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CRAWFORD V. MARION COUNTY ELECTION BOARD: A PICTURE IS WORTH A THOUSAND WORDS AND EXACTLY ONE VOTE

BRIAN C. CROOK*

> There is no more fundamental right accorded to United States citizens by the Constitution than the right to vote. The unimpeded exercise of this right is essential to the functioning of our democracy. Unfortunately, history has not been kind to certain citizens in protecting their ability to exercise this right. . . . [D]isenfranchised groups—minorities, the poor, the elderly and the disabled—are most affected by photo ID laws.
>
> – President Barack Obama, speaking on the Senate floor in opposition to a voter identification requirement (May 24, 2006).

I. INTRODUCTION

In *Crawford v. Marion County Election Board*,[1] the United States Supreme Court upheld an Indiana statute requiring all voters to present a form of government-issued photo identification ("ID") before casting a ballot.[2] Despite the various burdens the law places on people who lack proper ID, the Court found the law to be neutral and nondiscriminatory.[3] Specifically, the Court determined that the State's interests in combating voter fraud and administering fair elections outweighed the petitioners'[4] interest in casting a ballot freely.[5]

The Court made this determination notwithstanding the State's inability to provide actual evidence of in-person voter fraud in the state of Indiana.[6] Indeed, instead of requiring the State to present concrete,

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1. 128 S. Ct. 1610 (2008).
2. *Id.* at 1615.
3. *Id.* at 1624.
4. *See infra* Part II. The petitioners included the Indiana Democratic Party, the Marion County Democratic Central Committee, two elected officials, and several nonprofit organizations.
5. *Crawford*, 128 S. Ct. at 1623.
6. *See infra* Part V.A.

particular findings of voter fraud, the Court accepted the mere *possibility* of in-person voter fraud as sufficient justification to limit access to the polls.[7] In doing so, the Court misapplied the *Burdick*[8] balancing test, which requires a court to weigh the character and magnitude of the burden on the voter with the "*precise interests* put forward by the State as justification for the burden . . . ."[9] The Court recognized the travel costs and fees necessary to obtain a federal or state photo ID, but did not find these obstacles to be substantial.[10] As a result, the Court seriously disenfranchised the poor, elderly, and disabled, all of whom will be forced to overcome significant hurdles to vote in the next Indiana election.[11] Perhaps most importantly, the Court also failed to adequately consider many less restrictive alternatives that are readily available and have already been implemented in states across the nation.[12]

II. THE CASE

In 2005, the Indiana legislature passed a voter ID law, Senate Enrolled Act ("SEA") 483,[13] which requires voters to present a government-issued photo ID before casting a ballot on Election Day.[14] Following the enactment of SEA 483, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit in the Federal District Court for the Southern District of Indiana against the Indiana officials responsible for the law's enforcement,[15] claiming that the voter ID law is an unconstitutional burden on the right to vote as

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7. *Crawford*, 128 S. Ct. at 1618–19.
8. *See infra* Part III.C.
9. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added); *see infra* Part V.A.
10. *Crawford*, 128 S. Ct. at 1623.
11. *Id.* at 1622–23; *see infra* Part V.B.
12. *See infra* Part V.C.
13. 2005 Ind. Acts 2005.
14. *Id.* SEA 483 states in relevant part:

> 'Proof of identification' refers to a document that satisfies all the following: (1) The document shows the name of the individual to whom the document was issued, and the name conforms to the name in the individual's voter registration record. (2) The document shows a photograph of the individual to whom the document was issued. (3) The document includes an expiration date, and the document: (A) is not expired; or (B) expired after the date of the most recent general election. (4) The document was issued by the United States or the state of Indiana. *Id.*

15. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782–83 (S.D. Ind. 2006).

protected by the First[16] and Fourteenth[17] Amendments of the U.S. Constitution.[18] Various civil rights organizations and politicians also joined the suit, all of whom represented the interests of elderly, disabled, poor, and minority voters.[19] The plaintiffs and the cases were consolidated throughout.[20]

Beginning in the Federal District Court for the Southern District of Indiana, both the plaintiffs and the State of Indiana filed motions for summary judgment.[21] The district court, applying the *Burdick* standard, granted the State's motion for summary judgment on the basis that the photo ID requirement did not impose a severe burden on the right to vote.[22] The court held that there was no need to subject the law to strict scrutiny[23] and that the State of Indiana had an important regulatory interest in combating voter fraud, which was sufficient to justify the "reasonable, nondiscriminatory restrictions" contained in the statute.[24]

