

*CRAWFORD V. MARION COUNTY ELECTION BOARD: THE
MISSED OPPORTUNITY TO REMEDY THE AMBIGUITY AND
UNPREDICTABILITY OF BURDICK*

INTRODUCTION

The right to vote has been described as the most precious of rights in a democratic society because it protects so many other rights.¹ The Supreme Court has long recognized the individual's right to vote as a fundamental right,² with states having the constitutional right to manage election procedures.³ In earlier cases, the Court reviewed many election regulations using something akin to strict scrutiny analysis.⁴ However, the Court realized the tenuous balance between the individual's right to vote and the state's right to manage elections.⁵ Seeking to develop a standard that would adequately balance these competing rights, the Court developed a test to accomplish the goal.⁶ This balancing test weighs the burden on the right to vote against the state interests in passing legislation that manages election procedures,⁷ unfortunately, though, it has led to differing interpretations producing unpredictable outcomes.⁸

The Court had the opportunity to resolve the ambiguity and unpredictability resulting from prior decisions when it granted certiorari to review the constitutionality of Indiana's Senate Enrolled Act No. 483 ("SEA 483")⁹ in *Crawford v. Marion County Election Board*.¹⁰ In a 6-3 decision, the Court held that SEA 483 was constitutional; however, the plurality opinions reached that conclusion by very different reasoning.¹¹ The Court's lack of unity did nothing to settle the confusion courts were experiencing when determining the correct application of prior precedent,¹² or to provide guidance on how to measure the severity of a burden

1. Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174 (2007) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1963)).

2. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

3. U.S. CONST. art. I, § 4, cl. 1.

4. See *Harper*, 383 U.S. at 666-68.

5. *Anderson*, 460 U.S. at 788.

6. *Id.* at 789.

7. *Id.*

8. See Ordway, *supra* note 1, at 1192.

9. S.B. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

10. 128 S. Ct. 1610 (2008).

11. *Id.* at 1624 (Scalia, J., concurring) (explaining that the majority opinion rests its decision on a balancing approach while the concurrence bases its decision on an "important regulatory interests" standard).

12. *Id.* at 1627 (Scalia, J., concurring).

on the right to vote.¹³ The Court's plurality opinions demonstrate the need for a new rule to evaluate the constitutionality of election regulations.

Part I of this Comment explains the evolution of the standard the Court has used in its election law jurisprudence with three important cases—*Harper*, *Anderson*, and *Burdick*—and establishes the legal climate and precedent prior to *Crawford*. Part II discusses *Crawford* by starting with the facts and procedural history and then turning to the plurality opinions and dissents. Part III.A discusses the issues left unresolved by the *Crawford* decision—namely the ambiguity and unpredictability of the *Anderson* and *Burdick* standards. Part III.B suggests a new rule to resolve the limitations of the *Anderson* standard in reviewing election law challenges. The suggested rule would maintain the presumption of constitutionality for election laws. However, if there is evidence of political party entrenchment or the law disproportionately impacts an identifiable group that shares a particular political ideology, an intermediate level of scrutiny would be applied. Part III.C discusses the importance of facial challenges in light of *Crawford*. Part IV concludes that this new rule will remove the ambiguity and unpredictability from election law cases, protect against political party entrenchment and discriminatory effects, and maintain the state's ability to manage its elections.

I. BACKGROUND

The Constitution expressly grants the right to vote in federal elections;¹⁴ however, no such right is expressly granted for voting in state elections.¹⁵ Despite this omission, the Court has found the right to vote in state elections to exist implicitly in the First Amendment and to be incorporated through the Fourteenth Amendment, with challenges generally brought as a violation of the Equal Protection Clause.¹⁶ The following three cases demonstrate the right to vote has remained fundamental, but the approach used in detecting unconstitutional infringements of the right has changed.

13. David Schultz, *Election Law: Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 530 (2008).

14. U.S. CONST. art. I, § 2, cl. 1.

15. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

16. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (“It must first consider the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments*.”); see also *Harper*, 838 U.S. at 666 (“Our cases demonstrate that the *Equal Protection Clause of the Fourteenth Amendment* restrains the States from fixing voter qualifications which invidiously discriminate.”).

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A. Harper v. Virginia State Board of Elections¹⁷

In *Harper*, Virginia residents challenged the constitutionality of a section of the Virginia Constitution that required residents to pay a poll tax in order to register to vote.¹⁸ The issue was whether a voter's affluence (i.e., the ability to pay the poll tax) was a valid qualification for voting.¹⁹ In a 6-3 decision, the Court held the poll tax unconstitutional because a classification that makes voter wealth a qualification for exercising the right to vote was an invidious discrimination and invalid under the Equal Protection Clause of the Fourteenth Amendment.²⁰

Although passing on the possible issue of racial discrimination,²¹ the *Harper* Court did stress the fundamental importance of the right to vote in a democratic society because it protects and preserves all other rights guaranteed by the Constitution.²² In fact, so important is the right to vote that the Court believed it was the driving force behind President Lincoln's philosophy of "government of the people, by the people, [and] for the people."²³ After identifying the right at stake, the Court then turned to the level of review required for its analysis.

The Court did not expressly state it was reviewing the poll tax under strict scrutiny but noted that when a classification infringes upon a fundamental right under equal protection, the classification "must be closely scrutinized and carefully confined."²⁴ Under this level of review, the Court found no relation between the ability to pay the poll tax and an individual's qualifications to exercise the right to vote.²⁵ The lack of relationship between economic status and voter qualifications placed an unnecessary burden on the right to vote, which would be an invidious discrimination in violation of the Equal Protection Clause.²⁶ The final sentence of the majority opinion simply stated that "the right to vote is too precious, too fundamental to be so burdened or conditioned."²⁷

Harper provided no guidance on how election regulations would be reviewed in the future. Was the poll tax unconstitutional because it had no relation to voter qualifications, thus failing under any level of scrutiny? Or did the infringement on the fundamental right to vote trigger a

17. 383 U.S. 663 (1966).

18. *Id.* at 665 n.1 (discussing the various sections of the Virginia Constitution that authorize the poll tax). In 1965, one-year prior to *Harper*, the Virginia poll tax was declared a violation of the Twenty-Fourth Amendment as a prerequisite to voting in federal elections. *Harman v. Forssenius*, 380 U.S. 528, 544 (1965).

19. *See Harper*, 383 U.S. at 665-66.

20. *Id.* at 666-67.

21. *Id.* at 666 n.3.

22. *Id.* at 667 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

23. *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 568 (1963) (alteration in original)).

24. *Id.* at 670.

25. *Id.* at 666.

26. *Id.* at 666-67.

27. *Id.* 670 (referring to conditioning the right to vote on affluence).

heightened level of scrutiny? If the latter is true, then nearly all election regulations would be declared unconstitutional, which would be contrary to an express provision of the Constitution.²⁸

The Constitution expressly grants states the power to regulate the time, place, and manner for holding elections of senators and representatives to the United States Congress.²⁹ In order for elections to be fair, honest, and orderly there is a need for substantial regulation,³⁰ which necessarily burdens the right to vote.³¹ The fear is that subjecting all election laws to strict scrutiny analysis, which *Harper* may suggest, would frustrate the state's ability to effectively manage elections and render its constitutional power a nullity.³² In *Anderson*, the Court announced an approach in reviewing election laws that sought to protect the fundamental right to vote while respecting the state's right to regulate its elections.³³ The new approach was a noble effort, but the result would later prompt Justice Scalia to refer to it as "*Anderson's* amorphous flexible standard."³⁴

B. *Anderson v. Celebrezze*³⁵

John Anderson sought to have his name included on the ballot as an independent candidate for President in the Ohio primary election but was denied because of Ohio's early candidacy registration requirements for independent candidates.³⁶ Although Anderson was denied access to the ballot, the issue became whether the early registration deadline was an unconstitutional infringement on the right to vote of Anderson's supporters.³⁷ Justice Stevens delivered the majority opinion,³⁸ holding the early registration deadline unconstitutional.³⁹ Justice Stevens concluded that

28. See U.S. CONST. art. I, § 4, cl. 1.

29. *Id.*

30. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

31. *Id.*

32. *Burdick v. Takushi*, 504 U.S. 428, 433. *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (discussing the myth "that strict scrutiny is an 'inflexible' rule that invalidates every (or nearly every) law to which it applies").

33. *Anderson*, 460 U.S. at 788 ("Although 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.").

34. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring) (internal quotation marks omitted).

35. 460 U.S. 780 (1983).

36. *Id.* at 783 n.1 (explaining the challenged Ohio statute).

37. *Id.* at 782.

38. Chief Justice Burger and Justices Blackmun, Brennan, and Marshall joined in the majority opinion. *Id.* at 781.

39. *Id.* at 805-06.

