed to justify its restriction with evidence of fraud and doubted SEA 483 addressed existing fraud.[138] Consequently, the dissent found the state interest failed to justify a restriction placing a greater burden on poor and minority voters.[139]

Dissenting Opinion (Justice Breyer)

In a separate dissent, Justice Breyer also suggested the Court should use a balancing test.[140] He agreed with Justice Stevens' opinion that photo-identification statutes could be constitutional.[141] However, Justice Breyer found none of Indiana's interests justified SEA 483's disproportionate burden on eligible voters without identification.[142]

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[133] *Id.* at 1628 (Souter, J., dissenting).

[134] *Id.* at 1627.

[135] *Id.*

[136] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting).

[137] *Id.* at 1634. The dissent discussed how the burden of travel has worse effects on some voters based on circumstance. *Id.* at 1628–29. It also noted the most common sources of identification cost money, a cost falling disproportionately on the poor. *Id.* at 1630–31.

[138] *Id.* at 1638–39. The dissent also argued Indiana's bloated rolls resulted from its own negligence and failed to justify restricting voters. *Id.* at 1641–42. Similarly, the State's interest in maintaining voter confidence resulted from its own shortcomings. *Id.* at 1642.

[139] *Id.* at 1643.

[140] *Id.* at 1643 (Breyer, J., dissenting) ("I would balance the voting-related interests that the statute affects, asking 'whether the statute burdens any one such interest . . . out of proportion to the statute's salutary effects upon the others . . . .") (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

[141] *Crawford II*, 128 S. Ct. at 1643–44 (Breyer, J., dissenting).

[142] *Id.* at 1645. Justice Breyer noted, although the Carter-Baker Commission suggested voter-identification requirements, it also concluded states should phase in such laws providing sufficient time for states to provide identification to those who lacked it. *Id.* at 1644.

ANALYSIS

This section assesses the implications of *Crawford v. Marion County Board of Elections* (*Crawford II*). Although *Crawford II* provided guidance on how to evaluate voter-identification statutes, it failed to compare the concrete benefits and burdens of SEA 483.[143] Justice Stevens' opinion applied *Burdick's* sliding-scale test in a lopsided manner, giving Indiana the benefit of the doubt while undervaluing the nature and magnitude of voter-identification laws' burdens on voting rights.[144] The Court placed the initial burden of proof on those challenging identification laws, preventing actual balancing until challengers provide quantitative evidence of disenfranchisement.[145] The Court should have applied *Burdick* in a more balanced fashion, adjusting the tailoring required of the statute based on its benefits and burdens.[146]

A Lopsided Balancing Test

On the surface, *Crawford II* resolved lower federal court disagreements over which test to use when hearing challenges to voter-identification statutes.[147] Most lower courts correctly used the *Burdick* test to assess whether voter-identification statutes violated the Fourteenth Amendment, even if courts applied it in disparate ways.[148] Under Justice Stevens' opinion, this analysis depends on the facts of

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[143] *Crawford II*, 128 S. Ct. at 1628 (Souter, J., dissenting).

[144] *See id.* (pointing to the Stevens opinion's skewed balancing of interests); Rick Hasen, *Initial Thoughts on the Supreme Court's Opinion in* Crawford*, the Indiana Voter Identification Case*, ELECTION LAW BLOG, Apr. 28, 2008, http://electionlawblog.org/archives/010701.html (last visited Oct. 24, 2008) (arguing *Crawford II* only requires states to offer plausible pretexts to justify voter-identification laws, while requiring voters to show specific burdens).

[145] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (arguing in favor of a flexible standard for assessing firearms regulations as opposed to presuming such laws are constitutional); Cofsky, *supra* note 64, at 386–87 (arguing *Burdick* might lead to veiled tiered scrutiny and a presumption of constitutionality).

[146] *See Crawford II*, 128 S. Ct. at 1643 (Breyer, J., dissenting) (suggesting the Court should balance SEA 483's benefits and burdens, asking whether it burdens voting rights disproportionate to its benefits).

[147] *Id.* at 1616 (lead opinion).