On appeal before the Court of Appeals for the Seventh Circuit, a divided panel affirmed the district court's decision.[25] Writing for the

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16. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

17. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

18. *Rokita*, 458 F. Supp. 2d at 782–84. Specifically, the plaintiffs argued that the law "substantially burdens the fundamental right to vote, impermissibly discriminates between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new a material requirement for voting, and was not justified by existing circumstances or evidence." *Id.* at 783–84.

19. 128 S. Ct. 1610, 1614 (2008).

20. Edward B. Foley, Crawford v. Marion County Election Board: *Voter ID, 5-4? If So, So What?*, 7 ELECTION LAW J. 63, 66 (2008).

21. *Rokita*, 458 F. Supp. 2d at 782.

22. *Id.* at 825.

23. *Id.* For an explanation of how the Supreme Court applies different levels of scrutiny (i.e., strict scrutiny, intermediate scrutiny, and rational basis review), *see* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." (citations omitted)). For further discussion, see *infra* note 47 and accompanying text.

24. *Rokita*, 458 F. Supp. 2d at 826 (citation omitted).

25. Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).

majority, Judge Richard Posner concluded that a photo ID was necessary to prevent voter fraud.[26] In reaching this conclusion, the majority rejected the argument that the law should be strictly scrutinized, instead finding that the burden on voters was slight.[27] According to Judge Posner, whatever minimal burden existed was offset by the benefit of reducing the risk of fraud.[28] In a dissenting opinion, Judge Terence Evans argued that the law should have been struck down as an undue burden on the fundamental right to vote.[29] Following the Seventh Circuit's affirmation, the plaintiffs filed a petition for rehearing; however, a majority of the judges voted to deny the petition.[30]

III. LEGAL BACKGROUND

In a voting rights case, a court's primary task is to choose the appropriate standard with which to measure the extent of an individual's right to vote. Although the Supreme Court has determined that the right to vote is a fundamental right,[31] it has also concluded that states may regulate and restrict access to the polls in order to administer fair and legitimate elections.[32] In *Crawford*, the Court chose to apply the *Burdick* balancing standard to resolve the competing interests, an approach that weighs the character and magnitude of the asserted injury against a state's justifications for the injury imposed.[33]

26. *Id.* at 953.
27. *Id.* at 952.
28. *Id.* at 952–53.
29. *Id.* at 954 (Evans, J., dissenting). Judge Evans opened his opinion this way:

    Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny–or at least . . . something akin to 'strict scrutiny light'–and strike it down as an undue burden on the fundamental right to vote. *Id.*
30. Crawford v. Marion County Election Bd., 484 F.3d 436, 437 (7th Cir. 2007).
31. *See infra* Part III.A.
32. *See infra* Part III.B.
33. *See infra* Part III.C.

A. The Right to Vote as a Fundamental Right

The Supreme Court has long recognized that the right to vote is a fundamental right under the Equal Protection Clause[34] of the U.S. Constitution.[35] As early as 1886, in *Yick Wo v. Hopkins*,[36] the Court described the "political franchise of voting" as a "fundamental political right, because [it is] preservative of all rights."[37] Nearly eighty years later, in 1964, Chief Justice Earl Warren reiterated this notion in *Reynolds v. Sims*:[38]

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[39]

The Court added in *Reynolds* that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and restrictions on that right strike at the heart of representative government."[40] Similarly, the right to vote has been addressed in many of the Amendments to the Constitution, which together have expanded the right to vote to virtually all adult citizens.[41]

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34. U.S. CONST. amend. XIV, § 1 (The Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

35. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

36. 118 U.S. 356 (1886).

37. *Id.* at 370.

38. *Reynolds*, 377 U.S. 533 (1964).

39. *Id.* at 561–62 (Warren, C.J.).

40. *Id.* at 555.