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the deadline may substantially impact independent voters⁴⁰ and that this burden outweighed the state's minimal interest for the regulation.⁴¹

For purposes of analysis, the Court drew the parallel between the rights of the candidate and those of the voter because a burden on one is necessarily a burden on the other.⁴² The Court also recognized the dichotomy between the individual's right to vote and the state's right to regulate elections, noting that "the [s]tate's *important* regulatory interests are *generally* sufficient to justify reasonable, nondiscriminatory restrictions."⁴³ The Court did not expand on what was meant by nondiscriminatory—either facially nondiscriminatory or a nondiscriminatory effect—but would later state that burdens falling on a particular voter segment would be hard to justify by the state.⁴⁴ The Court then announced the following approach to guide its analysis:

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the . . . [Constitution] that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. . . . [T]he 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.⁴⁵

In *Storer v. Brown*,⁴⁶ which seems to have borne the early parameters of this approach,⁴⁷ Justice White rather prophetically stated: "What the result of this process will be in any specific case may be very difficult to predict with great assurance."⁴⁸ The unpredictability stems from the ambiguity created by three possible interpretations of the *Anderson* standard. First, the standard may simply stand for a balancing test between the burden on the individual's right to vote and the interest of the state.⁴⁹ Second, the standard could suggest that identifying the magnitude of the

40. *Id.* at 790.

41. *Id.* at 806.

42. *Id.* at 786.

43. *Id.* at 788 (first and second emphasis added). This quotation was cited in both *Burdick* and *Crawford*. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Justice Scalia believed the statement, as used in *Burdick*, helped refine the *Anderson* approach into "an administrable rule." *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring).

44. *Anderson*, 460 U.S. at 786, 792-93.

45. *Id.* at 789.

46. 415 U.S. 724 (1974).

47. *See id.* at 730.

48. *Id.*

49. This appears to be the interpretation the *Anderson* Court adopts, as it finds the state interests do not outweigh the burden on the right to vote. *Anderson*, 460 U.S. at 806.

burden on the right to vote triggers a set level of scrutiny by the Court.⁵⁰ Finally, the standard could also support the idea that the level of scrutiny is on a sliding-scale, where the level of scrutiny increases correspondingly with an increase of the burden on the right to vote.⁵¹ The Court seemed to adopt the balancing test interpretation as it found the burden on the right to vote outweighed the state interest, but in doing so, it left few clues as to the proper application of this interpretation.

The Court found there to be a “particular” burden on the rights of an identifiable segment of Ohio voters.⁵² The existence of this particularized burden prompted the Court to note that “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”⁵³ The previous passage suggests the Court viewed the burden on the right to vote to be sufficient enough to elevate the state’s burden in showing that the deadline was necessary to protect its interests. However, the Court never defined the magnitude of the burden on the right to vote, which is troubling because under any interpretation of the standard the first step of the analysis is to identify the level of the burden.⁵⁴ Equally troubling, the Court did not provide any guidance on how to *measure* the magnitude of the burden on the right to vote.

The Court then closely reviewed—without announcing a level of scrutiny—the state’s asserted interests of voter education, equal treatment of candidates, and political stability,⁵⁵ not only looking at the legitimacy of the interest, but also how well the early registration deadline served those interests.⁵⁶ After determining the state interests to be minor, and not advanced by the deadline,⁵⁷ the Court declared them insufficient to outweigh the burden on the right to vote.⁵⁸

50. This is the interpretation, although refined by *Burdick*, which Justice Scalia adopts. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 at 1624–25 (2008) (Scalia, J., plurality opinion).

51. This is the interpretation that the *Burdick* Court seemingly adopted. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“Under 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.”).

52. *Anderson*, 460 U.S. at 790, 792 (“An early filing deadline may have a substantial impact on independent-minded voters”). This evidences that the Court has been willing to look at generalized burdens that impact voters differently—contrary to Justice Scalia’s plurality opinion in *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring).

53. *Anderson*, 460 U.S. at 793.

54. *Crawford*, 128 S. Ct. at 1624; *Anderson*, 460 U.S. at 806; see *Burdick*, 504 U.S. at 434.

55. *Anderson*, 460 U.S. at 796-802.

56. *Id.* at 797-98, 800-01.

57. *Id.* at 798, 801, 805.

58. *Id.* at 806.

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Justice Rehnquist dissented⁵⁹ in *Anderson* because he believed the Court's precedent never required a state to narrowly tailor its election laws.⁶⁰ Instead, Justice Rehnquist stated it was the Court's duty to make sure the state was not attempting to freeze the "status quo."⁶¹ If it was not, then the "State's laws will be upheld if they are tied to a particularized legitimate purpose, and are in no sense invidious or arbitrary."⁶² Justice Rehnquist believed that the early registration deadline passed this test and would have found it constitutional.⁶³

Anderson attempted to create an approach that would protect the rights of individuals and states, but the end result was an ambiguous standard with three possible interpretations. *Anderson* adopted the balancing test interpretation, but it did not provide guidance on how to measure the burden on the right to vote nor did it reveal the level of scrutiny to apply when reviewing the state interest. The ambiguity of the *Anderson* standard and the Court's lack of guidance in its application lead to unpredictable outcomes. In *Burdick*, the Court followed the sliding-scale interpretation of the *Anderson* standard instead of the balancing test, evidencing the ambiguity.⁶⁴ Further, the majority and dissenting opinions reached different conclusions as to the magnitude of the burden, evidencing the unpredictability.⁶⁵

Another factor that may have played a role in choosing a different interpretation of *Anderson* is that the composition of the Court changed during the time between the *Anderson* and *Burdick* decisions. Justices Stevens, Blackmun, Rehnquist, White, and O'Connor were the only justices to hear both cases. In *Anderson*, Justices Stevens and Blackmun were in the majority, whereas Justices Rehnquist, White, and O'Connor dissented. In *Burdick*, Chief Justice Rehnquist and Justices White and O'Connor were in the majority, whereas Justices Stevens and Blackmun dissented.

C. *Burdick v. Takushi*⁶⁶

At issue in *Burdick* was whether Hawaii's ban on write-in voting was a violation of the First and Fourteenth Amendments.⁶⁷ Alan Burdick was a registered voter in Hawaii claiming he would cast a write-in vote for a person who was not on the ballot and, among other things, had the

59. *Id.* (Rehnquist, J., dissenting) (Justices White, Powell, and O'Connor joined in Justice Rehnquist's dissent).

60. *Id.*

61. *Id.* at 817 (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)).

62. *Id.* (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (internal quotation marks and brackets omitted)).

63. *Id.* at 818, 823.

64. See discussion *infra* Part I.C.

65. See discussion *infra* Part I.C.

66. 504 U.S. 428 (1992).

67. *Id.* at 430.

right to cast a write-in “protest vote for Donald Duck” or anyone else he chose.⁶⁸ Burdick argued that any infringement on this right was unconstitutional.⁶⁹ Justice White, delivering the opinion of the Court, acknowledged that the right to vote is fundamental⁷⁰ but, as in *Anderson*, qualified the right as non-absolute.⁷¹ In holding Hawaii’s ban on write-in voting constitutional, the Court rejected the argument that all voting regulations should be subjected to strict scrutiny analysis⁷² and applied *Anderson*’s “more flexible standard.”⁷³

As the Court began its analysis, it seemingly used the sliding-scale interpretation of the *Anderson* approach by declaring that the rigorosity of its inquiry was dependent on the magnitude of the burden on the right to vote.⁷⁴ The first step of the analysis found a “very limited” burden on the right to vote.⁷⁵ Hawaii had three mechanisms through which a candidate could gain access to the ballot at least sixty days prior to the primary election⁷⁶ and the Court believed these mechanisms reduced the burden on the right to vote.⁷⁷

However, after finding the burden limited,⁷⁸ the Court noted, “the State need not establish a compelling interest to tip the constitutional scales in its direction.”⁷⁹ This would suggest that the Court viewed the *Anderson* standard as triggering a set level of scrutiny depending on the magnitude of the burden on the right to vote.⁸⁰ A possible explanation is that the Court was merely referencing an earlier quotation from *Norman v. Reed*,⁸¹ stating that a state would have to show a compelling interest in order to justify a severe burden on the right to vote.⁸² In *Norman*, however, the statement was an example of a sufficiently weighty corresponding interest as opposed to saying that a severe burden triggers strict scrutiny.⁸³

68. *Id.* at 430, 438 (internal quotation marks omitted).

69. *Id.* at 438.

70. *Id.* at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

71. *Id.* at 433 (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)).

72. *Id.* at 432.

73. *Id.* at 434.

74. *Id.*

75. *Id.* at 437. The majority opinion also characterized the burden as “limited” and “slight.” *Id.* at 438-39.

76. *Id.* at 435-36 (explaining that the three mechanisms to gain ballot access were filing through a party petition, an established political party, or a designated non-partisan ballot).

77. *Id.* at 436-37.

78. *Id.* at 439.

79. *Id.*

80. *See supra* note 49 and accompanying text.

81. 502 U.S. 279 (1992).

