The Right, the Test, and the Vote: Evaluating the Reasoning Employed in Crawford v. Marion County Election Board

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“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.”

I. INTRODUCTION

Justice Byron White’s words from *Burdick v. Takushi* make a powerful statement about the importance of the right to vote in our unique democracy. However, several state legislatures have recently implemented increasingly restrictive regulations on this right. Perhaps the most restrictive of such regulations are those that require citizens voting in person to present government-issued photo identification. In 2005, the Indiana legislature passed Senate Enrolled Act No. 483 ("SEA 483"), resulting in the most significant nationwide impact of any recent election regulation. Following its enactment, various plaintiffs brought two separate suits in an effort to have SEA 483 declared invalid. These two cases were later consolidated into a single case—*Crawford v. Marion County Election Board*. On review, the United States Supreme Court upheld SEA 483 as constitutional. However, the constitutionality of voter identification statutes such as SEA 483 must also be examined in light of the tests that have traditionally been applied in cases involving elections and the right to vote. This Note examines the significance of *Crawford* and argues that the plurality should have applied a heightened scrutiny analysis, as set forth in *Harper v. Virginia Board of Elections*, instead of the balancing test from *Anderson v. Celebrezze*. Part II explores the fundamental nature of the right to vote and the legal precedent regarding elections and voting. Part III discusses each opinion set
forth in the Crawford decision. Part IV analyzes the reasoning employed by the Supreme Court and proposes that a heightened scrutiny test be used in its place. It also addresses the possibility of a "severe burden" requirement in order for the Court to apply heightened scrutiny in election cases. This Note concludes that the Court erred in its use of the Anderson test in Crawford and that the statute would have been held unconstitutional if the Court had instead applied heightened scrutiny. The Note also concludes that the imposition of a severe burden requirement for heightened scrutiny would be inappropriate for a number of reasons.

II. HISTORICAL BACKGROUND

The significant history and development of the right to vote are established within the United States Constitution and Supreme Court jurisprudence. While the Constitution implies the existence of the right to vote, jurisprudence—especially throughout the past fifty years—has developed the standards of review applicable to the right.

A. The Right to Vote in the Constitution

While there are constitutional amendments that regulate the right to vote, the precise nature of the right must be determined primarily from the structure of the Constitution itself. Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Additionally, Article II, Section 1 delegates to the states the power to establish the method of selecting electors during a presidential election. While it appears that the Constitution initially conferred matters

9. See U.S. CONST. amend. XV (the right of citizens to vote cannot be denied on account of "race, color, or previous condition of servitude"); U.S. CONST. amend. XIX (the right of citizens to vote cannot be denied on account of sex); U.S. CONST. amend. XXVI (the right of citizens who are eighteen years of age or older to vote cannot be denied).
11. U.S. CONST. art. II, § 1. Specifically, this provision states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." U.S. CONST. art. II, § 1, cl. 2.
relating to the franchise of voting upon the states, changes began to occur with the passing of constitutional amendments regarding states’ rights and the right to vote.

In 1868, the nation adopted the Fourteenth Amendment to the Constitution. The Fourteenth Amendment guarantees constitutionally protected rights to all citizens and restricts the states from any action that would deprive citizens of those rights. In the context of voting, the Equal Protection Clause of the Fourteenth Amendment has been interpreted to protect United States citizens’ right to vote.

The Fifteenth Amendment to the Constitution was adopted in 1870 and states that “[t]he rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Consequently, the Fifteenth Amendment effectively established a federal interest in an area that had traditionally been conferred upon the states. The Constitution’s indirect approach to addressing voting rights has allowed the judiciary to interpret this constitutional basis and provide a more thorough explanation as to the nature and application of this right.

B. Jurisprudential Standards Regarding the Right to Vote

The ambiguity surrounding the constitutional source of voting rights gave rise to the need for Supreme Court decisions

13. Id.
14. The amendment states, in pertinent part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
18. See also Schultz, supra note 12, at 488 (discussing the series of constitutional amendments addressing the right to vote, including the Fifteenth, Seventeenth, and Nineteenth Amendments, but acknowledging that none of the amendments “affirmatively granted the right to vote”).
interpreting the nature of the right to vote. However, it was necessary not only for the Court to determine whether the right was fundamental, but also to delineate the applicable standards of scrutiny that should be used when determining the constitutionality of statutes that burden the right to vote. 19

Fundamental rights are generally entitled to a high level of judicial scrutiny because of the traditional importance with which society regards their value. 20 Yet, there is currently some debate concerning both the source and nature of fundamental rights. Many theories exist regarding the source of rights that are not expressly provided for in the Constitution—also called unenumerated rights—that have resulted in great difficulty when trying to ascertain "one unifying principle for assessing the fundamentality of rights." 21 In determining which rights are fundamental in nature, Justice Cardozo proposed that a right is fundamental "when infringement upon the alleged right would 'offend some principle of justice so rooted in the traditions and conscience of our people.'" 22

Modern jurisprudence has established that both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment protect fundamental rights. 23 The Equal Protection Clause typically applies to discrete and insular minorities; however, it also offers heightened protection for fundamental rights. 24 Because of this, the doctrines of equal protection and

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20. See Wolf, supra note 15, at 107–08 ("[T]radition is the current, generally accepted methodology for assessing purported fundamental rights . . . .").
21. Id. at 106.
22. Id. at 110 (quoting Synder v. Massachusetts, 291 U.S. 97, 105 (1934)).
23. Viktor Mayer-Schonberger, Substantive Due Process and Equal Protection in the Fundamental Rights Realm, 33 How. L.J. 287, 290 (1990). As far as due process is concerned, the Supreme Court's jurisprudence has established that "the Due Process Clause should embrace more than certain procedural safeguards." Wolf, supra note 15, at 108. Under this theory of substantive due process, the states may not infringe upon those rights of citizens that are protected by the Due Process Clause. See Nathan N. Frost, Rachel Beth Klein-Levine & Thomas B. McAffee, Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States, 2004 Utah L. Rev. 333, 341 (2004) (describing substantive due process as a judicial function that "discovered 'fundamental rights' to be protected by due process clauses of state and federal constitutions"). Recently, this theory has been used almost exclusively to declare the rights of the family and the right of privacy as fundamental. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997); Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990).
24. Mayer-Schonberger, supra note 23, at 291. The origins of the equal protection doctrine can be found in Footnote 4 of United States v. Carolene
substantive due process may overlap when dealing with fundamental rights. When analyzing regulations that infringe upon rights protected by the Due Process Clause and fundamental rights in an equal protection context, the Court often applies a "strict" or "heightened" level of scrutiny. Under the strict scrutiny analysis, courts make a two-part inquiry. First, a court must ask whether there is a compelling government interest that supports the challenged regulation. Second, the court must determine whether the regulation is sufficiently narrowly tailored to serve this compelling interest. This approach also requires a court to "assess the relative 'weights' or dignities of the contending interests...."

Although the Supreme Court had engaged in some discussion of voting rights in its early decisions, the Court did not

Products, which implied that a "more exacting judicial scrutiny" might be necessary for legislation that restricts certain political processes. 304 U.S. 144, 152 n.4 (1938). See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding an Oklahoma law that required the sterilization of habitual criminals unconstitutional under the Equal Protection Clause because the legislation "involve[d] one of the basic civil rights of man").

25. This was the case in Harper v. Virginia Board of Elections, which seemed to employ the principles of substantive due process within the framework of an equal protection analysis. 383 U.S. 663 (1966). The Harper Court's approach in combining these two doctrines indicates that both doctrines may apply when evaluating a provision that imposes a burden on the right to vote.

26. Glucksberg, 521 U.S. at 721 (stating that the Fourteenth Amendment "forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (internal quotations omitted).

27. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1968) (applying strict scrutiny to the fundamental right to travel in the context of welfare assistance).

28. See infra note 50.

29. See Glucksberg, 521 U.S. at 772 n.12. The Court described the "'compelling interest test,' under which regulations that substantially burden a constitutionally protected (or 'fundamental') liberty must be narrowly tailored to serve a compelling state interest.” Id. (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

30. See id. at 766. The Court noted that when "interests in liberty [are] sufficiently important to be judged fundamental,” a state may only prevail "on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted.” Id. (internal quotations omitted) (citing Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting)).

31. Id. at 766–67 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) and Flores, 507 U.S. at 301–02).

32. Id. at 767.

33. See, e.g., Ex parte Yarborough, 110 U.S. 651, 657 (1884) (discussing the power of the government to secure elections from the influence of violence,
affirmatively address the constitutional protection of the right to vote until the 1940s. In United States v. Classic, the issue presented itself in the context of criminal allegations of voter fraud in a federal election. The Court framed the constitutional issue as "whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured by the Constitution . . . ." The Classic Court held that federal primary elections fall within the reach of the constitutional provision and are thus subject to congressional regulation. Observing the text of Article I, Section 2, which provides that congressional representatives are to be chosen by the people of the states by electors, the Court reasoned that "[t]he right of the people to choose, whatever its appropriate constitutional limitations[,] . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.