41. U.S. CONST. amend. XV, § 1 (The Fifteenth Amendment forbids discrimination in the context of voting on the basis "of race, color, or previous condition of servitude."); U.S. CONST. amend. XIX (The Nineteenth Amendment forbids discrimination in the context of voting "on account of sex."); U.S. CONST. amend. XXIV, § 1 (The Twenty-fourth Amendment prohibits "any poll tax" on persons before they can vote); U.S. CONST. amend. XXVI, § 1(The Twenty-sixth Amendment grants the right to vote to all citizens over the age of eighteen).

B. Determining the Standard with which to Analyze an Individual's Right to Vote

It was not until *Harper v. Virginia Board of Elections*[42] in 1966 that the Court first announced a fixed standard to determine whether a qualification on the right to vote would be deemed constitutional.[43] In *Harper*, the Court struck down a Virginia statute that required voters to pay a poll tax of $1.50.[44] The Court concluded that a state violates the Equal Protection Clause of the Fourteenth Amendment whenever "it makes the affluence of the voter or payment of any fee an electoral standard."[45] The Court added: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce . . . invidious discrimination that runs afoul of the Equal Protection Clause."[46]

The *Harper* Court, however, did not base its decision on a specific level of scrutiny.[47] It was not until three years later, in *Kramer v. Union Free School District*,[48] that the Court made it clear that an exacting standard was necessary to protect the right to vote.[49] In *Kramer*, a bachelor who lived with his parents challenged a New York law which stated that voters for school district elections must own taxable property in the district or be parents of one or more children enrolled in the school district.[50] The Court applied strict scrutiny to

42. 383 U.S. 663 (1966).

43. *Id.* at 670.

44. *Id.*

45. *Id.* at 666. In addition, the Court noted that "[v]oter qualifications [should] have no relation to wealth" and that "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 665–66.

46. *Id.* at 668 (citation omitted).

47. As discussed earlier (*see supra* note 23), the Supreme Court has constructed three levels of scrutiny to determine whether a State law is valid under the Equal Protection Clause. The general rule is that legislation is presumed to be valid if the classification drawn by the statute is rationally related to a legitimate state interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This general rule explains the first, low level of scrutiny—the rational basis test—and it offers states wide latitude in legislating (usually social or economic) issues. The second level of scrutiny is referred to as intermediate scrutiny. *Id.* A court will use intermediate scrutiny if a law categorizes on the basis of gender. *Id.* In such a case, the law is unconstitutional unless it is substantially related to an important government interest. *Id.* Finally, under strict scrutiny, the toughest of the three levels of scrutiny, a law is unconstitutional if it categorizes on the basis of a "suspect class" like race or national origin, or infringes a fundamental right, unless the law is narrowly tailored to serve a compelling government interest. *Id.* Under strict scrutiny, a state law is almost always struck down as unconstitutional.

48. 395 U.S. 621 (1969).

49. *Id.* at 626.

50. *Id.* at 623–24.

invalidate the law and found that it was not narrowly tailored to serve the State's interest.[51] The *Kramer* Court held that limitations on voting are subject to "exacting judicial scrutiny"[52] and must "further a compelling state interest."[53]

Unfortunately, the *Kramer* Court's strict reinterpretation of the *Harper* standard created tension with the states' constitutionally protected responsibility to administer elections.[54] Although an individual's right to vote usually invokes the greatest of constitutional protections, states also have an interest in conducting legitimate elections. This state interest invariably impedes an individual's right to vote.[55] For example, in *Marston v. Lewis*[56] the Court upheld an Arizona law that involved a fifty-day durational residency requirement.[57] The majority agreed with the State's argument that the law, which required voters to reside in the state for at least fifty days, was an "amply justifiable legislative judgment . . . necessary to promote the State's important interest in accurate voter lists."[58] In reaching this conclusion, the Court never addressed which level of scrutiny it used to make its decision.[59] It is clear, however, that the Court did not use strict scrutiny since it did not analyze whether the law was narrowly tailored to serve a governmental interest. The *Marston* standard was noticeably more relaxed than the *Harper* standard. In fact, the Court's deference to the legislature's judgment was most consistent with the rational basis test.[60]

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51. *Id.* at 632–33.

52. *Id.* at 628.

53. *Id.* at 633.

54. Not only does state sovereignty require that state elections be governed by state law, but Article I, Section 4 of the U.S. Constitution grants mutual authority to the federal government and the states to administer federal elections: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." As a result, the Court has recognized that States retain the power to regulate their own elections. *See e.g.*, Sugarman v. Dougall, 413 U.S. 634, 647 (1973); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

55. *See* Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

56. 410 U.S. 679 (1973).