82. *Burdick*, 504 U.S. at 434 (citing *Norman*, 502 U.S. at 289).

83. *Norman*, 502 U.S. at 288-89 (“To the degree that a State would thwart this 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

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The Court quickly analyzed the asserted state interests of avoiding unrestrained factionalism and party raiding⁸⁴ and came to the conclusion that the legitimate state interests *outweighed* the burden on the right to vote.⁸⁵ The use of the word “outweighed” suggests the Court was using the balancing test interpretation of the *Anderson* standard. However, this may just be a result of the sliding-scale analysis as there inevitably must be a comparison between the burden on the right to vote and the state interest.

Justice Kennedy, joined by Justices Stevens and Blackmun, dissented in *Burdick*.⁸⁶ Justice Kennedy agreed with the majority opinion that *Anderson* was the correct standard, but seemed to follow the balancing test interpretation. Justice Kennedy believed the record showed that the write-in ban placed a significant burden on the right to vote⁸⁷ and was unnecessary to advance the state interests.⁸⁸ Justice Kennedy, therefore, would have declared the write-in ban unconstitutional as the state’s asserted interests were insufficient “under any standard” to justify the limitation on the right to vote.⁸⁹

Criticizing the majority opinion, Justice Kennedy stated: “The majority’s analysis ignores the inevitable and significant burden a write-in ban imposes upon *some individual voters* by preventing them from exercising their right to vote in a meaningful manner.”⁹⁰ This line of reasoning is also consistent with *Anderson*’s statement that a state would have a difficult time justifying a regulation that disproportionately burdened certain groups.⁹¹ It is also significant to recognize the Court’s cognizance of how election regulations can affect voters that fall within identifiable groups of the voting population at large.

Burdick further muddied the already murky *Anderson* water by injecting new language into the analysis. The *Burdick* Court replaced the *Anderson* requirement of looking at the legitimacy and strength of the state’s interests with looking at the state’s precise interests.⁹² The Court did not define what “precise” interest means, which adds to the ambiguity of the *Anderson* standard. Further, the Court added that the state interests would have to be compelling and narrowly tailored to justify a

severe restriction to be narrowly drawn to advance a state interest of compelling importance.”) (internal citations omitted).

84. *Burdick*, 504 U.S. at 439-40.

85. *Id.* at 440.

86. *Id.* at 442 (Kennedy, J., dissenting).

87. *Id.*

88. *Id.* at 448.

89. *Id.* at 450.

90. *Id.* at 448 (emphasis added).

91. See *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983).

92. Compare *Anderson*, 460 U.S. at 789, with *Burdick*, 504 U.S. at 434. This alteration may be an import from Justice Rehnquist’s dissent in *Anderson*. See *Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting).

severe burden on the right to vote.⁹³ Unfortunately, the Court did not announce how to measure the severity of a burden. Taken as a whole, the Court's language could be read as adopting either the sliding-scale or trigger interpretation of *Anderson*. The *Burdick* Court failed to relieve the interpretation ambiguity of *Anderson*, to announce a test to measure the severity of the burden on the right to vote, or to provide an answer as to what a precise state interest is.

Prior to the Supreme Court's decision in *Crawford*, five lower court cases decided the constitutionality of voter photo ID laws.⁹⁴ Three of these cases upheld the voter photo ID law, while the other two found the law unconstitutional.⁹⁵ The courts upholding the voter photo ID laws applied the flexible standard of *Burdick*⁹⁶ in determining the laws were not a severe burden on the right to vote.⁹⁷ However, in the cases holding the law unconstitutional, the District Court of New Mexico used the *Burdick* test and applied a level of scrutiny similar to that in *Anderson*, and the Supreme Court of Missouri rejected the *Burdick* test and used state constitutional law in declaring the law unconstitutional.⁹⁸ With courts following different interpretations of *Burdick*, measuring the burden on the right to vote differently, or being unwilling to follow *Burdick*, combined with the recent national prominence of voting rights,⁹⁹ the Supreme Court noted the importance of voter photo ID cases and granted certiorari to hear *Crawford*.¹⁰⁰

II. CRAWFORD V. MARION COUNTY ELECTION BOARD¹⁰¹

Following the problems stemming from the 2000 Presidential Election, voter rights became an issue of national prominence. Congress passed legislation, such as the Help America Vote Act ("HAVA"), seeking to alleviate some of the issues faced in the 2000 election.¹⁰² Former President Jimmy Carter and James A. Baker III co-chaired a commission that issued a report with recommendations on how to restore voter confi-

93. *Burdick*, 504 U.S. at 434 (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

94. See Schultz, *supra* note 13, at 503-22 (discussing *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007); *ACLU of N.M. v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007); *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2005); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007); *Weinshenck v. Missouri*, 203 S.W.3d 201 (Mo. 2006)).

95. *Id.* at 521.

96. *Id.* By this time courts were referring to the *Anderson* standard as the "*Burdick* test." See *id.*

97. *Id.*

98. *Id.* at 522.

99. See Ordway, *supra* note 1, at 1174 ("Since the presidential election of 2000, a host of new claims has arisen alleging unlawful denial of the right to vote. Litigants have challenged the use of error-prone voting machines, misleading registration forms, and the highly controversial photo identification requirements for in-person voting.")

100. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1615 (2008).

101. 128 S. Ct. 1610 (2008).

102. See 42 U.S.C.A. § 15301(b)(1) (West 2008); see also *Crawford*, 128 S. Ct. at 1614 n.3, 1617-18 (discussing the requirements of HAVA).

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dence and improve election procedures.¹⁰³ HAVA had a provision requiring voters to present identification at the time of voting with photo ID being one valid form of identification.¹⁰⁴ Similarly, the Carter-Baker Report suggested that photo IDs were necessary to combat in-person voter fraud.¹⁰⁵ Several states passed legislation to comply with HAVA, including Indiana.¹⁰⁶

A. Facts

In 2005 Indiana enacted Senate Enrolled Act No. 483 (“SEA 483”),¹⁰⁷ requiring voters to present a valid, government-issued photo ID in order to cast an in-person vote at general and primary elections.¹⁰⁸ If a voter did not have the valid photo ID at the time of casting the vote, the voter could later bring the identification to the county clerk’s office in order to have the vote counted.¹⁰⁹ The photo ID requirement was not applicable to mail-in absentee ballots.¹¹⁰ SEA 483 excluded residents of state-licensed facilities from the requirement.¹¹¹ Impoverished voters or religious objectors could cast a provisional ballot that would be counted provided they executed an affidavit with the clerk of the circuit court within ten days after the election.¹¹² SEA 483 did not require a voter to present a photo ID in registering to vote but did require the voter to comply with the requirements of HAVA.¹¹³

B. Procedural History

Almost immediately after its enactment, multiple parties filed two suits seeking to enjoin enforcement¹¹⁴ of SEA 483 as a violation of the First and Fourteenth Amendments, the Voting Rights Act,¹¹⁵ and provisions of the Indiana Constitution.¹¹⁶ After consolidating the suits in the Federal District Court for the Southern District of Indiana, Indiana inter-

103. COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 4 (2005), available at http://www.american.edu/ia/cfer/report/full_report.pdf [hereinafter CARTER-BAKER REPORT].

104. 42 U.S.C.A. § 15483(b)(2)(A)(i)(I) (West 2008).

105. See CARTER-BAKER REPORT, *supra* note 103, § 2.5.

106. Schultz, *supra* note 13, at 485-86.

107. S.B. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

108. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613 (2008).

109. *Id.* at 1614 (citing IND. CODE ANN. § 3-11.7-5-2.5(b) (West 2006)).

110. *Id.* at 1613 (citing IND. CODE ANN. § 3-11-8-25.1(e) (West Supp. 2007)).

111. *Id.*

112. *Id.* at 1613-14 (citing IND. CODE ANN. § 3-11.7-5-2.5(c) (West 2006)).

113. *Id.* at 1614 n.3, 1617-18 (discussing the requirements of HAVA); see also 42 U.S.C.A. § 15483(b)(2)(A)(i)(II) (West 2008) (stating that HAVA did require a voter to include in her registration application some form of identification, e.g., bank statement, utility bill, paycheck, etc., for verification purposes).

114. Crawford, 128 S. Ct. at 1614.

115. 42 U.S.C.A. § 1971 (West 2008).

116. IND. CONST. art II, §§ 1, 2.

vened to defend the statute.¹¹⁷ The District Court granted Indiana's motion for summary judgment because the plaintiffs failed to provide sufficient proof that SEA 483 would prevent any citizens from voting or would unduly burden their right to vote.¹¹⁸

On appeal, the Seventh Circuit rejected the petitioner's argument that the heightened scrutiny of *Harper* should apply.¹¹⁹ In affirming the District Court's ruling, the Court of Appeals reasoned that the burden on the right to vote was offset by the state's interest in preventing voter fraud.¹²⁰

The Court granted certiorari after four judges on the Seventh Circuit voted to rehear the case en banc.¹²¹ In a plurality opinion, six justices agreed SEA 483 did not unduly burden the right to vote and affirmed the decision of the Seventh Circuit.