[148] *See* Daniel P. Tokaji, *Judicial Review of Election Administration*, 156 U. PA. L. REV. PENNUMBRA 379, 384 (2007), *available at* http://pennumbra.com/responses/response.php?rid=38 (last accessed November 15, 2008) (noting how many lower courts used *Burdick* to evaluate voter-identification cases); Elizabeth D. Lauzon, *Constitutionality of Requiring Presentation of Photographic Identification in Order to Vote*, 27 A.L.R.6th 541 (2007) (noting most federal courts applied *Burdick* to voter-identification laws, although some applied strict scrutiny, and how Justice Stevens' opinion in *Crawford II* adopted a balancing approach).

specific situations rather than a pre-existing formula.[149] Although the Court based its approach on *Burdick*, it departed from prior precedent because it assessed SEA 483's burden on specific voters, rather than its systemic burden on all voters.[150]

In applying *Burdick*, the Court morphed its balanced sliding-scale test into a lopsided balancing test.[151] *Burdick* required the Court to balance all relevant interests in favor of and against an electoral regulation.[152] In contrast, the *Crawford II* Court found the magnitude of SEA 483's injury non-severe and avoided comparing it to the State's interest.[153] Although the Court discussed the legitimacy of Indiana's interest in stopping fraud, modernizing elections, and ensuring electoral legitimacy, no comparison of those interests to the character and magnitude of the burden on voting rights occurred.[154] This deviates from *Burdick*, which required thorough evaluation of the State's rationale and the degree to which that interest necessitated burdening voting rights.[155] Justice Stevens' opinion examined evidence showing SEA 483's burden on voting with a skeptical eye, but accepted Indiana's claims of voter fraud at face value and did not require concrete

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[149] *Crawford II*, 128 S. Ct. at 1616; *see also* Am. Assoc. of People with Disabilities v. Herrera, No. CIV 08-0702, 2008 U.S. Dist. LEXIS 82597, at *54-57 (D.N.M. Sept. 17, 2008) (finding that *Crawford II* affirmed *Anderson's* sliding-scale as the proper test for assessing challenges to state electoral regulations).

[150] Reply Brief for Petitioners at 6–7, *Crawford II*, 128 S. Ct. 1610 (No. 07-25), 2007 WL 4466632 ("[*B*]*urdick* clearly calls upon courts to assess voting regulations facially. *Burdick* itself was a facial attack on a law that burdened the rights of only a subset of voters."); *see also* Tokaji, *supra* note 18 (arguing *Crawford II* erroneously focused on SEA 483's burden on individual voters, avoiding its systemic burdens and "skewing effect on the electorate"); Chemerinsky, *supra* note 113, at 441 (arguing *Crawford II* broke from *Harper*); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) (finding it irrelevant whether the plaintiffs could identify individuals disenfranchised by a $1.50 poll tax and holding the tax facially invalid because it introduced a standard irrelevant to voter qualifications).

[151] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); Hasen, *supra* note 144 (arguing Justice Stevens' opinion failed to accurately compare SEA 483's benefits and burdens).

[152] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Storer v. Brown, 415 U.S. 724, 730 (1974) ("The rule is not self-executing and is no substitute for the hard judgments that must be made."); Bullock v. Carter, 405 U.S. 134, 143 (1972) ("In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.").

[153] *Crawford II*, 128 S. Ct. at 1623 ("[T]he statute's broad application to all Indiana voters . . . 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.") (quoting *Burdick*, 504 U.S. at 434, 439).

[154] *Id.* at 1635–36 (Souter, J., dissenting).

[155] *See Burdick*, 504 U.S. at 434 (comparing the actual benefits and burdens of Hawaii's write-in ban).

evidence in support of those claims.[156] Since the petitioners failed to provide quantifiable evidence of a burden, the Court did not compare the interests.[157] Consequently, Indiana's theoretical interest in stopping fraud justified the burden its statute imposed on voting rights.[158] Rather than balancing based on the relative strengths of each interest, Justice Stevens' opinion found the petitioners failed to demonstrate SEA 483's burden in terms of quantifiable disenfranchisement and accepted the State's speculative interest in fighting fraud.[159] The Court used a lopsided balancing test to evaluate voter-identification laws, requiring a higher standard of proof from those who challenge such laws than from states seeking to justify them.[160] If the Court finds the statute lacks a quantifiable burden,

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[156] *Crawford II,* 128 S. Ct. at 1627 (Souter, J., dissenting). According to Souter's dissent:

> [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. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried.