57. *Id.* at 679–80.

58. *Id.* at 681.

59. *Id.*

60. *Id.* The Court exercised a level of scrutiny close to rational basis by accepting the fifty-day residency requirement. The Court stated that the requirement was "tied to the closing of the State's registration process at 50 days prior to elections and reflects a state legislative judgment that the period is necessary to achieve the State's legitimate goals." *Id.* at 680.

C. The Burdick Balancing Approach

As a result of these conflicting standards, for two decades the Court alternated between a strict scrutiny standard and a lower, more deferential standard resembling the rational basis test.[61] The Court finally addressed this conflict in *Anderson v. Celebrezze*.[62] In *Anderson*, the Court discussed the inevitable burdens placed on individual voters when a state attempts to administer a fair election: "[W]hether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, [an election code] inevitably affects—at least to some degree—the individual's right to vote . . . ."[63] Recognizing that states need some degree of latitude in administering fair elections, the *Anderson* Court rejected the argument that every voting regulation needs to be strictly scrutinized; instead, the Court created a more flexible, balancing approach.[64] The new balancing approach weighed a state's interest in administering fair elections with the burdens placed on a group of voters.[65] Under this approach, the Court no longer needed to adopt a specific level of scrutiny when analyzing an election law; as stated in *Anderson*, a state's election laws "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions."[66]

Finally, in *Burdick v. Takushi*,[67] nine years after the Court's decision in *Anderson*, the Court reformulated its balancing approach into the standard used today when analyzing the constitutionality of a state election law:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate" against "the precise interests put forward by

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61. *Compare* City of Phoenix v. Kolodziejski, 399 U.S. 204, 205, 213 (1970) (applying a heightened level of scrutiny under *Kramer* to strike down the law because the Court had not "been shown that the 14 States now restricting the franchise have unique problems that make it necessary to limit the vote to property owners") *with* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68–70 (1978) (applying a more deferential standard in holding that because plaintiffs resided within police jurisdiction of Tuscaloosa but outside city limits, the law only needed to "bear some rational relationship to a legitimate state purpose").

62. 460 U.S. 780 (1983).

63. *Id.* at 788.

64. *Id.*

65. *Id.* at 789.

66. *Id.*

67. 504 U.S. 428 (1992).

> the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[68]

The *Burdick* Court emphasized that although voting rights are fundamental, not all restrictions limiting access to the polls should be deemed unconstitutional.[69] Only when voting rights are subjected to severe restrictions should the regulation be "narrowly drawn to advance a state interest of compelling importance."[70] On the other hand, if the regulation imposes only "reasonable, nondiscriminatory restrictions" upon those rights, then the State's important regulatory interests are generally sufficient to justify the restrictions.[71] In other words, the *Burdick* standard allows courts to weigh the law's burden on voters with the importance of the state interest at stake: If the burden is great and the state interest only slight, then the law will most likely be struck down;[72] however, if the burden is light and the state interest weighty, then the law will most likely be upheld.[73]

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68. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789 (1983)). Although this balancing test was originally created by the *Anderson* court, because the *Burdick* Court clarified and expounded upon the test, today, the balancing test is referred to as the *Burdick* balancing test.

69. *Id.*

70. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)). Unfortunately, the Supreme Court has not been very explicit in determining when an election law imposes a severe burden on the right to vote. As a result, courts tend to differ on what qualifies as "severe," instead resorting to "judicial 'eyeballing'" to determine the severity of election laws. Muhammad At-Tauhidi, *Access v. Integrity: Determining the Constitutionality of Voter ID Laws Under* Anderson v. Celebrezze, 17 Temp. Pol. & Civ. Rts. L. Rev. 215, 233 (2007).

71. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788 (1983)).

72. For examples of cases determining the burden to be "severe," see Common Cause/Georgia v. Billups, 439 F.Supp. 2d 1294 (N.D. Ga. 2006) (holding that the law presented a severe restriction on the right to vote based primarily on the large number of registered Georgia voters who did not already have a government-issued photo ID); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (en banc) (finding that forcing ID holders to pay the fees associated with getting a state ID placed severe burdens on the right to vote and thus the law would be subjected to strict scrutiny).