C. Plurality Opinions

The issue before the Court was whether the requirement of having to present a photo ID prior to casting an in-person vote or an early vote at the circuit court clerk's office is a violation of the Fourteenth Amendment.¹²² The majority of the Court agreed SEA 483 was constitutional; however, the plurality opinions both purported to use the *Burdick* test but disagreed as to the interpretation of what the test was.¹²³

1. Justice Stevens's Opinion

Chief Justice Roberts and Justice Kennedy joined Justice Stevens in his plurality opinion.¹²⁴ Justice Stevens discussed *Harper* to the extent that regulations that invidiously discriminate are unconstitutional but "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*.¹²⁵ Justice Stevens acknowledged there was no test in place to measure the severity of the burden a state election regulation places on the right to vote;¹²⁶ however, the state must still have legitimate interests to justify the burden no matter how slight the burden is.¹²⁷

117. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782–83 (S.D. Ind. 2006), *aff'd sub nom.* *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610 (2008); *see also Crawford*, 128 S. Ct. at 1614.

118. *Crawford*, 128 S. Ct. at 1614 (quoting *Ind. Democratic Party*, 458 F. Supp. 2d at 783).

119. *Id.* at 1615 (citing *Crawford*, 472 F.3d at 952 (7th Cir. 2007)).

120. *Id.*

121. *Id.*

122. *Id.* at 1613–14.

123. *Id.* at 1616 n.8; *see also id.* at 1624–25.

124. *Id.* at 1613.

125. *Id.* at 1616 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

126. *Id.* at 1616.

127. *Id.*

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Justice Stevens then started his analysis by testing the legitimacy of the asserted state interests of preventing voter fraud, modernizing election procedures, and maintaining voter confidence.¹²⁸ Finding these interests legitimate, Justice Stevens turned to the burden on the right to vote, but noted that because of the facial challenge of SEA 483, the petitioners had a heavy burden of proof.¹²⁹ Justice Stevens found there to be little or no burden on the right to vote, thus the state's legitimate interests were sufficient to justify the requirements of SEA 483.¹³⁰

Although claiming to follow *Anderson* and *Burdick*,¹³¹ Justice Stevens's approach does not seem to fit any of the three possible interpretations. All three interpretations call for identifying the burden first and then analyzing the state interests. Justice Stevens's analysis began by verifying the state's legitimate interests, and when compared to no evidence of a burden on the right to vote, the state law was constitutional. Comparing the two interest may suggest he was using the balancing test interpretation. However, Justice Stevens's approach did not provide a test to measure the burden on the right to vote, which the balancing test interpretation of *Anderson* and *Burdick* requires.

2. Justice Scalia's Opinion

Justices Thomas and Alito joined Justice Scalia in his plurality opinion.¹³² Justice Scalia believed the other plurality opinion misinterpreted *Burdick* as simply adopting the flexible *Anderson* standard.¹³³ Justice Scalia interpreted *Burdick* to reshape *Anderson* into a more rigid, two-tier analysis.¹³⁴ One tier of the analysis would allow for a deferential standard of review when a regulation is non-severe and nondiscriminatory.¹³⁵ The second tier of the analysis would require strict scrutiny for regulations producing severe burdens on the right to vote.¹³⁶ However, Justice Scalia was unclear as to what constitutes a severe burden, in one instance saying a severe burden goes "beyond the merely inconvenient," and in another saying a severe burden is "so burdensome as to be virtually impossible to satisfy."¹³⁷

Justice Scalia believed it was of no importance that SEA 483 would burden some voters more than others.¹³⁸ Justice Scalia stressed that the regulation created a burden for all voters but just impacted voters differ-

128. *Id.* at 1617-20.

129. *Id.* at 1621.

130. *Id.* at 1624.

131. *Id.* at 1616 n.8.

132. *Id.* at 1624 (Scalia, J., plurality opinion).

133. *Id.*

134. *Id.*

135. *Id.* (calling this tier a "deferential important regulatory interests standard") (internal quotation marks omitted).

136. *Id.*

137. *Id.* at 1625 (internal quotation marks omitted).

138. *Id.* at 1626.

ently.¹³⁹ Therefore, a law that applied to all voters would not violate the Equal Protection Clause and addressing these individual impacts would “effectively turn back decades of equal-protection jurisprudence.”¹⁴⁰ Justice Scalia was unwilling to look at discriminatory effects; therefore, his definition of nondiscriminatory would only include facially nondiscriminatory laws. Combining the first tier of Justice Scalia’s analysis with an indifference to discriminatory effects would allow political party entrenchment to go unchecked, as many laws can be passed that produce a non-severe burden on the total population and are not discriminatory on their face.

Justice Scalia also believed a flood of litigation would occur if the courts were to review the impact of a regulation on individual voters, a task the Constitution relegated to the states.¹⁴¹ Further, the uncertainty created by the plurality opinion “will embolden litigants who surmise that our precedents have been abandoned.”¹⁴² Although Justice Scalia’s interpretation of *Burdick* would make great strides in eliminating the ambiguity and unpredictability of *Anderson* and *Burdick*, the plurality in *Crawford* does not provide guidance as to what interpretation the Court will apply in the future.

D. Dissenting Opinions

1. Justice Souter’s Dissent

Justice Ginsburg joined in Justice Souter’s dissent.¹⁴³ Justice Souter would have declared SEA 483 unconstitutional and remanded the case for further proceedings.¹⁴⁴ He agreed that the *Burdick* test guided the analysis but further qualified it by stating the state “must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.”¹⁴⁵ He believed that Indiana had not made the requisite showing.¹⁴⁶

Justice Souter started his analysis by identifying the “character and magnitude” of the burdens placed on the right to vote, which were the travel and costs associated with obtaining the required documentation or casting a provisional ballot.¹⁴⁷ In Justice Souter’s opinion, the magnitude equated to how many voters would have to shoulder the burden. Using the district court’s findings as an acceptable estimate¹⁴⁸ and adjusting that

139. *Id.* at 1625.

140. *Id.* at 1626.

141. *Id.* at 1626-27.

142. *Id.* at 1627.

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

144. *Id.* at 1643.

145. *Id.* at 1627.

146. *Id.* at 1643.

147. *Id.* at 1628.

148. *Id.* at 1632 (accepting estimate “that 43,000 voting-age residents lack the kind of identification card required by Indiana’s law”).

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number downward for several factors, Justice Souter determined that tens of thousands of eligible voters would still be without a photo ID, many of whom would be in poor financial shape.¹⁴⁹ Finding that a significant number of residents would be discouraged or disabled from voting due to the burdens in place,¹⁵⁰ Justice Souter subjected the state interests to “more than a cursory examination.”¹⁵¹

Justice Souter believed the asserted state interest should be shaved down to the precise interest and discounted to the extent the regulation is necessary to protect that interest.¹⁵² Probing the state interests more deeply, Justice Souter found them insufficient to justify the burden on the right to vote.¹⁵³

Justice Souter’s approach follows the sliding-scale interpretation of *Anderson* and *Burdick*. His analysis is very similar to that of the *Anderson* Court in reviewing the necessity of the regulation and taking a close look at the state interests. Further, Justice Souter made an attempt to define how to measure the burden on the right to vote by stating that the quantity of voters that are burdened is determinative. However, this does not speak to the severity of a burden because it does not define what constitutes a severe burden. Does a severe burden mean a voter must be denied the right to vote or just have a very difficult time in casting a vote? In addition, how many people must a regulation affect before the burden moves into the severe category? Ultimately, Justice Souter’s dissent will do little to clear up the ambiguity of *Anderson* and *Burdick* as he subscribed to a different interpretation than either of the plurality opinions. Justice Souter’s attempt to define what a burden is also will do little to create a predictable measure.

2. Justice Breyer’s Dissent

Justice Breyer applied the standard he articulated in *Nixon v. Shrink Missouri Government PAC*,¹⁵⁴ which he described as similar to the standard used by Justice Stevens and Justice Souter.¹⁵⁵ Under this standard, Justice Breyer would:

[B]alance 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,

149. *Id.* at 1634.

150. *Id.*

151. *Id.*; *see also id.* at 1635 (“But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of the precise interests put forward by the State . . .”) (internal quotation marks omitted).

152. *Id.* at 1636.

153. *Id.* at 1642-43.