Id. (citation omitted). Courts should apply *Burdick* to state interests with a skeptical eye, conducting more than a cursory examination of a state's abstract interests and not allowing states to "swat flies with a hammer." Chad Flanders, *How to Think about Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 152–53 (2007); *see also* Richard L. Hasen, *Courts Need to Keep a Skeptical Eye on New Voter Identification Laws*, Ohio State University: Election Law @ Moritz, Apr. 24, 2007, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=147 (last visited Oct. 24, 2008) (arguing courts should examine fraud claims skeptically in light of their partisan background and lack of empirical basis). Justice Stevens' opinion rigorously deconstructed the petitioners' evidence of disenfranchisement. *Crawford II,* 128 S. Ct. at 1623. It criticized the petitioners' statistics for using old numbers, not demonstrating the lack of transportation proves the lack of opportunity to obtain identification, and not demonstrating a distribution of voters lacking identification. *Id.* at 1623 n.20. In contrast, Justice Stevens' opinion accepted "scattered instances" of fraud elsewhere in the United States, justifying the State's interest. *Id.* at 1618–19; 1619 n.10. This bears similarity to the lopsided applications of lower federal courts. *See* Schultz, *supra* note 1, at 507–08, 525–26 (describing federal courts' imbalanced interpretation of *Burdick*).

[157] *Crawford II*, 128 S. Ct. at 1635–36 (Souter, J., dissenting).

[158] *Id.* at 1622 (lead opinion). According to Justice Stevens' opinion, "[SEA 483's] broad application to all Indiana voters . . . 'imposes only a limited burden on voters' rights.' The 'precise interests' advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483." *Id.* (quoting *Burdick*, 504 U.S. at 434, 439).

[159] *Id.* at 1623. Justice Stevens' opinion failed to discuss degrees of necessity or how narrowly Indiana must tailor SEA 483. *Id.* The unquantifiable nature of the threat to voting rights triggered a kind of rational basis review whereby a "sufficiently strong" justification for a neutral law sufficed to withstand a Fourteenth Amendment challenge. *See id.* at 1628 (Souter, J., dissenting) (arguing Justice Stevens' opinion failed to engage in the hard weighing of interests required by *Burdick*). The Court's approach had more in common with lower federal courts that assumed *Burdick* demanded an either/or choice between rational basis review and strict scrutiny based on the severity of the law in question, rather than courts that used a more flexible sliding-scale with intermediate standards of review. *See* Schultz, *supra* note 1, at 531 (arguing lower courts mistakenly applied *Burdick* as a binary choice between rational basis review and strict scrutiny).

[160] Hasen, *supra* note 144 (arguing the Court tipped the sliding-scale in favor of the state's interest). After *Washington State Grange*, Prof. Hasen suggested the Court might be moving in this

little weighing of interests occurs and the Court will likely defer to the state's regulatory interest.[161] Such a deferential test poses substantial problems to future voter-identification law challenges because a court's initial adoption of a standard of review often determines the outcome of an election law challenge.[162]

The Court's lopsided balancing test makes it extremely difficult to facially challenge a voter-identification law.[163] *Crawford II* involved a facial challenge because the petitioners alleged that all applications of SEA 483 violated the Constitution.[164] While Justice Stevens' opinion made such challenges difficult, it did not foreclose the possibility of as-applied challenges, which allege that a law's particular application violates the Constitution.[165] If a regulation imposes a minimal burden on the public and the legislature offers a neutral pretext, regardless of the strength of the evidence supporting that interest, the statute will likely survive a facial challenge.[166] Groups facing a disparate impact must challenge voter-identification laws as applied to specific situations and offer quantitative

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direction: "If a state tries to justify its election law, it can do so by merely positing—not proving—the existence of voter confusion. . . . [I]f voters . . . want to challenge a law, then they need to come forward with actual evidence . . . ." *Id.*

[161] *Compare Crawford II*, 128 S. Ct. at 1623 (holding SEA 483's limited burden on all voters sufficed to overcome a facial challenge), *with* Norman v. Reed, 502 U.S. 279, 288–89 (1992) (requiring the state to show a corresponding interest sufficiently weighty to justify denying parties the right to name themselves).