The constitutional protection of the right to vote in federal elections was upheld in Reynolds v. Sims, in which the Court held that, under the Equal Protection Clause, both houses of a bicameral legislature have to be apportioned on the basis of population. In its equal protection analysis, the Court focused on whether the record displayed any discrimination that impermissibly interfered with the plaintiffs' constitutionally protected right to vote. The Court stated:

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 corruption, and fraud); Minor v. Happersett, 88 U.S. 162, 178 (1874) (holding that the Constitution does not confer the right of suffrage on anyone and that state laws that give the right exclusively to men are constitutionally valid).

34. Schultz, supra note 12, at 488.
35. 313 U.S. 299 (1941).
36. Id. at 307.
37. Id.
38. Id. at 320.
39. Id. at 314.
40. 377 U.S. 533, 568 (1964). The plaintiffs alleged that the Alabama legislature failed to reapportion state voting districts despite uneven population growth. Id. at 540. As a result, they argued, voters were denied equal suffrage in violation of the Equal Protection Clause. Id.
41. Id. at 561. The Court characterized the issue as one that "involves one of the basic civil rights of man . . . ." Id. (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). This parallel drawn between the voting issues in Reynolds and the issue in Skinner—the right to procreate—indicates the Court's belief that the right to vote is fundamental. Schultz, supra note 12, at 489.
preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.\textsuperscript{42}

Following the Court’s decisions in \textit{Classic} and \textit{Reynolds}, it was established that the right to vote in federal elections is protected by the Constitution. However, questions regarding the constitutional protection of voting in state elections, the nature of the right to vote, and the appropriate standards of scrutiny remained unanswered until the Court’s decision in \textit{Harper v. Virginia Board of Elections}.\textsuperscript{43}

In \textit{Harper}, Virginia residents sought to have a state poll tax declared unconstitutional.\textsuperscript{44} The Virginia Constitution mandated the tax, which required voters to pay an annual fee of $1.50.\textsuperscript{45} The \textit{Harper} majority first addressed the nature of the right to vote. The Court observed the provisions of Article I, Section 2, noting that while the right to vote in federal elections is conferred, there is no mention of the right to vote in state elections.\textsuperscript{46} The Court asserted that the right to vote in state elections is implied by the First Amendment and cannot be conditioned on the payment of a tax.\textsuperscript{47} It further reiterated the principle that the “political franchise of voting” is a “fundamental political right, because [it is] preservative of all rights.”\textsuperscript{48} The right to vote was thus categorized by the Supreme Court as “fundamental.”\textsuperscript{49}

The \textit{Harper} Court then had the task of determining the appropriate standard of scrutiny to be used in assessing the constitutionality of the poll tax. The Court acknowledged that the principles of “close scrutiny” apply in cases involving fundamental rights and liberties asserted under the Equal Protection Clause and

\begin{itemize}
\item \textsuperscript{42} \textit{Reynolds}, 377 U.S. at 561–62. \textit{See also} Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (reiterating the assertion that the right to vote is a fundamental political right).
\item \textsuperscript{43} 383 U.S. 663 (1966).
\item \textsuperscript{44} \textit{Id.} at 664.
\item \textsuperscript{45} \textit{Id.} at 665 n.1.
\item \textsuperscript{46} \textit{Id.} at 665.
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 667 (quoting \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 370 (1886)).
\item \textsuperscript{49} \textit{Id.} Modern jurisprudence has affirmed the \textit{Harper} Court’s assertion that voting is a fundamental right. \textit{See, e.g.}, Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (“[T]hese rights of voters are fundamental . . . ”); \textit{Bullock v. Carter}, 405 U.S. 134, 142–43 (1972) (“The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review.”).  
\end{itemize}
that those principles were applicable to the issue at hand.\footnote{50} It also asserted that the Court “ha[d] long been mindful that 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.”\footnote{51} The Court concluded that the Equal Protection Clause restricts the states from enacting voter qualifications that invidiously discriminate.\footnote{52} Holding the Virginia poll tax unconstitutional, the majority concluded its opinion by proclaiming, “[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”\footnote{53}

In the years following Harper, litigation concerning the right to vote continued without significant change.\footnote{54} The next landmark case in voting and election-related jurisprudence was Anderson v. Celebrezze,\footnote{55} which dealt primarily with the issue of ballot access.\footnote{56} The petitioner was an independent presidential candidate

\footnote{50. Harper, 383 U.S. at 670 (1966). Notably, in its determination of the applicable standard of scrutiny, the Harper Court did not use the phrase “strict scrutiny.” The Court stated instead that fundamental rights under the Equal Protection Clause must be “closely scrutinized and carefully confined.” \textit{Id.} It can be inferred from the Court’s language, however, that the standard employed by Harper was something approaching strict scrutiny. It may be debatable what differences—if any—exist between “strict” scrutiny and “heightened” or “close” scrutiny. Presumably, and for the purposes of this Note, heightened scrutiny employs the same considerations as strict scrutiny when contemplating the constitutionality of a provision.}

\footnote{51. \textit{Id.} at 670.}

\footnote{52. \textit{Id.} at 666. The Court also noted that “the interest of the [s]tate, when it comes to voting, is limited to the power to fix qualifications.” \textit{Id.} at 668.}

\footnote{53. \textit{Id.} at 670.}

\footnote{54. Two Supreme Court decisions in the 1970s illustrated the Court’s efforts to assess a state’s attempts at preventing voter fraud under the Harper standard. Jocelyn Friedrichs Benson, \textit{Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud}, 44 HARV. C.R.-C.L. L. REV. 1, 13 (2009). In \textit{Dunn v. Blumstein}, the Court held unconstitutional a Tennessee statute that required voters to reside in the state for one year before being permitted to vote in the state. \textit{Id.} at 13–14 (citing Dunn v. Blumstein, 405 U.S. 330, 352 (1972)). Although the state asserted an interest in preventing voter fraud by non-residents, the Court reasoned that “the Tennessee law was not the ‘least restrictive means necessary for preventing fraud.’” \textit{Id.} at 14 (quoting \textit{Dunn}, 405 U.S. at 353). The next year, the Court decided \textit{Marston v. Lewis}, which upheld an Arizona statute requiring a fifty-day residency requirement for voter registration. \textit{Id.} at 14 (citing Marston v. Lewis, 410 U.S. 679, 681 (1973)). The Court’s reasoning showed high deference to “amply justifiable legislative judgment” that the requirement would reduce voter fraud. \textit{Id.} (quoting \textit{Marston}, 410 U.S. at 681.).}

\footnote{55. 460 U.S. 780 (1983).}

\footnote{56. \textit{Id.}}
who, because of an early filing requirement for independent candidates in the Ohio Revised Code, was precluded from appearing on the Ohio ballot.\textsuperscript{57} The Court framed the issue as whether the early filing requirement placed an “unconstitutional burden on the voting and associational rights of Anderson’s supporters.”\textsuperscript{58}

Although the deadline directly impacted only the independent candidate himself, the Court asserted that “‘the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.’”\textsuperscript{59} The Court reasoned that the issue should be examined in light of its impact on voters because the restrictions reduce the choices available to them.\textsuperscript{60} Discussing these implications, the Court added in a footnote that it based its conclusions “directly on the First and Fourteenth Amendments” and did not “engage in a separate Equal Protection Clause analysis.”\textsuperscript{61}

Reasoning that challenges to state election laws cannot be resolved with a “litmus paper test,” the Court set forth a new balancing test to analyze “challenges to specific provisions of a [s]tate’s election laws”:\textsuperscript{62}

Instead, a Court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and

\textsuperscript{57} Id. at 782–83.

\textsuperscript{58} Id. at 782.

\textsuperscript{59} Id. at 786 (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)). The Court stated that “[a]lthough these rights of voters are fundamental, not all restrictions imposed by the states on candidates’ eligibility for the ballot impose constitutionally-suspect burdens on voters’ rights to associate or to choose among candidates.” Id. at 788. It supported this assertion by reasoning that a certain amount of election regulation is required by the government in order to assist the democratic process. Id. (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

\textsuperscript{60} Id. at 786.

\textsuperscript{61} Id. at 786 n.7. The footnote stated in full that:

We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the “fundamental rights” strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the [s]tate’s restrictions further legitimate state interests.

\textit{Id.}

\textsuperscript{62} Id. at 789 (quoting \textit{Storer}, 415 U.S. at 730). The Court stated that such challenges cannot be resolved by a test “that will separate valid from invalid restrictions.” \textit{Id.}
Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing Court in a position to decide whether the challenged provision is unconstitutional.

Applying this balancing test, the Court held that the burdens placed on the Ohio voters' freedom of choice and freedom of association outweighed the state's minimal interests. Anderson thus initiated the Court's shift from a heightened to a more flexible standard of scrutiny in election-related cases. Even though the facts of Anderson dealt with the issue of a political candidate's ballot access, the open-ended language of its new balancing test allowed for varying applications with regard to voting in subsequent jurisprudence.