154. 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

155. *Crawford*, 128 S. Ct. at 1643 (Breyer, J., dissenting).

but not necessarily, because of the existence of a clearly superior, less restrictive alternative).¹⁵⁶

Justice Breyer acknowledged that the Carter-Baker Report recommended states require photo ID but noted that the recommendation was conditional on the IDs being free to voters and the regulations “phased in over two federal election cycles.”¹⁵⁷ Considering Justices Stevens and Souter’s analyses of the state interests in conjunction with the findings of the Carter-Baker Report, Justice Breyer believed that SEA 483 created a disproportionate burden on voters who did not have a government-issued photo ID.¹⁵⁸

Justice Breyer, like Justice Souter, believed that SEA 483 imposed a “significantly harsher, unjustified burden”¹⁵⁹ on the poor, elderly, and disabled due mainly to costs involved in obtaining the documentation required to get a photo ID.¹⁶⁰ The cost of obtaining a copy of a birth certificate could be as much as \$12, a passport up to \$100, and some people may not even know how to go about obtaining these documents.¹⁶¹ Furthermore, the exception for not presenting a photo ID at the polling place added the additional burden of making more than one trip in order to execute a vote by provisional ballot.¹⁶² Justice Breyer believed this additional burden was particularly problematic in those Indiana counties that lacked public transportation.¹⁶³

Finally, Justice Breyer believed there were less restrictive alternatives to SEA 483.¹⁶⁴ He cited Georgia and Florida as examples of states that had passed voter photo ID laws but had requirements less restrictive than those of SEA 483.¹⁶⁵ Additionally, Indiana made the regulations effective immediately without the phase-in period suggested by the Carter-Baker Report.¹⁶⁶

156. *Id.* (internal quotation marks omitted).

157. *Id.* at 1644; Carter-Baker Report, *supra* note 103, §§ 2.5, 2.5.3.

158. *Crawford*, 128 S. Ct. at 1645.

159. *Id.*

160. *Id.* at 1644.

161. *Id.* Justice Breyer noted, by way of comparison, that the \$1.50 poll tax—declared unconstitutional in *Harper*—would be less than \$10 today.

162. *Id.* (citing *Crawford*, 128 S. Ct. at 1616-17 (Souter, J., dissenting)).

163. *Id.* (citing Justice Souter’s dissent, which stated 21 of Indiana’s 92 counties have no public transportation and an additional 32 counties only regional county service).

164. *Id.* at 1643 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000)).

165. *Id.* at 1644-45; see FLA. STAT. ANN. §§ 101.043(1)-(2), 101.048(2)(b) (West 2008); GA. CODE ANN. §§ 21-2-381, 21-2-417 (West 2007). The Florida and Georgia laws allow the voter a greater range of acceptable forms of identification to present when voting, similar to the list supplied by HAVA.

166. *Crawford*, 128 S. Ct. at 1640 (Souter, J., dissenting).

III. ANALYSIS

The decision in *Crawford* was, for the most part, dissatisfying because the plurality opinion did not provide a clear legal standard.¹⁶⁷ The Court neither resolved the ambiguity of *Burdick* nor did it provide a test on how to measure a burden on the right to vote. Justice Scalia's opinion was the closest to offering a workable solution, but his rule would make virtually all election laws constitutional. The downside to such an outcome is political party entrenchment and discriminatory effects will be ignored when considering election law challenges. This Comment suggests developing a rule courts can administer with clarity and predictability, while being cognizant of the ill effects and purposes behind some election laws. Finally, one significant teaching from *Crawford* is that succeeding on a facial challenge of a law will be difficult—especially without evidence of an actual harm. Future litigants now know an as-applied challenge will be the necessary avenue in order to challenge voter photo ID laws. This section closes by speculating on the outcome of *Crawford* had there been evidence of a voter who was unable to obtain a photo ID.

A. Questions Unresolved

The *Crawford* decision becomes less tidy when one considers the questions that were left unresolved. First and foremost, what is the *Burdick* test? There are three possible interpretations of the approach announced in *Anderson* and *Burdick*. Unfortunately, *Crawford* provided no guidance on the correct interpretation. Second, how does a court measure the severity of a burden on the right to vote? In *Crawford* the Court recognized there was no test to determine the magnitude or severity of the burden but failed to articulate a test for future guidance. The Court's lack of guidance on these issues could possibly leave lower courts grappling with a slew of new cases that may arise after the 2008 presidential election;¹⁶⁸ however, these cases will most likely have real plaintiffs who were not able to vote due to lack of a photo ID.

The first question lower courts will have to confront is what is the *Burdick* test? Justice Stevens believed that *Burdick* reaffirmed the flexible approach announced in *Anderson*,¹⁶⁹ but he did not offer guidance as to which interpretation. However, Justice Stevens started his analysis by discussing the state interests instead of identifying the severity of the

167. *Id.* at 1627 (Scalia, J., plurality opinion) (“The lead opinion’s record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned.”).

168. See generally Posting of Michael C. Dorf to Dorf on Law, <http://www.michaeldorf.org/2008/04/roberts-court-on-facial-challenges.html> (Apr. 29, 2008, 14:43 EST).

169. *Crawford*, 128 S. Ct. at 1616 n.8 (Stevens, J., plurality opinion).

burden on the right to vote.¹⁷⁰ Under any interpretation of *Burdick*, the character and magnitude of the burden must be determined before proceeding to an inquiry of the state interests.¹⁷¹ This deviation from *Burdick* may simply have been a matter of form over substance, as Justice Stevens later stated that due to the absence of any evidence in the record the magnitude of the burden could not be measured.¹⁷²

Justice Scalia disagreed with the other plurality opinion in that *Burdick* simply adopted the balancing test from *Anderson*.¹⁷³ Interestingly, though, Justice Scalia joined the majority opinion in *Burdick* that explicitly stated *Anderson* was the correct standard for evaluating burdens on the right to vote.¹⁷⁴ However, in *Crawford* he believed that *Burdick* refined *Anderson*'s sliding scale "into something resembling an administrable rule" by creating a two-tier analysis.¹⁷⁵ The first tier would allow deference to the state for important regulatory interests when the challenged law was non-severe and nondiscriminatory.¹⁷⁶ The second tier would subject laws imposing a severe burden on the right to vote to strict scrutiny.¹⁷⁷ Burdens that are merely inconvenient and applicable to the general public are not severe.¹⁷⁸ Thus, in Justice Scalia's opinion, *Burdick* refashioned the sliding scale of *Anderson* into the interpretation where a severe burden would trigger strict scrutiny.

It seems plausible, however, the *Burdick* Court did not intend this result. First, as previously stated, the *Burdick* Court explicitly stated *Anderson* was the controlling standard.¹⁷⁹ Although one of the interpretations of *Anderson* is a strict scrutiny trigger, neither *Anderson* nor *Burdick* expressly stated it was using that interpretation. The *Burdick* Court could have simply held that the burden on the right to vote was non-severe and the state's reasonable, nondiscriminatory restriction sufficiently justified the burden. Second, prior to explaining the *Anderson* standard, the *Burdick* Court stated that "a more flexible standard applies," as opposed to subjecting all election laws to strict scrutiny.¹⁸⁰ This statement seems contrary to an intention to create a rigid, two-tier approach in analyzing restrictions on the right to vote. Finally, *Burdick* incorporated language stating that severe burdens on the right to vote

170. *Id.* at 1616.

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

172. *Crawford*, 128 S. Ct. at 1622 (Stevens, J., plurality opinion).

173. *Id.* at 1624 (Scalia, J., plurality opinion).

174. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *Crawford*, 128 S. Ct. at 1616 n.8 (Stevens, J., plurality opinion) ("The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson* . . .") (citing *Burkick*, 504 U.S. 428 at 434).

175. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion).

176. *Id.*

177. *Id.* Justice Scalia, in a parenthetical, seemed to suggest a severe burden is such where a law is "so burdensome as to be virtually impossible to satisfy." *Id.* at 1625.

178. *Id.* at 1625 (citing *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)).

179. *Burdick*, 504 U.S. at 438.

180. *Id.* at 433–34.

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require strict scrutiny and a “State’s important regulatory interests are generally sufficient to justify [reasonable, non-discriminatory] restrictions.”¹⁸¹ The quoted phrase originated in *Anderson*,¹⁸² which the Court immediately followed by stating there was no litmus test to distinguish between valid and invalid restrictions.¹⁸³ In addition, the use of the phrase “generally sufficient” suggests a balancing or sliding-scale aspect to a test because “generally” does not mean “always” and leaves open the possibility that some reasonable, non-discriminatory restrictions are not justifiable. This further supports the idea that the Court did not intend to create a bright-line rule between valid and invalid restrictions.