[162] Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 771–72 (2008) (arguing the burden often determines a case's outcome by setting the level of scrutiny). In unpublished decisions, some federal courts have interpreted *Crawford II* in this fashion, deferring to states' abstract interests rather than engaging in actual balancing. *See* Tex. Democratic Party v. Williams, No. 07-51064, 2008 U.S. App. LEXIS 16406, at *1–2 (5th Cir. July 30, 2008) (holding a district court correctly applied rational basis review to a voting system not allowing straight-ticket voters to emphasize votes because the statute imposed a non-severe burden); *Herrera*, 2008 U.S. Dist. LEXIS 82597, at *90 (finding no distinction between Justice Stevens' sliding-scale approach and Justice Scalia's deferential two-track approach where an election law imposes a non-severe burden); Paralyzed Veterans of Am. v. McPherson, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *48 (N.D. Cal. Sept. 9, 2008) (applying rational basis review to a voting system imposing minimal burdens on visually and manually impaired citizens). Cases await review in lower courts in response to *Crawford II*. *See generally* Common Cause/Ga. v. Billups, No. 07-14664 (11th Cir. filed Sept. 11, 2008) (order staying appeal pending resolution of *Crawford II*); Gonzalez v. Arizona, No. 08-17094 (9th Cir. filed Sept. 24 2008).

[163] *See Voting Rights: Hearing Before S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Pam S. Karlan) (arguing the Court continued its trend of rejecting facial challenges but left the possibility of as-applied challenges).

[164] *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (describing facial and as-applied challenges).

[165] *See Crawford II*, 128 S. Ct. at 1621–22 (discussing the heightened burden faced by the petitioners in succeeding in their broad challenge to SEA 483's constitutionality).

[166] Hasen, *supra* note 144.

evidence of disenfranchisement.[167] *Crawford II* comports with the Roberts Court's trend of resisting facial challenges to statutes burdening fundamental rights.[168] The Court's hostility to facial challenges is problematic because it allows potentially unconstitutional laws to exist for some time before opponents effectively challenge them as applied to specific situations.[169] In the meantime, voter-identification laws may infringe upon fundamental voting rights, an effect that is likely irreversible.[170]

Rather than resolving confusion about how lower federal courts should evaluate voter-identification laws, *Crawford II* compounded the confusion by failing to provide an example of how to weigh competing electoral interests.[171] Justice Stevens' opinion turned largely on the facts surrounding SEA 483, complicating attempts to articulate a general rule for evaluating future challenges to voter-identification laws.[172] The failure of any rationale to command a majority

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[167] *Id.* (arguing the Court's disfavor of facial challenges disadvantages burdened plaintiffs and contradicts decisions like *Harper*, which outlawed poll taxes for everyone); *cf. Harper*, 383 U.S. at 668 (striking down a poll tax regardless of a citizen's ability to pay it).

[168] Warshak v. United States, 532 F.3d 521, 530 (6th Cir. 2008) (suggesting *Crawford II* continued the Roberts Court's trend disfavoring facial challenges); David G. Savage, *About Face: A Tool of the Civil Rights Movement is Increasingly Unwelcome in the High Court*, 94 A.B.A. J. 21 (2008) ("In a series of rulings during the past two years, the court has rejected broad challenges to new laws while at the same time leaving open the door to a more targeted attack on some of the laws' provisions."); *see also* Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1183, 1191 (2008) (disfavoring facial challenges to election laws because they rely on speculation and interfere with popularly elected branches of government).

[169] Chemerinsky, *supra* note 113, at 441 (arguing *Crawford II's* preference for as-applied challenges forces challengers to wait for an election law to disenfranchise voters before challenging it); Tokaji, *supra* note 18 (arguing as-applied challenges focus on the end of the election process, risking partisan court battles).

[170] *See supra* notes 35–39 and accompanying text.