Nearly ten years after Anderson, the Court restated the balancing test in Norman v. Reed. Norman involved a complex set of facts arising from an Illinois election law regarding the formation of new political parties. Citing the test set forth in Anderson, the Court restated the standard, asserting that:

[T]o the degree that a [s]tate would thwart this [constitutional] interest, by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.

63. Id.
64. Id. at 806. The Court first examined the potential burdens on independent voters, discussing the significance of time in elections campaigns, specifically in a presidential race. Id. at 790–92. The Court then weighed these impacts against the state's asserted interests. Id. at 796. The state identified three main interests with respect to the early filing deadline for independent candidates, including voter education, political stability, and "equal treatment for partisan and independent candidates." Id. Under this analysis, the Court found each of the state's interests inadequate to justify the law. Id. at 796, 799, 805–06.
65. Id. at 782–83.
67. Id. at 282–84.
68. Id. at 288–89.
The *Norman* Court ultimately held that the Illinois Supreme Court’s construction of the law unconstitutionally violated the rights of the petitioners to the ballot.69

Just months after the Court’s distinctive construction of the *Anderson* balance in *Norman*, it extended the application of the test even further.70 The petitioner in *Burdick v. Takushi* was a Hawaii citizen concerned with the state’s policy regarding write-in voting.71 The Court began by stating that the “[p]etitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.”72 It continued by stating, “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’ It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.”73

Discussing the need for the government’s role in regulating elections, the Court asserted that all election regulations impose some sort of burden upon individual voters.74 Citing *Anderson*, the Court called for the application of a “more flexible standard.”75 It discussed ballot access procedures in relation to the potential burdens on the petitioner.76 The Court noted the petitioner’s

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69. Id. at 289, 293–94.
71. Id. at 430. The petitioner originally wrote to Hawaii officials asking about this policy and, upon learning that there was no provision on write-in voting, filed suit in district court. Id. In his suit, the petitioner claimed that “he wished to vote in the primary and general elections for a person who had not filed nominating papers and that he wished to vote in future elections for other persons whose names might not appear on the ballot.” Id.
72. Id. at 432.
73. Id. at 433 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) and citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).
74. Id. The Court argued that “the mere fact that a [s]tate’s system ‘creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.’” Id. (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)). The Court then asserted, “[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of [s]tates seeking to assure that elections are operated equitably and efficiently.” Id.
75. Id. at 434 (citing Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)). The *Burdick* Court stated that “[u]nder this standard, the rigorosity 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.” Id.
76. Id. Concluding that Hawaii’s election system generally provided “easy access” to the ballot, the Court asserted that “any burden on voters’ freedom of
argument—that his case concerned voting rights, not ballot access. However, responding that the petitioner's argument was based on a "flawed" premise, the Court explained that it had "minimized the extent to which voting rights cases are distinguishable from ballot access cases" because "the rights of voters and the rights of candidates do not lend themselves to neat separation." Using this reasoning, the Court ruled that "[t]he appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in Anderson." In closing, the Burdick Court noted that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system" and upheld Hawaii’s ban on write-in voting as constitutional.

Burdick, which was decided in 1992, was the last Supreme Court opinion to significantly adjust the Anderson balancing test. Burdick furthered the shift to a more flexible standard of review by applying the Anderson test to an issue more closely related to the right to vote itself. The application of the Anderson test in Crawford would ultimately prove to be the test’s most expansive and far-reaching application to date.

choice and association” was essentially the fault of those who did not recognize their preferred candidate before the primary. Id. at 436–37.

77. Id. at 438.

78. Id. (citing Bullock v. Carter, 405 U.S. 134, 143 (1972)).

79. Id. The Court further concluded that Hawaii’s ban on write-in voting imposed “only a limited burden on voters’ rights to make free choices and to associate politically through the vote.” Id. at 438–39. The Court found that the state’s asserted interests were “sufficient to outweigh the limited burden” that the law imposed. Id. at 440.

80. Id. at 441–42. The Court stated, “We think that Hawaii’s prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the [s]tate’s voters.” Id.


III. CRAWFORD V. MARION COUNTY ELECTION BOARD

A. Factual and Procedural Background

In 2005, the Indiana legislature introduced SEA 483, which amended a number of existing election provisions and enacted three new provisions to be placed in the Indiana Code. These changes represented a significant shift from Indiana’s prior election procedures. The most significant aspects of these provisions are the restrictive requirements for valid voter identification and the requirement of affirmative action by voters—as opposed to the government—when a voter is unable to produce the required form of identification.

The “proof of identification” provision sets out the requirements for voter identification. It requires that “[t]he

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84. See IND. CODE ANN. §§ 3-11-8-25.1, -25.2, -25.5 (West Supp. 2008); id. § 3-11.5-4-16; id. § 3-11.7-2-3; IND. CODE ANN. §§ 3-11.7-5-2, -2.5, -3 (West 2006); IND. CODE ANN. § 9-24-16-10 (West 2004 & Supp. 2008); id. § 9-29-3-4; id. § 9-29-9-15.
85. These new provisions include Indiana Code §§ 3-5-2-40.5, 3-10-1-7.2, and 3-11.7-5-2.5.
86. “Under prior Indiana law, a voter seeking to vote in-person at a polling place would be required to present himself or herself to the clerks and sign the poll book.” Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 788 (S.D. Ind. 2006). “There was no requirement that a voter show any form of identification in order to vote after the prospective voter signed in with the clerk.” Id. Furthermore, before SEA 483, “Indiana law did not provide for the casting of a ‘provisional ballot.’ Instead, a member of the precinct election board, or the election clerk, who wished to challenge the eligibility of a voter would be required to swear out an affidavit under the penalties of perjury.” Id.
87. IND. CODE ANN. § 3-5-2-40.5 (West 2006 & Supp. 2008). Compare LA. REV. STAT. ANN. § 18:562 (Supp. 2010) (“Each applicant shall identify himself . . . and present to the commissioners a Louisiana driver’s license, a Louisiana special identification card . . . or other generally recognized picture identification card that contains the name, address, and signature of the applicant.”).
88. IND. CODE ANN. § 3-11.7-5-2.5(B) (West 2006 & Supp. 2008). Compare LA. REV. STAT. ANN. § 18:562 (Supp. 2010) (“If the applicant does not have [proper identification], the applicant shall sign an affidavit . . . to that effect before the commissioners who shall place the affidavit in the envelope marked ‘Registrar of Voters’ and attach the envelope to the precinct register, and the applicant shall provide further identification by presenting his current registration certificate, giving his date of birth, or providing other information stated in the precinct register that is requested by the commissioners. However, an applicant that is allowed to vote without the picture identification required by this Paragraph is subject to challenge as provided in R.S. 18:565.” (emphasis added)).
document [show] a photograph of the individual to whom the document was issued, and that it "[be] issued by the United States or the State of Indiana." SEA 483 significantly amended both the primary election and general election procedures with regard to voter identification in Indiana. Statutes governing each type of election explain the procedures for entering polls and instances in which a voter does not meet the photo identification requirements. According to these provisions: "A voter who desires to vote an official ballot at [an] election shall provide proof of identification . . . before being permitted to sign the poll list." Both statutes allow for such a voter to execute a challenged voter's affidavit, in which case a voter may "sign the poll list[] and receive a provisional ballot." Another newly enacted provision under SEA 483 deals with the procedures to be followed after a voter files the provisional ballot.

90. *Id.* § 3-5-2-40.5(2).
91. *Id.* § 3-5-2-40.5(4).
92. *Id.* § 3-10-1-7.2.
93. *Id.* § 3-11-8-25.1.
94. *Id.* § 3-10-1-7.2; *id.* § 3-11-8-25.1.
95. *Id.* § 3-10-1-7.2; *see also id.* § 3-11-8-25.1 (referring to general elections). There is an exception to the general rule in both statutes, which is that "[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." *Id.* § 3-11-8-25.1(c); *see also id.* § 3-10-1-7.2(e) (referring to primary elections). Furthermore:

If: (1) the voter is unable or declines to present the proof of identification; or (2) a member of the precinct election board determines that the proof of identification presented by the voter does not qualify as proof of identification under IC 3-5-2-40.5; a member of the election board shall challenge the voter as prescribed by IC 3-11-8.

*Id.* § 3-11-8-25.1(c); *see also id.* § 3-10-1-7.2(c) (referring to primary elections).
96. *Id.* § 3-10-1-7.2(d); *id.* § 3-11-8-25.1(d). This must be done in accordance with Indiana Code § 3-10-1-9. *Id.* § 3-10-1-7.2(d); *id.* § 3-11-8-25.1(d).
97. *Id.* § 3-11.7-5-2.5(b).

A voter who was challenged and . . . cast a provisional ballot . . . may personally appear before the circuit court clerk or the county election board no later than the deadline specified by . . . IC 3-11.7-5-1 . . . for the election board to determine whether to count a provisional ballot.