After deciding which interpretation of *Burdick* to follow, the lower courts will have to decide how to measure the burden on the right to vote. Applying Justice Scalia’s interpretation will, in essence, foreclose the matter as nearly all reasonable, nondiscriminatory state election laws will be upheld unless the burden is severe.¹⁸⁴ However, if a lower court accepts *Burdick* as either the balancing test or sliding-scale interpretation of *Anderson*, then it will have to determine how to measure the severity of the burden on the right to vote.¹⁸⁵

In *Crawford* Justice Stevens acknowledged that there was no “litmus test for measuring the severity of a burden a state law imposes on” the right to vote.¹⁸⁶ This fact was quite obvious as, looking at the same evidence, Justice Stevens found a limited burden¹⁸⁷ and Justice Souter found more than a trivial burden.¹⁸⁸ Undoubtedly, the availability of a bypass, such as the provisional ballot in SEA 483, affects the burden on the right to vote.¹⁸⁹ However, the availability of bypasses is not conclusive in measuring the burden either, as Justice Stevens believed the provisional ballot lowered the burden¹⁹⁰ and Justice Souter believed it increased the burden.¹⁹¹ Furthermore, in *Burdick*, Justice Stevens joined in Justice Kennedy’s dissent, who did not believe Hawaii’s mechanisms for ballot access lowered the burden on the right to vote.¹⁹²

Justice Scalia’s two-tier analysis would make measuring the burden unnecessary. Unfortunately, this resolution would come with the side

181. *Id.* at 434.

182. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

183. *Id.* at 789.

184. *See Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624-25 (2008) (Scalia, J., plurality opinion).

185. *Anderson*, 460 U.S. at 789.

186. *Crawford*, 128 S. Ct. at 1616 (Stevens, J., plurality opinion).

187. *Id.* at 1623.

188. *Id.* at 1635 (Souter, J., dissenting).

189. *See id.* at 1621 (Stevens, J., plurality opinion); *id.* at 1631-32 (Souter, J., dissenting); *Burdick v. Takushi*, 504 U.S. 428, 435-36 (1992).

190. *Crawford*, 128 S. Ct. at 1621 (Stevens, J., plurality opinion).

191. *Id.* at 1631-32 (Souter, J., dissenting).

192. *See Burdick*, 504 U.S. at 448.

effect that nearly all election laws would be held constitutional.¹⁹³ Only regulations that were facially discriminatory or made it virtually impossible for anyone to vote would be unconstitutional.¹⁹⁴

However, fashioning the *Anderson* standard into a more rigid legal rule does have a benefit. There is evidence that legal doctrine, more so than standards, constrains judicial ideology.¹⁹⁵ There is strong support for the proposition that judges ruled along political party lines in the voter photo ID cases in Indiana, Michigan, Georgia, Arizona, Missouri, and New Mexico.¹⁹⁶ Similarly, it is more likely for Democratic judges than for Republican judges to rule in favor of claims brought under Section 2 of the Voting Rights Act.¹⁹⁷ On the extreme end, one need look no further than *Bush v. Gore*¹⁹⁸ to ascertain the pitfalls of partisan ideology in judicial decision-making.¹⁹⁹ Commenting on the result in *Bush v. Gore*, Dean Erwin Chemerinsky noted that the Supreme Court “invented new constitutional rules and disregarded old ones to decide a presidential election,” and concluded the decision was inexplicable except for partisanship ideology.²⁰⁰ Indeed, Justice Stevens’s dissent in *Bush v. Gore* suggests the real loser in the case was “the Nation’s confidence in the judge as an *impartial* guardian of the rule of law.”²⁰¹

The negative effects would largely outweigh the positive effects of adopting Justice Scalia’s rule. Many election laws that sought to entrench political parties through disproportionately burdening the right to vote of groups that share a political ideology would pass constitutional muster under the guise of reasonable and nondiscriminatory regulations.

193. See Posting of Dan Tokaji to Election Law @ Moritz, http://moritzlaw.osu.edu/blogs/tokaji/2008_04_01_equalvote_archive.html (Apr. 29, 2008 06:53 CST) [hereinafter Tokaji].

194. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion).

195. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence* 1 (Univ. of Chi., Pub. Law Working Paper No. 231, 2008), available at <http://ssrn.com/abstract=1260998>.

196. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote*, 35 HASTINGS CONST. L.Q. 643, 646-47, app. at 703 (2008) (“By way of summary, Democratic judges have expressed ‘anti’ views on the constitutionality of photo ID requirements 14 times, and ‘pro’ views only 3 times. For Republican judges, the respective numbers are 3 (anti) and 15 (pro).”).

197. Cox & Miles, *supra* note 194, at 1. Section 2 of the Voting Rights Act provides in part: “No person acting under color of law shall - - (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.” 42 U.S.C.A. § 1971 (West 2008).

198. 531 U.S. 98 (2000).

199. Erwin Chemerinsky, *Further Thoughts*, 54 OKLA. L. REV. 59, 60 (2001).

200. *Id.* at 60. Dean Chemerinsky supported this contention by stating “[n]o prior case ever had found that differences within a state in counting ballots violates equal protection. For decades, the Supreme Court emphasized that state courts have the final say in interpreting state law; yet, the Supreme Court ended the counting because it believed Florida law required that result.” *Id.*

201. *Bush*, 531 U.S. at 129 (Stevens, J., dissenting) (emphasis added).

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Justice Scalia noted in *McConnell v. Federal Election Commission*²⁰² that those in power will instinctively try to keep it, with the best way to achieve that being the “suppression of election-time speech.”²⁰³ The *Harper* Court declined to discuss the current motivation behind the poll tax;²⁰⁴ however, one-year prior to *Harper*, in *Harman v. Forssenius*,²⁰⁵ the Court did discuss the original purpose behind Virginia’s poll tax. The *Harman* Court looked to the legislative history of the poll tax to determine that its purpose was to circumvent the Fifteenth Amendment and disenfranchise African-Americans.²⁰⁶ In support of the idea that election regulations can be an effective means to disenfranchise certain groups of citizens, Carter Glass²⁰⁷ at the 1901-02 Virginia Constitutional Convention stated:

Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.²⁰⁸

Indeed, within three months of becoming effective, the poll tax in *Harper* reduced the number of African-Americans registered to vote from 147,000 to 22,000.²⁰⁹

In *Clingman v. Beaver*,²¹⁰ Justice O’Connor echoed these concerns by recognizing that the political party in power has an incentive to shape election laws in order to retain power.²¹¹ According to Justice O’Connor, under the *Burdick* test the Court’s function is a limited but important one as a check against legislative action.²¹² A heightened level of scrutiny

202. 540 U.S. 93 (2003).

203. *Id.* at 263 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part).

204. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 n.3 (1966).

205. 380 U.S. 528 (1965).

206. *See id.* at 543. *See also* Va. Historical Soc’y, The Civil Rights Movement in Virginia—Voting Rights, <http://www.vahistorical.org/civilrights/vote.htm> (last visited Dec. 18, 2008) [hereinafter *Voting Rights*].

207. Carter Glass served in the Virginia Senate from 1899-1903, then enjoyed a long career as a Representative and Senator from Virginia in the United States Congress, eventually serving as the Secretary of the Treasury for the United States from 1918-20. Biographical Directory of the U.S. Congress, GLASS, Carter, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000232> (last visited Dec. 18, 2008).

208. *Harman*, 380 U.S. at 543 (quoting 2 VA. CONSTITUTIONAL CONVENTION (1901-1902), REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA: HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902, at 2937, 3076-77 (J.H. Lindsay, ed., Hermitage Press 1906)). The Court noted that this was the general theme of the poll tax discussion with the only real debate occurring as to the effectiveness of the poll tax in disenfranchising African-Americans. *Id.* at 543 n.23.

209. *Voting Rights*, *supra* note 206.

210. 544 U.S. 581 (2005).

211. *Id.* at 603 (O’Connor, J., concurring in part and concurring in the judgment).

212. *Id.* at 602-03.

should be used when election regulations have “discriminatory effects”²¹³ because “there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition.”²¹⁴

Yet in *Crawford*, very little attention was paid to the evidence of entrenchment. Justice Stevens devoted a single paragraph discussing the evidence of entrenchment.²¹⁵ Fifty-two out of fifty-two Republican House members voted for SEA 483, while forty-five out of forty-eight Democrats (three were excused from voting) voted against it.²¹⁶ In addition, thirty-three out of thirty-three Republicans in the Senate voted for SEA 483 and seventeen out of seventeen Democrats voted against it.²¹⁷ Each of the opinions and dissents recognized that the burden SEA 483 placed on the right to vote would most likely fall on the poor.²¹⁸ Justice Stevens recognized that partisanship may have played a large part in the enactment of SEA 483, however, only if partisanship was the *sole reason* the law was passed would it be declared unconstitutional.²¹⁹

B. A New Rule for Reviewing Election Regulations

The *Anderson* standard was the result of an effort to balance the individual’s fundamental right to vote and the state’s constitutional right to manage election procedures.²²⁰ Voter rights issues came to national prominence after the problems experienced in the 2000 presidential election,²²¹ culminating in *Bush v. Gore*.²²² The complexity of these issues may not have been contemplated by the *Anderson* court in developing the flexible standard. The Court’s interpretation and application of the *Anderson* standard after *Burdick* has yielded inconsistent results, with judicial political ideology playing a role in the decisions.²²³ This unpre-

213. Throughout Part III of this Comment the phrase “discriminatory effect” is synonymous with disparate impact, discriminatory impact, or disproportionate impact.

214. *Clingman*, 544 U.S. at 603.

215. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623-24 (2008) (Stevens, J., plurality opinion).

216. *Id.* at 1624 n.21.

217. *Id.*

218. *Id.* at 1621 (“[A] somewhat heavier burden may be placed on a limited number of persons. They include . . . persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification . . .”); *id.* at 1625 (Scalia, J., plurality opinion) (“The Indiana law affects different voters differently, but what petitioners view as the law’s several light and heavy burdens are no more than the different impacts of the single burden that the law uniformly imposes on all voters.”) (citation omitted); *id.* at 1634 (Souter, J., dissenting) (“Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically.”) (citations omitted); *id.* at 1644 (Breyer, J., dissenting) (“[A]n Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles.”); *id.* at 1644 (Breyer, J., dissenting) (“[T]his statute imposes a disproportionate burden upon those without valid photo IDs.”).

219. *Id.* at 1624 (Stevens, J., plurality opinion).

220. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

221. See Schultz, *supra* note 13, at 485-86.

222. 531 U.S. 98 (2000).

223. See *supra* Part III.A.

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dictability suggests the *Anderson* standard needs to be refined into an “administrable rule”²²⁴ or test.

The foundation of this proposed rule is that the right to vote is a fundamental right.²²⁵ The right to vote is of the utmost importance in a democratic society because it allows a voice that protects and preserves all other rights guaranteed by the Constitution.²²⁶ The protest that sparked the Revolutionary War was based on the theory of no taxation without representation.²²⁷ The founding of the United States was based on the citizen’s right to have a voice in the government through representation and although through the years the citizens allowed to vote have changed,²²⁸ the right itself has not. Although this rule supports an idea that Justice Scalia described as “turn[ing] back decades of equal-protection jurisprudence,”²²⁹ it is this Comment’s position that the plurality opinions in *Crawford* did not place enough value on the fundamental right to vote.²³⁰

The new framework would begin with the presumption that election laws are constitutional.²³¹ This must be the starting point in order to preserve the state’s express constitutional right to manage election procedures.²³² This starting point also stays true to the rule from *Anderson* and *Burdick* that reasonable, nondiscriminatory regulations will generally be constitutional.²³³ However, if there is evidence of political party entrenchment or the law has a discriminatory effect, then the level of analysis would be raised to intermediate scrutiny.²³⁴ The combination of evi-

224. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment) (“Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson*’s amorphous ‘flexible standard’ into something resembling an administrable rule.”) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

225. See *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O’Connor, J., concurring in part and concurring in the judgment) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)); *Burdick*, 504 U.S. at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); *Anderson*, 460 U.S. at 788; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

226. See *Wesberry*, 376 U.S. at 17.

227. UK Parliament, “No Taxation Without Representation”—Britain, America and the 1765 Stamp Act, http://www.parliament.uk/parliamentary_publications_and_archives/parliamentary_archives/archive_s__stamp_act.cfm (last visited on Dec. 18, 2008).

228. See Schultz, *supra* note 13, at 484.

229. *Crawford*, 128 S. Ct. at 1626 (Scalia, J., plurality opinion).

230. Neither Justice Stevens’s, nor Justice Scalia’s opinion mentioned that voting was a fundamental right. See *id.* at 1613-24 (Stevens, J.), 1624-27 (Scalia, J., plurality opinion).

231. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969).

232. U.S. CONST. art. I, § 4, cl. 1; *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008).

233. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); see also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

234. See Recent Cases, *Constitutional Law—Voting Rights—Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1984-86 (2007) [hereinafter *Voting Rights*]. The *Voting Rights* article advocates a raised level of scrutiny, similar to the review used of campaign finance laws, that would look more to the “process by which such laws were enacted” *Id.* at 1985. The analysis would also “take a peek” at the effects of such regulations. *Id.* This comment suggests that evidence of entrenchment or discriminatory effect should raise the level of scrutiny to intermediate; the pres-

dence of both entrenchment and discriminatory effect would trigger strict scrutiny.²³⁵ An intermediate level of scrutiny will shift the burden of proof to the state to provide evidence that the law is necessary to effectuate an important state interest.²³⁶ Strict scrutiny will require a showing that the law is narrowly tailored to achieve a compelling state interest.²³⁷

Political party entrenchment is repugnant to the presumption of constitutionality and goal of democracy—that state legislatures can be held accountable by the constituency they represent.²³⁸ Election regulations are the most logical way to achieve entrenchment.²³⁹ Justice Rehnquist noted in his dissent in *Anderson* that it was the Court's duty to ensure the state was not trying to maintain the status quo through election regulations.²⁴⁰ Evidence of entrenchment should remove the presumption of constitutionality and allow a court to take a closer look at the challenged law to ensure "the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions."²⁴¹

Evidence of discriminatory effect should also trigger intermediate scrutiny. The strongest authority for this proposition is *Washington v. Davis*,²⁴² holding that discriminatory impact does not imply the regulation was passed with a discriminatory purpose. The Court had strong policy reasons for its holding in that subjecting all laws having a discriminatory impact to strict scrutiny would invalidate a great deal of legislation.²⁴³ The Court was careful to state that discriminatory impact was not irrelevant and it would be viewed in conjunction with the facts on the record.²⁴⁴ Applying intermediate scrutiny to election laws that have a discriminatory impact would not upset the policy considerations contemplated by the *Davis* Court.²⁴⁵

ence of both entrenchment and discriminatory effect should trigger strict scrutiny. *See also* *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (noting heightened scrutiny should be used in cases where discriminatory effects are present).

235. *See infra* note 250.

236. *See Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.")

237. *Burdick*, 504 U.S. at 434 ("[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.")

238. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."); *Voting Rights*, *supra* note 233, at 1986.

239. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003).

240. *Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting).

241. *Clingman v. Beaver*, 544 U.S. 581, 603 (2005).

242. *See* 426 U.S. 229, 242 (1976).

243. *Id.* at 248.

244. *Id.* at 241-42.

245. The contested regulation in *Davis* was "Test 21," a test to determine minimum verbal and communicative skill, which applicants for the police academy were required to take. *Id.* at 234. The Supreme Court found no error in the District Court's finding that the test was "directly related to the

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In suggesting that evidence of discriminatory effect trigger intermediate scrutiny it is relevant to note the *Davis* Court held that discriminatory effect alone was not sufficient to trigger *strict scrutiny*.²⁴⁶ In addition, the respondents in *Davis* did not suffer a complete deprivation of the right to work, just in their chosen profession.²⁴⁷ There is evidence that some voters—more likely African-Americans and Hispanic-Americans—will be completely deprived of their right to vote as a result of voter photo ID laws.²⁴⁸

Finally, evidence of both entrenchment and discriminatory effect should warrant strict scrutiny. Justice Stewart noted, in his concurring opinion in *Davis*, “that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”²⁴⁹ The majority noted that although discriminatory impact was not the sole touchstone to trigger strict scrutiny, it was not irrelevant either.²⁵⁰ The Court further noted that a discriminatory purpose could “be inferred from the totality of the relevant facts.”²⁵¹ Taken together, these statements suggest the record need not contain an overabundance of evidence to push discriminatory impact into discriminatory purpose and thus trigger strict scrutiny. This Comment suggests that evidence of entrenchment, combined with evidence of discriminatory impact, is sufficient to trigger strict scrutiny.

C. Facial Challenges

Although *Crawford* did not settle the proper interpretation of *Burdick*, what Justice Stevens made clear is that a facial challenge, where the record contains little or no evidence of an actual harm, has little chance of prevailing.²⁵² State laws carry with them a presumption of constitutionality.²⁵³ As a result of this presumption, a state need only offer legitimate interests as justification for the law—without necessarily pro-

requirements of the police training program.” *Id.* at 251-52. Further, this contention “was supported by a validation study, as well as by other evidence of record.” *Id.* Under intermediate scrutiny, Test 21 would comply with the requirement of a necessary regulation to effectuate an important state interest.

246. *Id.* at 242.

247. *See id.* at 232-33.

248. *See Schultz, supra* note 13, at 501-03.

249. *Davis*, 426 U.S. at 254 (Stewart, J., concurring in part and concurring in the judgment).

250. *Id.* at 242.

251. *Id.*

252. *See Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621-22 (2008); *see also Sabri v. United States*, 541 U.S. 600, 609 (2004) (“We add an afterword on Sabri’s technique for challenging his indictment by facial attack on the underlying statute, and begin by recalling that facial challenges *are best when infrequent.*”) (emphasis added); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (“We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.”) (citation omitted).

253. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969).

viding any evidence.²⁵⁴ A plaintiff, on the other hand, must present evidence that an actual harm has occurred.²⁵⁵ This principle was evident in *Washington State Grange v. Washington State Republican Party*,²⁵⁶ a case decided approximately one month prior to *Crawford*, where the Court denied a facial challenge to Washington's Initiative 872 ("I-872").²⁵⁷

The Washington State Republican Party ("Party") filed suit almost immediately after implementation of I-872 seeking to have the law declared facially invalid.²⁵⁸ The Party believed that the candidates' party designations on the ballot would confuse voters.²⁵⁹ It argued that voters would assume a candidate was the nominee of the party he designated on the ballot, or at least believe the party supported the candidate, thus violating their associational rights.²⁶⁰ Similar to *Crawford*, in *Washington State Grange* the Court would have to speculate as to the burden caused by the new ballot. In concluding that I-872 was constitutional,²⁶¹ the Court acknowledged that it was *possible* voters could be confused but there was "no evidentiary record against which to assess [the Party's] assertions that voters [would] be confused."²⁶²

Prior to reaching its decision, the Court laid out significant obstacles to overcome in order to prevail on a facial challenge.²⁶³ The Court noted that it must resist the temptation to "speculate about hypothetical or imaginary cases."²⁶⁴ The following passage is of particular importance in understanding Justice Stevens's opinion in *Crawford*:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the funda-

254. See Posting of Rick L. Hasen to FindLaw, http://writ.lp.findlaw.com/commentary/20080326_hasen.html#bio (Mar. 26, 2008).

255. *Id.*

256. 128 S. Ct. 1184 (2008).

257. *Id.* at 1187 ("The People's Choice Initiative of 2004, or Initiative 872 (I-872), provides that candidates for office shall be identified on the ballot by their self-designated party preference; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election.") (internal quotation marks omitted).

258. *Id.* at 1189.

259. *Id.* at 1193.

260. *Id.*

261. *Id.* at 1195.

262. *Id.* at 1194. The Court further noted the record did not contain the new style of ballot because they had not been created yet; therefore, there was no way to determine how the party preference would appear on the ballots. *Id.*

263. *Id.* at 1190-91 ("[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid'" (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see also *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008) ("Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

264. *Wash. State Grange*, 128 S. Ct. at 1190 (internal quotation marks omitted).

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mental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.²⁶⁵

In *Crawford*, Justice Stevens stated that the Court's reasoning in *Washington State Grange* applied "with added force to the arguments advanced by [the] petitioners in these cases."²⁶⁶ Like the plaintiffs in *Washington State Grange*, the plaintiffs in *Crawford* filed suit shortly after SEA 483 was enacted.²⁶⁷ In *Crawford*, the District Court,²⁶⁸ the Seventh Circuit,²⁶⁹ and the Supreme Court²⁷⁰ all stressed that the record contained no evidence that any voter would be unable to vote due to the photo ID law. The lack of evidence proved fatal in both cases.²⁷¹

Professor Richard Hasen suggested the strong stance on facial challenges in *Washington State Grange* set the stage for the more controversial issue of the voter photo ID law in *Crawford*.²⁷² However, the Court did state that it recognized the importance of the voter photo ID law cases.²⁷³ It is hard to imagine that the Court granted certiorari with the idea that it would simply deny the plaintiffs facial challenge, especially considering the District Court and Court of Appeals had already done that.²⁷⁴ A more plausible explanation is that the plurality opinions could not agree on an interpretation of *Burdick*. Disposing of the case via the facial challenge kept the Court from pronouncing an interpretation of

265. *Id.* at 1191 (internal brackets omitted) (internal citations omitted) (internal quotation marks omitted).

266. *Crawford*, 128 S. Ct. at 1622.

267. *Id.* at 1614.

268. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006), *aff'd sub nom.* *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610, 1623 (2008).

269. *Crawford*, 472 F.3d at 952.

270. *Crawford*, 128 S. Ct. at 1622-23.

271. *Id.* at 1615 ("[T]he District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute . . ."); *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1193 (2008) ("But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion.").

272. Hasen, *supra* note 254. Professor Hasen calls this the "unfair double standard" because the state can justify its election law by "merely positing—not proving—the existence of voter confusion or another interest. However, if voters (or groups) want to challenge a law, then they need to come forward with actual evidence of confusion or another burden. For them to posit the risk of confusion is not enough." Hason, *supra* note 254; *see also* Schultz, *supra* note 13, at 521–22.

273. *Crawford*, 128 S. Ct. at 1615.

274. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 845 (S.D. Ind. 2006), *aff'd sub nom.* *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610 (2008); *Crawford*, 472 F.3d at 954.

Burdick that Chief Justice Roberts and Justices Stevens and Kennedy could not agree with.

It is possible the outcome in *Crawford* would have been drastically different had the plaintiffs produced one person that was unable to vote due to SEA 483.²⁷⁵ The difference in the record between *Crawford* and *Burdick* is that in *Burdick* there was evidence of an actual harm to Alan Burdick, a voter who claimed he would not be able to vote for the candidate of his choice due to Hawaii's ban on write-in voting.²⁷⁶ As previously noted, Justice Kennedy, joined by Justice Stevens, authored the dissent in *Burdick*.²⁷⁷ In *Crawford*, Justice Stevens, joined by Justice Kennedy, stressed the significance of the absence of a single voter who would be harmed by the photo ID law.²⁷⁸ Similarities exist when comparing the analysis of Justice Kennedy's dissent in *Burdick* with the analysis of Justice Souter's dissent in *Crawford*.²⁷⁹ Both dissents found a significant burden to exist as to a certain group of voters and that the asserted state interests were lacking. Regardless of the facial challenge, it would seem possible that both Justices Stevens and Kennedy would have joined with Justice Souter in *Crawford* had there been at least one voter who had been denied the right to vote as a result of the photo ID law.

Justice Stevens's disposition of *Crawford* by way of the facial challenge was correct based on the reasoning in *Washington State Grange*, although it may have only delayed the inevitable as future plaintiffs now know they must bring an "as applied" challenge²⁸⁰ and be able to prove they have suffered an actual harm. The downside, unfortunately, is

275. *Crawford* was a 6-3 decision upholding SEA 483; however, provided the record had shown evidence of an actual harm and Justices Stevens and Kennedy adhered to their reasoning in *Burdick v. Takushi*, 504 U.S. 428, 442-450 (1992) (Kennedy, J., dissenting), it is possible the outcome of the case would have been 6-3 or 5-4 (depending on Chief Justice Roberts's vote) holding SEA 483 unconstitutional. The facial challenge would seemingly be a non-issue in such a case because Justice Scalia expressed his dissatisfaction with the lead opinion resolving the case in such a manner, *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion), and the dissenting opinions did not discuss facial challenges, *id.* at 1627-43 (Souter, J., dissenting); *id.* at 1643-45 (Breyer, J., dissenting).

276. *See Burdick*, 504 U.S. at 430.

277. *Id.* at 442 (Kennedy, J., dissenting).

278. *Crawford*, 128 S. Ct. at 1621.

279. *Compare Burdick*, 504 U.S. at 448-450 (Kennedy, J., dissenting), *with Crawford*, 128 S. Ct. at 1636-1643 (Souter, J., dissenting). The result of each dissent is not surprising as both used the flexible standard of *Anderson* in finding a substantial burden on the right to vote and thus taking a close look at the purported state interests.

280. 16 C.J.S. *Constitutional Law* § 187 (2008) ("An 'as applied' challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations."); *see also* *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.")

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someone will have been denied his or her fundamental right to vote in order for these cases to be filed.²⁸¹

CONCLUSION

The standard articulated many years ago in *Anderson* was an effort at compromise between the fundamental right to vote and the state's constitutional right to manage elections. The standard was ambiguous because it was open to different interpretations resulting in unpredictable outcomes. In *Crawford*, the Court had the opportunity to clarify *Anderson* and *Burdick* in order to provide guidance to the lower courts that may face multiple lawsuits after the 2008 presidential election. Unfortunately, the *Crawford* Court did not provide this guidance. Justice Scalia fashioned a rule that would remove the ambiguity and unpredictability of *Anderson*, while eliminating political ideology from judicial decisions. However, this rule would also allow greater opportunity for political party entrenchment through the disproportionate burden of groups of voters that share similar political ideologies.

Therefore, this Comment suggests a rule similar to that of Justice Scalia's but allows for adjustments to be made to account for evidence of entrenchment or discriminatory effects. The existence of such evidence would trigger an intermediate level of scrutiny in place of the baseline differential review. Further, the existence of evidence suggesting both entrenchment and discriminatory effect would trigger strict scrutiny. This rule would eliminate the ambiguity and unpredictability of *Anderson* and *Burdick*, account for entrenchment and discriminatory effect, curtail political ideology in judicial decisions, and allow states to manage election procedures.

The Court's disfavor of facial challenges provided guidance to litigants in terms of what type of suit to file in the future. The next voter photo ID case that comes before the Court will be an as-applied challenge. The Court must then make hard decisions concerning the correct interpretation of *Burdick* and measuring the magnitude of the burden on the right to vote. It is this Comment's suggestion that the Court adopt a rule that requires an intermediate level of scrutiny where there is evidence of entrenchment or discriminatory effect and strict scrutiny where evidence of both are present.

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281. See Tokaji, *supra* note 193.

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