[171] *See* Hasen, *supra* note 144 (noting the cursory nature of Justice Stevens' opinion and the difficulty it creates in predicting the outcomes of future voter-identification litigation). Although Justice Stevens' opinion found insufficient evidence to invalidate SEA 483 on facial grounds, it left the door open for future as-applied challenges. *See* Chemerinsky, *supra* note 113, at 428 (arguing *Crawford II* leaves open the possibility of as-applied challenges); Carrie Apfel, *The Pitfalls of Voter-Identification Laws in a Post-*Crawford *World*, AM. CONSTITUTION SOCIETY, at 1 (2008), *available at* http://www.acslaw.org/files/Apfel%20Issue%20Brief.pdf (last visited Oct. 24, 2008) (arguing *Crawford II* invites as-applied challenges in the future). The Court suggests one type of evidence capable of invalidating voter-identification laws, but fails to explain what constitutes a severe burden or how narrowly the state must draw its law to justify such a burden. *See Crawford II*, 128 S. Ct. at 1623–24 (suggesting the unconstitutionality of voter-identification laws without non-partisan motivations). Unfortunately, few major empirical studies of in-person voter fraud exist. Overton, *supra* note 73, at 665–66. As long as little hard data exists, courts may continue to apply the balancing test in an ad hoc manner, leading to contrary results based on similar facts. *Id.*

[172] Michael W. Hoskins, *Voter ID Questions Remain After SCOTUS Ruling*, IND. LAWYER, May 14, 2008, at 13.

of the Court also risks confusion in lower courts regarding how to apply it to future election regulation challenges.[173] The lack of a clear rule encourages future litigation because the Court did not rule out future as-applied challenges, so long as plaintiffs can present more evidence of disenfranchisement.[174] In spite of *Crawford II's* narrow holding, both advocates of voter-identification laws, and those who seek to challenge them, remain undeterred.[175] Not only have several states expressed interest in passing voter-identification laws in the post-*Crawford II* world, but activists also retain hope that they may succeed in challenging such laws.[176]

A Flexible Alternative

A better approach to voter-identification cases would apply the *Burdick* test in a balanced fashion, adhering to its flexibility.[177] The Court should actually weigh a statute's burden on both individual and group voting rights against the realistic threat of voter fraud.[178] Since courts have no predetermined test for which standard of review to use, the relative nature and magnitude of the two competing interests should determine the proper level of scrutiny.[179] In his dissent, Justice Breyer

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[173] Chemerinsky, *supra* note 113, at 428; *see also Herrera*, 2008 U.S. Dist. LEXIS 82597, at *90 (noting confusion as to whether to apply Justice Stevens' flexible standard or the two-track standard articulated in Justice Scalia's concurrence); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (noting federal courts' contradictory interpretations of the plurality rationale in *Regents of the University of California v. Bakke*).

[174] *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring) (arguing the lack of clear standards before elections encourages disruptive litigation).

[175] Erwin Chemerinsky, *A Severe Setback to Voting Rights*, TRIAL, July 1, 2008, at 64 ("This rationale is an open invitation to state legislatures across the country to devise statutes that will disenfranchise one party's voters."); Karen Brooks, *Texas Voter ID Debate Revived Justices' Support of Indiana Photo Law Means Proponents In Legislature Likely to Try Again*, DALLAS MORNING NEWS, Apr. 29, 2008, at 1A ("Now that the [United States] Supreme Court has cleared strong voter-identification requirements. . . . Texas Republicans say there's nothing to stop them from making it the law here in 2009.").

[176] Hoskins, *supra* note 172, at 13.

[177] *Crawford II*, 128 S. Ct. at 1628 (Souter, J., dissenting).

[178] *Id.*

[179] *Id.* According to the dissent:

> Under *Burdick*, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," upon an assessment of the "character and magnitude of the asserted [threatened] injury," and an estimate of the number of voters likely to be affected.