*Id.* § 3-11.7-5-2.5(a). The deadline mentioned within this provision is "not later than noon ten (10) days following the election." *Id.* § 3-11.7-5-1(b).

If the voter: (1) provides proof of identification to the circuit court clerk or county election board; and (2) executes an affidavit before the clerk or board . . . affirming under the penalties of perjury that the voter is the same individual who: (A) personally appeared . . . and (B) cast the provisional ballot on election day; the county election board shall find that the voter's provisional ballot is valid and direct that the provisional ballot be opened . . . and processed in accordance with this chapter.
Following the introduction of SEA 483, various plaintiffs brought two separate suits challenging its constitutionality. The first was *Crawford v. Marion County Election Board*, in which the plaintiffs challenged the voter identification requirement set forth in SEA 483 on First and Fourteenth Amendment grounds, seeking declaratory and injunctive relief. The second suit, *Indiana Democratic Party v. Rokita (Rokita)*, addressed similar challenges, including claims that the law violated the First and Fourteenth Amendments of the United States Constitution, as well as provisions of the Indiana Constitution.

The district court in *Rokita* held that the plaintiffs failed to demonstrate that strict scrutiny was warranted because they “totally failed to adduce evidence establishing that any actual voters will be adversely impacted by [SEA 483].” The court observed that “strict scrutiny of an election law is not warranted merely because it may prevent some otherwise eligible voters from exercising that right.” In granting summary judgment for the defendants, the court concluded that the photo identification

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*Id.* § 3-11.7-5-2.5(b). These procedures for filing a provisional ballot are described in § 3-10-1-7.2 and § 3-11-8-25.1. The same statute provides exceptions to this procedure under certain circumstances. *Id.* § 3-11.7-5-2.5(c). The exception provides that the voter must still appear before the clerk of court or county election board, must execute an affidavit stating that the voter is the same person that filed the provisional ballot, and must then execute an additional affidavit stating that the voter is either “indigent and unable to obtain proof of identification without payment of a fee” or “has a religious objection to being photographed.” *Id.* § 3-11.7-5-2.5(c). If the voter was only challenged because of his failure to produce proof of identification, the provisional ballot will then be deemed valid. *Id.* § 3-11.7-5-2.5(d).

98. 355 F. Supp. 2d 788 (S.D. Ind. 2005). The plaintiffs in this case were two elected individuals, William Crawford and Joseph Simpson, as well as several non-profit groups, and the defendant was the Marion County Election Board. *Id.* Also named as defendants were the Indiana Secretary of State, Todd Rokita, and the co-directors of the Indiana Election Division, J. Bradley King and Kristi Robertson. *Id.*

99. *Id.*

100. 458 F. Supp. 2d 775 (S.D. Ind. 2006). This suit featured all of the same plaintiffs from *Crawford*, along with additional plaintiffs, such as the Indiana Democratic Party and the Marion County Democratic Central Committee. *Id.* The defendants in this case again included Rokita, King, Robertson, and the Marion County Election Board. *Id.*

101. *Id.* at 782. Plaintiffs and defendants filed cross motions for summary judgment. *Id.*

102. *Id.* at 820.

103. *Id.* at 822.

104. *Id.* at 784.
requirements under SEA 483 were "constitutionally permissible [s]tate regulations of elections." 105

From the Indiana district court ruling, the plaintiffs from Rokita appealed to the Court of Appeals for the Seventh Circuit, where the case was renamed Crawford v. Marion County Election Board. 106 The court rejected a heightened standard of scrutiny and instead applied the test set forth in Anderson 107 and Burdick 108 by balancing the effect of requiring photo identification against the interest in preventing voter fraud. 109 The Seventh Circuit concluded that "perhaps the Indiana law can be improved [but] the details for election regulation must be left up to the states, pursuant to Article I, section 4 of the [United States] Constitution." 110 With the judgment of the district court affirmed, the plaintiffs once again appealed, and the United States Supreme Court granted certiorari. 111

B. Plurality Opinion

On April 28, 2008, Justice Stevens delivered the plurality opinion for the Supreme Court in Crawford. 112 He began by discussing the standards set by the Court's election-related jurisprudence. Justice Stevens first identified Harper, 113 which employed a strict standard in the context of the right to vote. 114 The

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105. Id. at 830.
106. 472 F.3d 949 (7th Cir. 2007). On appeal, the parties remained the same as in Rokita, but the case was renamed. Id. In the opinion, the court noted that the Democratic Party had standing because "most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates." Id. The court concluded that "the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote." Id. at 951.
109. Crawford, 472 F.3d at 952–53. In doing so, the court explained that "[t]he argument pressed by the plaintiffs that any burden on the right to vote, however slight it is or however meager the number of voters affected by it, cannot pass constitutional muster unless it is shown to serve a compelling state interest was rejected in Burdick v. Takushi." Id. at 952 (citing Burdick, 504 U.S. at 433–34).
110. Id. at 954.
112. Id. Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy in the plurality opinion. Id. at 1613.
Court then discussed the balancing test promulgated in *Anderson*, that “a court must identify and evaluate the interests put forward by the [s]tate as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.” The opinion also addressed *Norman* and *Burdick*, cases that both followed and interpreted the balancing test employed in *Anderson*. The Court closed its discussion of these jurisprudential standards by relating back to the *Harper* principle, under which state interests must be supported by sufficiently weighty justifications to withstand constitutional scrutiny no matter how slight the burden imposed by a law restricting voting rights.

In applying the *Anderson* balancing test, the Court first examined the interests asserted by the State of Indiana. It noted the state’s valid interests in preventing voter fraud, increasing election modernization, and securing voter confidence. With regard to voter fraud, the Court pointed out that SEA 483 only addresses in-person voter fraud and that there were no recorded instances of such fraud in Indiana’s history. Although this lack of recorded evidence arguably demonstrated a weakness in the state’s assertion of its interest, the Court concluded that “[t]here is no question about the legitimacy or importance of the [s]tate’s interest in counting only the votes of eligible voters” after evaluating evidence of in-person voter fraud in other states and absentee ballot fraud within Indiana.

The Court then discussed the burdens upon voters that were likely to result from enforcing SEA 483. It acknowledged that although the photo identification requirement imposes some unique burdens, the burdens that arise from “life’s vagaries” are not sufficiently serious or frequent to render SEA 483 unconstitutional. Examples of such scenarios include a voter losing his driver’s license on the way to the polls or no longer

115. *Id.* at 1616 (citing *Anderson v. Celebrezze*, 660 U.S. 780, 778 n.9 (1983)).
118. *Crawford*, 128 S. Ct. at 1616. The Court further noted that *Burdick* applied the standard set forth in *Anderson* for “reasonable, nondiscriminatory restrictions.” *Id.* (citing *Burdick*, 504 U.S. at 434).
119. *Id.*
120. *Id.* at 1616–17.
121. *Id.* at 1617.
122. *Id.* at 1618–19.
123. *Id.* at 1619.
124. *Id.* at 1620.
125. *Id.*
resembling the picture on the identification card. The Court identified a limited number of persons upon whom the laws would impose a heavier burden, such as the elderly who would have trouble locating a birth certificate if born out-of-state, persons with economic and personal limitations who would be unable to acquire a birth certificate or state-issued identification, the homeless, and persons with religious objections to being photographed. While identifying these burdens, however, the Court also reasoned that the stipulation allowing voters to cast provisional ballots mitigated this “heavier burden.” Concluding the burden discussion, the Court opined that “[i]t is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified.”

After addressing the arguments of each party, the Court set out to weigh the competing interests and determine the constitutionality of SEA 483. The Court stated that “[a] facial challenge must fail where the statute has a ‘plainly legitimate sweep’” and that it could not “conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”

The plurality asserted that the petitioners were asking the Court to “perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the [s]tate’s broad interests in protecting election integrity.” However, in response, the Court stated that it was not possible to quantify the magnitude of the burden imposed on the “narrow class of voters” on the basis of the record. The opinion concluded that “[t]he application of the statute to the vast majority of Indiana voters is

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126. Id.
127. Id. at 1621.
128. Id.
129. Id.
130. Id.
131. Id. at 1622–23 (quoting Storer v. Brown, 415 U.S. 724, 738 (1974) and Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 (2008)). The Court noted that while partisan considerations may have played a role in the enactment of the law, “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.” Id. at 1624. This was in response to the petitioners’ emphasis of the fact that the Republicans in the Indiana General Assembly unanimously supported SEA 483, while every Democrat voted against it. Id. at 1623.
132. Id. at 1622.
133. Id.
amply justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’”

C. Concurring Opinion by Justice Scalia

Although Justice Scalia agreed with the plurality’s conclusion that SEA 483 was constitutionally sound, his concurring opinion offered a different means of analysis to reach the same conclusion. His opinion was based on the grounds “that petitioners’ premise is irrelevant and that the burden at issue is minimal and justified.” Justice Scalia’s reasoning relied on the approach set out in *Burdick*, which he characterized as requiring the use of a deferential standard when dealing with important regulatory interests. Furthermore, Justice Scalia noted that *Burdick* reserved strict scrutiny for cases in which the right to vote is severely burdened, as “[s]trict scrutiny is appropriate only if the burden is severe.”

Justice Scalia also rejected the equal protection claim, reasoning that “without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.” The concurring opinion continued by criticizing the plurality’s “record-based” decision, arguing that it did not give sufficient weight to legal precedent or provide any certainty for future litigants. The opinion concluded that the burden imposed by the law was not severe, thus rendering strict scrutiny unwarranted, and that the state’s interests were sufficiently strong to overcome the minimal burden.

134. *Id.* at 1624 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).
135. *Id.* (Scalia, J., concurring). Justices Alito and Thomas joined Justice Scalia in the concurring opinion.
136. *Id.*
138. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring) (citing *Burdick*, 504 U.S. at 433–34). Employing this standard, Justice Scalia determined that the Indiana law was “generally applicable” and nondiscriminatory and that individual impacts resulting from the law were not relevant in evaluating the severity of the burden. *Id.* at 1625. Thus, Justice Scalia employed the *Burdick* rule, showing deference to the state because it dealt with what he considered an “important regulatory interest” and finding that strict scrutiny was unnecessary because the burden on the right to vote was not severe. *Id.* at 1624.
139. *Id.* at 1624.
140. *Id.* at 1625 (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005)).
141. *Id.* at 1626.
142. *Id.* at 1627.
143. *Id.*
D. Dissenting Opinion by Justice Souter

The first dissent in the Crawford opinion was written by Justice Souter. He began by asserting that the Indiana law was unconstitutional under the Burdick standard because “a [s]tate 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.” Justice Souter argued that Indiana simply had not been able to justify the burden with this required showing. He also noted that voting rights cases avoid “pre-set” levels of scrutiny due to the important competing interests of the fundamental right to vote and the government’s interest in regulating elections. Instead, he explained, the Court “favor[s] . . . a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.”

Justice Souter’s dissent then analyzed the issue under the same standard employed by the plurality—the Anderson balancing test as interpreted by Burdick. He identified the three main factors for review: the extent to which the law burdens First and Fourteenth Amendment rights, the “character and magnitude” of the asserted injury, and the number of voters likely to be affected by the law. He also looked to the provisional ballot exception and noted the difficulty that a voter would incur in having to travel to the clerk of court—located in the county seat—every time he tries to vote. Concluding that the law “threatens to impose serious burdens on the voting right, even if not ‘severe’ ones,” Justice Souter then sought to determine the number of individuals

144. Id. (Souter, J., dissenting). Justice Ginsburg joined Justice Souter in this dissenting opinion.
145. Id.
146. Id.
147. Id. at 1627–28.
148. Id. at 1628. The opinion argued that although the plurality did not completely abandon the jurisprudential principles in balancing the state’s interests and the petitioners’ burdens, it failed to adequately assess the “hard facts” required by the standard of review. Id.
149. Id.
150. Id. (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992) and quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). In evaluating the burdens on the First and Fourteenth Amendment rights, Justice Souter looked primarily at the burden of traveling, as well as the travel costs and fees needed to obtain photo identification. Id. at 1628–31. He noted that “in the Burdick analysis it matters that both the travel costs and fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.” Id. at 1631.
151. Id. at 1631–32.
that would likely be adversely affected by SEA 483.\textsuperscript{152} He highlighted the district court’s finding that 43,000 qualified voters were without proper identification and argued that although the figure must be adjusted due to the statutory exceptions, the state did not—and could not—claim that this figure could be reduced to an “insubstantial number.”  

Justice Souter conceded that he would “readily stipulate that a [s]tate has an interest in responding to the risk (however small) of in-person voter impersonation,” but that the evaluation of a state’s interest must take into account both evidence and legislative judgments.\textsuperscript{154} He consequently reasoned that, on the basis of the record, this asserted state interest could not be accorded any more than “modest significance.”\textsuperscript{155} He further argued that, based on the record, the state’s interest in the law did not outweigh the serious burdens imposed on the right to vote.\textsuperscript{156} “The calculation revealed in the Indiana statute crosses a line when it targets the poor and the weak,” Justice Souter noted.\textsuperscript{157} He concluded that “[t]he Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old.”\textsuperscript{158}

\textit{E. Dissenting Opinion by Justice Breyer}

Justice Breyer wrote a separate dissent, suggesting a different standard under which to determine the statute’s constitutionality.\textsuperscript{159} Under Justice Breyer’s view, the analysis should “balance the voting-related interests that the statute affects, asking ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).’”\textsuperscript{160} Applying this standard, Justice Breyer

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\textsuperscript{152.} \textit{Id.} at 1632.
\textsuperscript{153.} \textit{Id.} at 1633.
\textsuperscript{154.} \textit{Id.} at 1639.
\textsuperscript{155.} \textit{Id.}
\textsuperscript{156.} \textit{Id.} at 1642–43.
\textsuperscript{157.} \textit{Id.} at 1643. Justice Souter further asserted that “[l]ike that fee [in \textit{Harper}]), the onus of the Indiana law is illegitimate just because it correlates with no state interest so well as it does with the object of deterring poorer residents from exercising the franchise.” \textit{Id.}
\textsuperscript{158.} \textit{Id.}
\textsuperscript{159.} \textit{Id.} (Breyer, J., dissenting).
\textsuperscript{160.} \textit{Id.} (quoting Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).
\end{flushleft}
found the Indiana statute unconstitutional. He agreed with the plurality in its view that “the Constitution does not automatically forbid” Indiana from enacting a photo identification requirement for election procedures. However, Justice Breyer’s dissenting opinion expressed a different view on the appraisal of the severity of burdens imposed by the law.

In formulating his separate dissenting opinion, Justice Breyer primarily relied on the findings and recommendations of the Carter–Baker Report. Justice Breyer noted that without convincing reason, Indiana had enacted a more burdensome requirement than that recommended by the Carter–Baker report. The opinion further observed that a non-driving voter would find it particularly difficult and costly to travel to the Indiana Bureau of Motor Vehicles, especially considering the number of counties in Indiana without public transportation. Justice Breyer concluded that “while the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs.”

IV. ANALYSIS

The reasoning employed by the Crawford plurality essentially amounted to an unwise extension of jurisprudence on voting rights and election regulations. By extending the application of the Anderson balancing test more than the Burdick Court, the Crawford Court departed even further from the standard of heightened scrutiny set forth in Harper. The use of the Anderson balancing test was inappropriate in Crawford: instead, the standard

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161. Id.
162. Id. at 1643–44.
163. Id. at 1644.
164. Id. at 1643–45. The Carter–Baker Report is a proposal by the Commission on Federal Election Reform that recommended, among other things, that the states require voters to present photo identification. COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005). The Report proposed the use of a “REAL ID” card—a state-issued driver’s license or personal ID card—for the purposes of voter identification. Id. at 19. The Commission made two primary recommendations in recognition of the potential challenges presented by the implementation of this new policy. First, it was recommended that the policy be “phased in” over a two-year period. Id. Under this proposal, voters would not have to travel to an election office to file a provisional ballot before January 1, 2010. Id. Second, the states were recommended to provide the identification free of charge and to make efforts to provide “convenient opportunities” for citizens to obtain the identification cards. Id. at 20.
165. Crawford, 128 S. Ct. at 1645.
166. Id. at 1644.
167. Id. at 1645.
set forth in Harper should apply any time the courts review provisions that directly burden the right to vote. Additionally, a showing of a severe burden should not be required in order to trigger heightened scrutiny.

A. Problems with the Use of the Anderson Balancing Test

The Court’s use of the Anderson balancing test in Crawford was erroneous for three essential reasons. First, the test itself was created within the context of a case involving the issue of ballot access, which is quite different from the issue of the fundamental right to vote. Second, the vague language used by the Anderson Court in the balancing test allowed for its misapplication in subsequent case law, bringing it beyond the scope of the issue for which it was originally intended. Finally, assuming arguendo that Anderson was indeed the correct standard for evaluating SEA 483, the test was incorrectly applied by the Crawford plurality.

1. The Development of the Anderson Balancing Test

In Anderson, the petitioner sought access to the Ohio ballot in a presidential election as an independent candidate.168 Although the Court framed the issue in the context of “the voting and associational rights of Anderson’s supporters,”169 it later noted that it based its conclusions “directly on the First and Fourteenth Amendments.”170 Therefore, the Anderson Court specifically addressed the First Amendment right of political association as applied through the Due Process Clause of the Fourteenth Amendment when it developed its balancing test.