Id. (quoting *Burdick*, 504 U.S. at 434); *see also* Overton, *supra* note 73, at 667 (stating voter-identification laws' relative benefits and burdens determine their permissible over and under-inclusiveness).

suggested how to apply a more balanced flexible test.[180] A severe burden on voting rights and a weak threat of fraud justifies heightened scrutiny.[181] Less extreme cases call for some form of intermediate scrutiny, requiring the state to show its statute substantially relates to an important government interest.[182] The degree of narrow tailoring states must demonstrate changes based on the interests at hand and the evidence supporting them.[183] Even heightened scrutiny need not be "strict in theory, fatal in fact," as strong evidence of voter fraud may justify a properly tailored voter-identification law where a disproportionate risk of fraud exists.[184]

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[180] *See Crawford II*, 128 S. Ct. at 1643 (Breyer, J., dissenting) (proposing the Court balance voting interests and determine if the statute imposes burdens disproportionate to the interests it serves). In *District of Columbia v. Heller*, Justice Breyer suggested a similar test in the Second Amendment context, which could serve as a useful rule for evaluating voter-identification laws:

> [R]eview of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.

District of Columbia v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (quoting *Nixon*, 528 U.S. at 402 (Breyer, J., concurring)). This breaks from the rigid application of discrete tiers of scrutiny, opting for more flexibility when statutes implicate rights on both sides of the scale. *Crawford II*, 128 S. Ct. at 2852–53 (Souter, J., dissenting).

[181] *See Norman*, 502 U.S. at 288–89 (holding a state must show a corresponding interest strong enough to justify electoral regulations and narrowly tailor severe restrictions). Some lower federal courts and a state court subjected voter-identification laws to heightened scrutiny. *Santillanes I*, 506 F. Supp. 2d at 636; Common Cause/Ga. v. Billups (*Billups I*), 406 F. Supp. 2d at 1361, 1365–66 (N.D. Ga. 2006); Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006).

[182] *See* Crawford v. Marion County Election Bd. (*Crawford I*), 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (suggesting the possibility of "strict scrutiny light"); United States v. Virginia, 518 U.S. 515, 524 (1996) (requiring Virginia to show the Virginia Military Institute's exclusion of women bore a substantial relationship to an important governmental objective); Flanders, *supra* note 156, at 151–52 (arguing state interests should not get a "free pass" by a plausible justification for maintaining electoral integrity and suggesting a court must determine how an interest necessitates its burden); Schultz, *supra* note 1, at 531 (arguing courts should subject some non-severe burdens to intermediate scrutiny).

[183] *See Santillanes I*, 506 F. Supp. 2d at 628–29.

> As the burden that an election law imposes . . . becomes more severe, the State's interest in imposing that burden must become more compelling, and the burden the law imposes must become more narrowly tailored to serve that interest. Under this approach, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."

Id. (quoting *Nixon*, 528 U.S. at 391).

[184] *See* Chemerinsky, *supra* note 175, at 64 (arguing a law like SEA 483 could meet strict scrutiny if necessitated by a real risk of voter fraud).

Courts should balance the nature and magnitude of a statute's burden and not arbitrarily tip the scale in favor of the state's interest, as the Court did in *Crawford II*.[185] The *Crawford II* Court erred in finding SEA 483 failed to severely burden petitioners' voting rights and in refusing to weigh those interests against the state interest.[186] Undue burden analysis does not require a statute to eliminate a right before comparing it to the state's interest.[187] Courts should compare the specific interests at hand, regardless of their initial determination of a statute's severity.[188] Even a seemingly minimal voting interest may invalidate a state regulation if the state has no rational justification for it.[189] Actually weighing interests may reduce

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[185] *See* Schultz, *supra* note 1, at 526 ("[E]vidence must be offered to support the interest to override a fundamental right."); David Schultz, *Lies, Damn Lies, and Voter IDs: The Fraud of Voter Fraud* 6 (2008), http://www.hlpronline.com/Schultz_HLPR.pdf (last visited Oct. 24, 2008) (arguing *Burdick* requires at least intermediate scrutiny and pointing to *Santillanes I* as an example of how to take the flexible standard seriously); Scott Ryan Nazzarine, Comment and Casenote, *A Faceless Name in the Crowd: Freedom of Association, Equal Protection, and Discriminatory Ballot Access Laws*, 72 U. CIN. L. REV. 309, 347–56 (2003) (arguing, while not every voting regulation deserves strict scrutiny, courts should apply a more balanced test, subjecting more severe restrictions to heightened scrutiny).

[186] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Reynolds v. Sims, 377 U.S. 533, 562 (1964) (requiring meticulous examination of voting restrictions); Langholz, *supra* note 162, at 777–78 (stating *Burdick* requires courts to assess the burden of a law and then compare it to the state interest).

[187] *See Casey*, 505 U.S. at 877 (holding a statute unduly burdened reproductive right by placing a substantial obstacle in the path of women seeking abortions, in spite of not proscribing abortions).

[188] *Crawford II*, 128 S. Ct. at 1627 (Souter, J., dissenting); *see also* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."); *Buckley*, 424 U.S. at 48–49 (requiring the state to show empirical foundation for burdening a fundamental right); Brief of Amici Curiae of the Brennan Center For Justice in Support of Petitioners, at 6–7, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2007 WL 4102238 (arguing states must show more than a rational basis for non-severe laws); Brief of Richard L. Hasen as Amicus Curiae Supporting Petitioners, at 4–5, *Crawford II*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2007 WL 3353103 [hereinafter Hasen Brief] (arguing courts misconstrue *Burdick* when they fail to engage in hard balancing of non-severe statutes). *Santillanes I* explains such a comparison:

> [T]he *Burdick* test does not call for the Court to look for any conceivable, generalized interest that might serve as a justification for imposing a burden on the exercise of First and Fourteenth Amendment rights in the context of elections. Rather, this test calls for the City to put forward "the precise interests [which serve] as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it *necessary* to burden the plaintiff's rights."

Santillanes I, 506 F. Supp. 2d at 637 (quoting *Burdick*, 504 U.S. at 434).

[189] *Santillanes I*, 506 F. Supp. 2d at 629 (explaining how bureaucratic burdens may impose significant obstacles on voting rights); *see also* McLaughlin v. N.C. Bd. of Elec., 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (holding even moderate regulations serving rational, but minor, interests, may fail the sliding-scale test); Hasen Brief, *supra* note 188, at 4–5 (arguing states must reasonably tailor election laws imposing non-severe burdens to their interests).

uncertainty regarding how courts should determine the severity of an election regulation.[190]

Suggestions for Practitioners and Legislators

Crawford II suggests a few lessons for legal practitioners and legislators seeking to design voter-identification legislation. Although challengers face significant burdens in facially challenging photo-identification requirements, challenges to specific applications of such statutes may succeed.[191] The Court's lopsided interpretation of *Burdick* imposes substantial burdens on those challenging voter-identification laws, but successful challenges remain possible.[192] Challengers may succeed in the difficult task of unearthing quantitative evidence of voters finding it difficult to obtain documents necessary to receive identification.[193]

State legislatures should take caution before passing voter-identification laws because such laws invite challenges even after *Crawford II*, risking expensive court battles and the possibility of unsatisfactory outcomes.[194] Lawmakers should assess

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[190] Chris Elmendorf, *Judicial Review of Electoral Mechanics*, Election Law @ Moritz, May 6, 2008, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=417 (last visited Oct. 24, 2008) (arguing *Crawford II* avoided clarifying how courts should weigh competing voting interests); Elmendorf, *supra* note 63, at 393 (arguing appellate courts should determine severity de novo, clarifying what constitutes a severe burden for lower courts). *But see* Tokaji, *supra* note 148, at 389 (arguing the fact intensive nature of election cases makes de novo review not optimal). Prof. Elmendorf draws a more systematic approach from Justices Breyer and Souter, suggesting courts should look for danger signs of a substantial threat to the democratic process before applying heightened scrutiny. Elmendorf, *supra* note 63, at 325; *see also* Randall v. Sorrell, 547 U.S. 230, 248–49 (2006) (independently evaluating a statute's danger signs to determine its severity); Vieth v. Jubelirer, 541 U.S. 267, 344 (2004) (Souter, J., dissenting) (searching for clues of a statute's unfairness).

[191] *See supra* notes 162–68 and accompanying text.