Anderson itself provides support for this proposition. The Court’s analysis of the Ohio statute asserted that the rights of voters are fundamental, stating that “not all restrictions imposed by the [s]tates on candidates’ eligibility for the ballot impose constitutionally-suspect burdens on voters’ rights to associate or to choose among candidates.”171 The Anderson opinion closed with the statement that “[u]nder any realistic appraisal, the ‘extent and nature’ of the burdens Ohio has placed on the voters’ freedom of choice and freedom of association . . . unquestionably outweigh the

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169. Id.
170. Id. at 788 n.7. The Court further stated that it relied on the equal protection analysis employed in a number of prior election cases, which have “identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates . . . .” Id.
171. Id. at 788 (emphasis added).
The state’s minimal interest . . .”

The Anderson Court’s mention of “freedom of choice” referred to the fact that if additional independent candidates were on the ballot, voters would ultimately be given a greater number of candidates from which to choose when casting their ballots. Thus, Anderson dealt with the issue of ballot access, which most logically falls under the First Amendment right of political association.

It was inappropriate to apply a test that was intended for ballot access issues to a case dealing directly with the fundamental right to vote. Due to the context of its development, the Anderson balancing test was an inapposite model to be used when analyzing a provision that directly burdens the right to vote. SEA 483 is not related to the First Amendment right of political association. It does not limit a voter’s ability to associate with a particular party or vote for a certain candidate. Quite differently, it is a direct burden on the right to vote. The provisions of SEA 483 directly limit the ability of otherwise-qualified voters to cast a vote in any election by creating additional prerequisites to voter eligibility. In doing so, SEA 483 and other voter identification laws present an issue that is different from those addressed in the Anderson line of cases.

Notwithstanding the differences between the issues of ballot access and the right to vote, the Anderson Court asserted that “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.” This statement has the effect of grouping two distinguishable issues into a seemingly indistinguishable class for the purposes of constitutional scrutiny. Furthermore, it invites courts to apply the test to virtually any scenario in which voting is at issue. Simply stated, the Anderson test should not be applied to assess the constitutionality of laws that directly burden the fundamental right to vote, such as SEA 483 in Crawford, because it was developed to assess the constitutionality of election laws relating to ballot access.

2. Vague Language of the Anderson Balancing Test and Its Misapplication in Subsequent Jurisprudence

In addition to the troubles regarding the context of the Anderson test’s development, the language of the test itself raises problems. The Anderson Court’s choice of words renders the test

172. Id. at 806 (emphasis added).
173. See discussion supra Part III.A.
quite ambiguous. While the Court labeled the balancing test as an "analytical process," the Anderson opinion's explanation of the analysis provides modest guidance as to how exactly a court is to weigh the competing interests of both parties. For example, telling courts to "consider the character and magnitude of the asserted injury" and to "determine the legitimacy and strength of each of those interests" does little to instruct them on the appropriate level of deference to give each interest. The language of the Anderson test consequently allows for the misinterpretation and misapplication of the standard originally set by the Court. In fact, the Anderson Court's use of vague language in developing the balancing test did not merely subject the test to misapplication—it resulted in the actual misapplication of the test in subsequent jurisprudence.

In Norman, the Court rephrased the requirements of the Anderson test, stating that when a state limits new parties to the ballot, the Court has "called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation." Although the Anderson test was already vague, the Norman interpretation grossly oversimplified any helpful aspect of the balancing test. By stating the Anderson balancing test as one that simply calls for a corresponding interest to justify the limitation, the test was transformed into one with little to no resemblance to the original.

The most significant extension of the Anderson test, however, took place in Burdick, which effectively increased the deference given to an asserted state interest when evaluating an election law. The Burdick Court did this by emphasizing the importance of government election regulation and reasoning that if strict scrutiny were used every time that an election law was challenged, it would have an impractical effect on the states.

Burdick further extended the Anderson test by holding that "[t]he appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in Anderson." With this statement, the Court explicitly extended the application of the Anderson balancing test far beyond ballot access issues. This assertion by the Burdick Court relied in part on a phrase from

175. Id. at 789.
176. Id.
179. Benson, supra note 54, at 15.
180. Burdick, 504 U.S. at 433.
181. Id. at 438.
*Bullock v. Carter*, which stated that "the rights of voters and the rights of candidates do not lend themselves to neat separation." 182 The *Burdick* Court believed that this statement had the effect of "minimiz[ing] the extent to which voting rights cases are distinguishable from ballot access cases . . . ." 183 However, a clear reading of *Bullock* shows that this statement was made in the context of *striking down* a statute requiring candidates to pay a filing fee because it would ultimately have a negative impact on voters as well as candidates. 184 Thus, *Bullock* did not stand for the proposition that voting rights cases should be assessed under the same standards as ballot access cases. It instead sought to protect the rights of voters by keeping the fundamental nature of their rights in mind while deciding ballot access cases under a different standard.

By ruling that the *Anderson* balancing test is the correct standard to use in assessing any petitioner’s claim that a state law burdens the right to vote, 185 the *Burdick* Court misapplied the *Anderson* balance—originally formulated to be used in the context of ballot access issues—and extended its application to cases that deal with the fundamental right of voting. This misapplication and extension gave rise to the distorted version of the *Anderson* balancing test used in *Crawford*. The *Crawford* Court’s application of this standard signified a considerable departure from the original standard set forth in *Anderson* and an even bigger departure from the heightened scrutiny standard employed in *Harper*.

3. Application of the Test in *Crawford*

Assuming arguendo that *Anderson* was the correct standard under which to evaluate SEA 483, its use in *Crawford* remains erroneous because of the Court’s misapplication of the test itself. In setting forth the balancing test, the *Anderson* Court stated:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule. 186

182. *Id.* (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).
183. *Id*.
But the *Crawford* Court employed a procedure quite different from this.

In *Crawford*, the Court began by listing the interests asserted by the state as justifications for SEA 483.\(^{187}\) Only after evaluating the state's interests did the Court address the potential burdens on Indiana voters.\(^{188}\) By approaching the analysis in this manner, the Court failed to fairly evaluate the burdens alleged by the petitioners. Instead, the Court essentially structured the analysis as if it was giving great deference to the state—almost as if it was putting the burden on the petitioners to prove that the state's interests were insufficient. The Court did this not only by discussing the state's interests before addressing the burdens on voters, but also by directing more attention to the state's interests and their potential impacts.\(^{189}\) However, as the wording of the *Anderson* test clearly indicates, this is not the manner in which the Court originally intended to conduct the balance.\(^{190}\) Instead, a court using the *Anderson* balance should first engage in a thorough assessment of the "character and magnitude" of the burdens asserted by petitioner and then weigh against those burdens the precise justifications set forth by the state.\(^{191}\)

The *Crawford* Court also explicitly noted the lack of evidence—both qualitative and quantitative—presented by the state in support of its interest in preventing voter fraud, while still finding this asserted interest sufficient to overcome the petitioners' burdens.\(^{192}\) In other words, although the record lacked substantial evidence supporting the state's asserted interest, the Court nevertheless found that the state had effectively demonstrated a weighty justification for imposing a burden on the right to vote. By taking this approach, the *Crawford* Court effectively abandoned the essence of the somewhat subjective standard set forth by *Anderson*—that the Court must engage in a precise and extensive evaluation of each party's interests before assessing whether the challenged provision violates the Constitution.\(^{193}\) In fact, the

\(^{188}\) Id. at 1620–21.
\(^{189}\) Id. at 1616–20.
\(^{190}\) *Anderson*, 460 U.S. at 789.
\(^{191}\) Id.
\(^{192}\) Benson, *supra* note 54, at 18.
\(^{193}\) *Anderson*, 460 U.S. at 789.
Court’s reasoning in *Crawford* more closely resembled a rational basis review than the balancing test created in *Anderson*.

**B. Finding the Appropriate Standard**

Because the *Anderson* balancing test was erroneously applied in *Crawford*, the determination of a different standard is necessary to replace it. In making this assessment, the fundamental nature of the right to vote and the importance that such status plays in determining the appropriate standard of review must be considered.

1. Circular Nature of “Sliding-Scale Scrutiny”

In his dissenting opinion in *Crawford*, Justice Souter noted that voting-rights cases avoid “pre-set” levels of scrutiny. Instead, he stated, the Court “favor[s] . . . a sliding-scale balancing analysis; the scrutiny varies with the effect of the regulation at issue.” While it is true that the common law generally allows the courts to decide the level of scrutiny on a case-by-case basis, this approach is problematic in the context of voting rights. The inherently political nature of provisions that infringe on the fundamental right to vote provides a strong argument in favor of a set standard of scrutiny in this context.

The *Crawford* plurality made note of the fact that partisan considerations may have played a role in the enactment of SEA 483. The record revealed that every Republican in the Indiana General Assembly voted in favor of the law, while the Democrats unanimously opposed it. Thus, provisions that deal directly with the right to vote are undeniably a political matter. A set level of scrutiny, then, would be most appropriate in this context.