[192] Hasen, *supra* note 144; Apfel, *supra* note 171, at 1. The few decisions applying *Crawford II* to non-voter-identification election laws did so in a lopsided manner, applying less demanding standards of review. *See* Paralyzed Veterans of Am. v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, *15 (N.D. Cal. Sept. 9, 2008) (subjecting a California voting system for the disabled to rational basis review because it imposed a minimal burden); Nader v. Cronin, Civ. No. 04-00611 ACK-LEK, 2008 WL 1932284, *11 (D. Haw. May 1, 2008) (holding Hawaii's regulatory interests justified stringent third party petition requirements).

[193] *See Crawford II*, 128 S. Ct. at 1621 (suggesting documentation justifying a voter-identification law challenge). The probability of successful challenges may increase as more data emerges during the next few elections. Apfel, *supra* note 171, at 7. However, the Court may demonstrate the same kind of skepticism expressed by the *Crawford II* Court towards disenfranchisement claims in future cases. *See* Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 860–61 (2008) (describing the Court's skepticism during oral arguments that SEA 483 would block access to the franchise).

[194] Apfel, *supra* note 171, at 9; Whitaker, *supra* note 17, at CRS-6; Hoskins, *supra* note 172, at 13 (predicting future litigation); Martin Frost, *GOP Cranking Up Suppression Efforts*, Politico.com, May 27, 2008, http://www.politico.com/news/stories/0508/10615.html (last visited November 15, 2008). The concurrence suggested as much when it warned Justice Stevens' reliance on specific facts risked "constant litigation." *Crawford II*, 128 S. Ct. at 1626 (Scalia, J., concurring).

whether voter fraud poses a realistic problem in their jurisdictions and carefully determine if that risk outweighs the costs of protracted litigation and burdening voting rights.[195] States may avoid larger problems if they opt for alternative means of addressing fraud, such as technological measures, increased enforcement of current rules, and changes in electoral administration.[196] Photographing registering voters and matching their faces before allowing them to vote may achieve the purported benefits of voter-identification legislation without burdening voting rights.[197] For the near future, states and litigants must navigate judicial uncertainty concerning what constitutes a severe burden on voting rights.[198]

CONCLUSION

Crawford II will do little to end disputes over voter-identification laws.[199] Many state legislatures continue to pursue such laws and challengers think they can succeed in attacking the application of such laws by making as-applied challenges.[200] The United States Supreme Court failed to articulate the method to compare interests in future photo-identification legislation.[201] Justice Stevens' opinion in *Crawford II*, which constitutes the Court's holding, failed to balance Indiana's interest requiring voter-identification against the burden the law poses to voting rights.[202] The Court's application of *Burdick* suggests a lopsided test, requiring concrete evidence from challengers to identification laws and accepting theoretical risks of fraud from states.[203] *Crawford II* illustrates the Roberts Court's

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[195] Apfel, *supra* note 171, at 9–10. Even if the abstract threat of voter fraud justified SEA 483, the little evidence available suggests in-person voter fraud poses a minor threat to electoral integrity. *See* David Callahan and Lori Minnite, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 7, 16–17 (2003), http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf (last visited Oct. 24, 2008) [hereinafter Demos] (explaining the dearth of evidence of fraud by pointing to declining local party power, stronger election administration, and new voting technology).

[196] Demos, *supra* note 195, at 7; *see also* Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 969–70 (2005) (suggesting registration reform using biometric identification).

[197] Edward B. Foley, *Is There a Middle Ground in the Voter ID Debate?*, Ohio State University: Election Law @ Moritz, Sept. 6, 2005, http://moritzlaw.osu.edu/electionlaw/comments/2005/050906.php (last visited Oct. 24, 2008).

[198] *See Leading Cases—Constitutional Law*, 113 HARV. L. REV. 286, 293–94 (1999) (arguing Justices Stevens, Kennedy, Scalia, Souter, and Ginsberg will never agree on the definition of severity).

[199] *See supra* notes 171–76 and accompanying text.

[200] *See supra* notes 174–76 and accompanying text.

[201] *See supra* notes 171–73 and accompanying text.

[202] *See supra* notes 147–62 and accompanying text.

[203] *Id.*

resistance to facial challenges, suggesting future litigation will depend on the facts of specific situations.[204] As such, both litigators and legislators should take caution in how they approach voter-identification laws.[205]

[204] *See supra* notes 163–70 and accompanying text.

[205] *See supra* notes 191–98 and accompanying text.