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194. Under the rational basis standard of review, the Court will uphold a challenged statute if the state is able to assert a rational reason for its enactment. *See*, e.g., *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927).
195. *See discussion supra* Part II.B.
197. *Id.*
198. *Id.* at 1624; *see supra* note 131.
199. *Id.* at 1623. This is in line with the popular belief that a higher voter turnout typically favors the Democratic Party. *See*, e.g., *Early Voting in Georgia is High*, MSNBC, Oct. 15, 2008, http://www.msnbc.msn.com/id/27201426/ (“The high interest among black voters could yield a higher overall turnout, which tends to favor Democrats.”).
Without such a rule, this amorphous "sliding-scale" determination of scrutiny allows for the possibility that a court will choose the level of scrutiny in an arbitrary manner. In other words, because judges are not only permitted to decide the applicable level of scrutiny for the regulation at issue, but are directed to do so, they are able to pick the level scrutiny at their own whim. Consequently, judges could choose the level of scrutiny based on the outcome that they would ideologically prefer, essentially rendering the outcome of the provision's analysis somewhat predetermined. Under this scenario, the desired outcome would be used to determine the applicable level of scrutiny, which would subsequently be used as a justification for the outcome. Thus, the sliding-scale approach is circular in its application.

With this in mind, and considering the importance of the right to vote, it would be more appropriate to abandon the "sliding-scale" scrutiny approach in favor of a rule requiring a set level of scrutiny. Although, as Justice Souter noted, it is likely that the parties on both sides of the argument have legitimate interests, a set level of scrutiny would provide a more reliable means for evaluating regulations that impose burdens on the right to vote and would improve the consistency of decisions on the issue. Such a rule would also prevent the appearance—and possibly the reality—of a court's consideration of partisan motives when analyzing regulations that burden the right to vote.

2. The Argument for Heightened Scrutiny

Considering that fundamental rights are protected under the doctrines of either substantive due process or equal protection and that both doctrines have traditionally triggered strict scrutiny when fundamental rights are involved, it follows that restrictions that impose a direct burden on the fundamental right to vote should be subject to a heightened level of scrutiny. As demonstrated by Crawford, however, this is not the standard of review currently employed by courts when dealing with this issue. Despite the recent shift to a more flexible standard, the Supreme Court should return to the standard of review set forth in Harper and employ the

meridianstar.com/editorials/local_story_366002545.html ("Mississippi legislators will find the contentious issues of voter identification and early voting politically intertwined during the 2009 regular session.").

201. Crawford, 128 S. Ct. at 1628 (Souter, J., dissenting).
202. See discussion supra Part II.B.
203. See discussion supra Part III.B.
use of heightened scrutiny in the context of voting rights. Heightened scrutiny would be most appropriate in consideration of the fundamental nature of the right to vote and the public policy surrounding the treatment of fundamental rights.

The Harper Court stated that the "political franchise of voting" is a "fundamental political right, because [it is] preservative of all rights." This statement is significant not only because the Court recognizes the right as fundamental, but also because it recognizes that it is a "fundamental political right." While many of the fundamental rights recognized by the Court are fundamental rights of humans that are protected by the Constitution, the right to vote is somewhat different in nature because it is a fundamental right of citizenship. Stated otherwise, the right is not inherently protected on the basis of natural law, but is instead afforded protection because of its significance within our democratic society. The right to vote is "preservative of all rights" in that it allows citizens to participate in the process of creating and developing the policies under which they must abide.

The fundamental importance of the right to vote provides a strong argument in favor of a heightened standard of scrutiny. While the government has an important interest in regulating elections to ensure efficiency and prevent voter fraud, these interests alone should not serve as sufficient justification for regulations that impose a burden by preventing otherwise-qualified voters from exercising their right to vote. The right to vote is simply too important to our nation's democratic ideals. Any level of judicial scrutiny short of a heightened standard, though, allows this result. In other words, unless heightened scrutiny is used to evaluate the constitutionality of provisions that impose a direct burden on the right to vote, the courts will give an inappropriate level of deference to the government's interests and will accordingly reduce the weight given to the asserted injuries to the right to vote.

Consequently, the standard of heightened scrutiny set forth in Harper is the standard that should prevail. By employing a

206. Under heightened scrutiny, the Court gives less deference to a state's interest when assessing the constitutionality of a statute and instead requires that the regulation be narrowly tailored to achieve a compelling state interest. See Glucksberg, 521 U.S. at 767.
heightened scrutiny analysis, the courts can ensure that the fundamental right to vote is not hindered by unnecessarily restrictive state regulations. This return to a less deferential standard will preserve the societal view on the importance of the right to vote.

Considering the necessity of employing heightened scrutiny to provisions that directly burden the right to vote, it should be determined whether the Crawford Court would have reached the same conclusion with regard to the constitutionality of SEA 483 under this standard. In the context of voting rights, a heightened scrutiny analysis requires that the state assert a compelling interest that is sought to be achieved through a restriction on the right to vote and that the statute be sufficiently narrowly tailored to meet that asserted interest.

In Crawford, the state asserted three primary interests in support of SEA 483. These included election modernization and increasing voter confidence; however, the state’s primary asserted interest was the prevention of in-person voter fraud. The Crawford Court noted that there was “no question” about the legitimacy of the state’s interest in wanting to count “only the votes of eligible voters.” Indeed, preventing voter fraud is an important and persuasive interest. Despite the fact that there were no recorded instances of in-person voter fraud within the state of Indiana, the record evidence of voter-fraud from other states provided a convincing argument for the compelling nature of this state interest.

Moreover, some unquestionably legitimate arguments support the validity of SEA 483. It is supported not only by the interest in preventing voter fraud, but also by the goals of improving election modernization and securing voter confidence. SEA 483 essentially waives the requirement of presenting government-issued photo ID for elderly citizens in licensed care facilities and arguably provides a workable exception for those who are indigent or have religious objections to being photographed. Additionally,
Indiana is able to offer government-issued photo identification free of charge to qualified voters.  

Even assuming that the interests asserted by the state in *Crawford* may be deemed "compelling," the difficult part of the heightened scrutiny analysis for the state is establishing that the provision is sufficiently narrowly tailored to achieve those interests. Although a state may have valid and compelling interests, the provision may be overly restrictive and therefore unconstitutional under the heightened scrutiny standard.

When assessing SEA 483, the court of appeals stated in its opinion that "[p]erhaps the Indiana law can be improved . . ." This is the first indicator that SEA 483 may not be sufficiently narrowly tailored to survive heightened scrutiny. *Crawford* has also already been criticized for "[d]eferring to Indiana's decision to justify a law that created an additional prerequisite to voting with, at best, very little analysis into whether the law addressed the type of fraud that the state claimed to be fighting . . ." Without careful analysis as to whether the specific interest asserted by the state is being met, the provision cannot be regarded as narrowly tailored to achieve the state's attempt at deterring in-person voter fraud. Likewise, the *Crawford* plurality itself noted the lack of recorded evidence offered by the state in support of its interest in preventing in-person voter fraud. It seems unlikely that a provision could be sufficiently narrowly tailored when there is a lack of empirical evidence identifying the specific aspects of the issue that it seeks to remedy. In the context of voter fraud, a provision that purports to prevent such fraud cannot be specifically addressed to solve it without first detecting the unique sources and causes of the problem.

As stated by the dissenting opinions, Indiana's provisions under SEA 483 are not only "one of the most restrictive in the country," but also are more restrictive than those recommended by the Carter–Baker Report—a nationally commissioned study recommending the states to enact photo-identification election requirements. In its report, the Carter–Baker commission

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216. *Crawford*, 128 S. Ct. at 1613 (citing IND. CODE § 9-24-16-10(b) (West Supp. 2007)).
217. *Crawford* v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).
221. *Id.* at 1643–45 (Breyer, J., dissenting); *see supra* note 164.
recommended a certain means by which states can achieve the same goals asserted by Indiana in *Crawford*; however, the provisions enacted by SEA 483 do not follow the statutory proposition suggested by the Carter–Baker Report. Justice Breyer stated in his dissent that “[t]he Carter-Baker Commission *conditioned* its recommendation upon the [s]tates’ willingness to ensure that the requisite photo IDs ‘be easily available and issued free of charge’ and that the requirement be ‘phased in’ over two federal election cycles, to ease the transition.” He added that “Indiana’s law fails to satisfy these aspects of the Commission’s recommendation.”

Therefore, it is clear that because the Carter–Baker Report developed a statutory scheme for voter identification that was less restrictive than the provisions enacted by the state of Indiana, SEA 483 was not sufficiently narrowly tailored to achieve its asserted interests.

Under this heightened scrutiny analysis, the challenged statute must be narrowly tailored to achieve a compelling interest asserted by the state as justification for imposing a burden on a fundamental right. SEA 483 cannot be upheld as constitutional under this standard. Although Indiana’s interest in preventing in-person voter fraud is legitimate, and possibly even compelling, the enacted provisions simply do not meet the standard of being necessary to achieve that interest. The provisions enacted under SEA 483 must then be deemed unconstitutional as an impermissible burden on the fundamental right to vote. Furthermore, SEA 483’s combination of restrictive provisions and lack of evidentiary support arguably renders it unconstitutional under the *Anderson* balancing test employed in *Crawford*. In fact, it appears that the only standard under which SEA 483 is truly constitutional is rational basis review.

Despite the logical conclusion that heightened scrutiny is the appropriate standard of review for voting rights cases, Justice Scalia asserted in his *Crawford* concurrence that “[s]trict scrutiny is appropriate only if the burden is severe.” Justice Scalia cited just one case, *Clingman v. Beaver*, when making this statement.

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223. *Id.*
224. *Id.* at 1624 (Scalia, J., dissenting) (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005)).
225. 544 U.S. 581 (2005) (holding that an election provision that opened the primary to only registered members of the party and registered independents did not violate the petitioners’ First Amendment rights to freedom of political association).
A clear reading of Clingman, however, indicates that the support for this assertion was taken out of context. The Clingman Court stated, in pertinent part, “But not every electoral law that burdens associational rights is subject to strict scrutiny. Instead . . . strict scrutiny is appropriate only if the burden is severe.” This only establishes that the “severe burden” requirement is a prerequisite for challenges of provisions that burden the First Amendment right to political association. It does not necessarily follow from Clingman that a severe burden must be shown in the case of all rights that are subject to strict scrutiny. As previously discussed, SEA 483 is a direct burden on the fundamental right to vote, not an issue of political association. Nonetheless, there are additional concerns regarding the possibility of this severe burden requirement.

While Crawford’s plurality opinion made no mention of a severe burden requirement in its analysis, the language in prior jurisprudence implies that such a burden may be required in order for heightened scrutiny to be applicable. The Burdick Court, for example, stated that “when those [First and Fourteenth Amendment Rights] are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” This assertion arguably lacks an explicit mention of a severe burden requirement for the application of a heightened scrutiny analysis. Conversely, it simply requires that heightened scrutiny be applied when such severe restrictions are present. However, the language undoubtedly gives rise to the possibility that, even if not currently required by the Court, the showing of such a burden may be necessary in future cases to trigger the application of heightened scrutiny. Regardless of the Court’s current position on this issue, such a requirement would pose a number of potential problems for courts in the future.

It is immediately obvious that there is a highly subjective element to the meaning of the phrase “severe burden.” Without a clear definition of what exactly constitutes a burden that is “severe,” courts will certainly run into several difficulties. One problem is the lack of clarity with regard to the factors that should be considered in an evaluation of a burden’s severity. There are a variety of possible considerations, including (but not limited to) the number of people burdened, the degree to which those people are burdened, and the nature of the burden. Without even knowing the

226. Id. at 592 (emphasis added) (citations omitted).
227. See discussion supra Part IV.A.1.
factors to be considered—not to mention the weight that should be given to each factor—courts will be unable to make consistent determinations of the asserted injuries. The more significant difficulty, though, is the absence of a threshold requirement for severity. If there is no set standard, courts will not be able to adequately assess the impact of the burden.

The hypothetical ramifications of this standard’s subjectivity are significant. Judges will constantly disagree over which factors should be given the most weight and whether the injuries asserted by petitioners meet the requirement of severity. Petitioners themselves will be without guidance as to whether their claims are sufficient to invoke heightened scrutiny. The overall consistency of decisions with regard to voting rights will suffer. Even if judges attempt to define “severe burden,” the task will be far from easy, especially considering the number of possible “burdens” that petitioners may allege.

Courts may choose to define the severe burden standard in a way that parallels the undue burden standard set forth in Planned Parenthood v. Casey (Casey). Under Casey, which addressed abortion rights, an undue burden exists if “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The “undue burden” discussed in Casey seems comparable to the potential “severe burden” requirement because both standards look at the asserted injury to a fundamental right in order to determine the constitutionality of a state regulation. Furthermore, the right to an abortion, like the right to vote, is an unenumerated fundamental right. The similarity between these two standards is initially troubling. If it required the showing of a severe burden, courts would essentially be treating the right to vote—a right that is entitled to a great deal of protection—in a manner similar to the arguably less-protected right to an abortion.

Notwithstanding this odd contrast between the treatment of the right to vote and the right to an abortion, the undue burden

230. Id. at 877.
231. Id. at 926–27.
232. See id. at 951–52. The Casey dissent argued against the Roe Court’s characterization of a woman’s right to terminate her pregnancy as “fundamental.” Id. (citing Roe v. Wade, 410 U.S. 113 (1973)). It stated that “in terming this right fundamental, the Court in Roe read the earlier opinions upon which it based its decision much too broadly.” Id. “Unlike marriage, procreation and contraception,” the dissent continued, “abortion ‘involves the purposeful termination of a potential life.’” Id. at 952 (citing Harris v. McRae, 448 U.S. 297, 325 (1980)).
standard set forth in *Casey* provides an interesting perspective when applied in the voting rights context. Under *Casey*, a provision is invalid if it “has the purpose or effect of placing a substantial obstacle in the path of a woman” seeking an abortion before the fetus is viable. Applying this standard to the right to vote, it follows that a petitioner can successfully demonstrate an undue burden without even addressing the legislative intent of the provision, the issue of whether the burden ultimately prevented any registered voters from actually casting a ballot, or the number of voters affected by the burden. Therefore, if courts define the severe burden standard in a manner similar to *Casey*’s undue burden standard, a petitioner would arguably be able to trigger the application of heightened scrutiny even more easily than under the current standard.

Setting aside all speculation regarding the possible definitions of a severe burden standard, such a requirement is ultimately inappropriate because of its clear departure from the standard set forth in *Harper*. The *Harper* Court did not require any showing of a severe burden when it applied heightened scrutiny to the Virginia poll tax provision. Conversely, the Court emphatically struck down an annual poll tax of just $1.50, stating that it was “the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it.” The *Harper* Court did not even discuss the asserted burdens, declaring the tax unconstitutional because “the opportunity for equal participation by all voters in the election of state legislators’ is required.” The *Harper* Court clearly focused on the fundamental nature of the right to vote without regard to the asserted burdens when it applied heightened scrutiny and declared the poll tax unconstitutional. Accordingly, the severe burden standard conflicts with the principles expounded in *Harper* and should not be a prerequisite to the application of heightened scrutiny in the context of voting rights.

Moreover, prospective plaintiffs have a right, as individuals, to challenge the constitutionality of a provision if they are injured or burdened as a result of the provision. In order for a plaintiff’s claim to be subject to heightened scrutiny, the plaintiff must demonstrate that the burden imposed by the provision is severe.

233.  *Id.* at 877 (emphasis added).
235.  *Id.* at 664 n.1.
236.  *Id.* at 668.
237.  *Id.* at 670 (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)).
However, without adopting a standard similar to *Casey*s undue burden standard, the Court is unlikely to ever find a severe burden when a single plaintiff claims an injury to himself alone. Furthermore, it can be inferred from the *Crawford* plurality's analysis that, under the *Anderson* balancing test, a significant portion of an election provision's constitutional assessment considers the number of voters that are adversely affected by the regulation. It follows that, unless an individual plaintiff's claim is analyzed under a heightened standard of scrutiny without the requirement of a severe burden, the plaintiff will not be entitled to any relief.

By establishing a requirement that plaintiffs demonstrate a severe burden before heightened scrutiny is applied—if they choose to do so—the courts will not only be stuck with a subjective rule that departs from established jurisprudence, but also will be left with a rule that will deprive citizens of the unique constitutional safeguards that are given to the most important and most valued of rights. Conversely, under the proposed return to the *Harper* standard of heightened scrutiny, any prospective requirement of a severe burden would be both unnecessary and inappropriate.

V. CONCLUSION

The right to vote is a right that has been established as fundamental under the Constitution. Because of its fundamental nature, it is necessary that courts employ heightened scrutiny when evaluating any restriction that imposes a direct burden on this right. This heightened scrutiny analysis is the only way that the fundamental right to vote can be adequately protected from infringements that threaten to unreasonably burden qualified voters from exercising the franchise.

*Crawford* is a clear example of how the right to vote is no longer treated as the fundamental right that it truly is. By upholding SEA 483 under a watered-down version of the original *Anderson* balance, the *Crawford* Court essentially demoted the right to vote from its status as fundamental by applying an inappropriate standard. Under this reasoning, the door is open for increasingly restrictive state statutes that further burden those who wish to participate in the political process. The photo identification requirements imposed by SEA 483 could be the beginning of a nationwide trend in favor of a burdensome identification requirement for all voters. Additionally, with the possibility of a severe burden requirement in order to trigger the application of a heightened level of scrutiny, courts may be willing to give an
increasing amount of deference to the interests asserted by the government. By returning to Harper's standard of heightened scrutiny when dealing with provisions that directly infringe upon the fundamental right to vote, however, courts can preserve this right and ensure that the franchise is available to all voters who are qualified under the currently established constitutional requirements.

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