73. *Burdick*, 504 U.S. at 434. For examples of state courts applying the *Burdick* test and determining the burden to be not "severe," *see* Colorado Common Cause v. Davidson, No. 04CV7709, 2004 WL 2360485, at *12 (D. Colo. Oct. 18, 2004) (holding that the law was unlikely to constitute a "severe" intrusion on voting rights because so many forms of photo and non-photo ID were accepted); League of Women Voters v. Blackwell, 340 F. Supp. 2d 823 (N.D. Ohio 2004) (the Ohio court found that the voter ID law was not "severe," and thus unlikely to affect the small number of voters who (a) were voting for the first time, (b) had registered by mail, and (c) could neither produce one of the numerous forms of acceptable documentary proof nor orally provide a social security number).

IV. THE COURT'S REASONING

The plurality in *Crawford* affirmed the Seventh Circuit's ruling that the evidence in the record was insufficient to support a broad attack on the validity of SEA 483.[74] To justify this conclusion, Justice John Paul Stevens, writing for the plurality, endorsed the *Burdick* test, which requires a court to weigh the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule."[75] Justice Stevens rejected a rigid litmus test for measuring the severity of the burden but instead endorsed the flexible standard affirmed in *Burdick.*[76] As interpreted by Justice Stevens, the *Burdick* test demands that even a slight burden on voting rights must "be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[77]

The plurality recognized four relevant state interests that could justify the burden placed on the right to vote: 1) the need to modernize elections; 2) the need to protect against voter fraud; 3) the need to address bloated voter rolls; and 4) the need to protect voter confidence in the electoral process.[78] Given these four state interests, the Court refused to accept the petitioners' facial attack on SEA 483.[79]

The *Crawford* Court first addressed the State's interest in modernizing election procedures. The Court recognized that two recently enacted federal statutes, the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA), both contain provisions that allow photo ID to be used in establishing a voter's qualifications.[80] Moreover, HAVA requires that every state maintain a computerized database of all registered voters.[81] According

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

75. *Id.* at 1616.

76. *Id.* There is debate among the Justices as to whether the *Burdick* test did anything more than affirm the balancing standard as laid out in *Anderson v. Celebrezze*. Whereas the plurality in *Crawford* believes that *Burdick* effectively adopted the *Anderson* balancing test at face value, Justice Antonin Scalia insists that the *Burdick* Court "forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule." *Id.* at 1624 (Scalia, J., concurring). According to Justice Scalia, the *Burdick* standard creates a two-tiered analysis. *Id.* First, a court must ask if the burden has a severe impact on voters generally. *Id.* If the burden is severe on the majority of voters, then a court should apply strict scrutiny. *Id.* at 1625. If the burden is generally non-severe and nondiscriminatory, then the Burdick standard becomes deferential to "important regulatory interests." *Id.* In other words, it is Justice Scalia's view that the *Burdick* standard informs, rather than replaces, the levels of scrutiny.

77. *Id.* (quoting Norman, 502 U.S. at 288–89 (1992)).

78. *Id.* at 1616–20.

79. *Id.* at 1624.

80. *Id.* at 1617–18.

81. *Id.* at 1617.

to the plurality, Congress's attempt to modernize elections through HAVA conveys an additional intent to stamp out voter fraud with more definite ID requirements.[82] The Commission on Federal Election Reform confirmed the plurality's stance, stating that "[p]hoto identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important."[83]

Second, the Court discussed the importance of preventing voter fraud. Although the record did not contain any evidence of actual in-person voter fraud in Indiana,[84] the Court nevertheless maintained that the mere possibility of voter fraud creates a legitimate state interest.[85] The Court stated that "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."[86]

Third, Justice Stevens accepted the State's argument that SEA 483 deals with the inflated voter roll problem effectively.[87] To support this proposition, the Court referred to a newspaper article that described Indiana's bloated voter rolls; the article stated that the rolls include names of persons "who had either moved, died or were not eligible to vote because they had been convicted of felonies."[88] The Court reinforced this position by noting the unusually large number of lawsuits brought in Indiana by the Federal Government alleging violations of NVRA.[89] The Court concluded that, despite the fact that the inaccurate inflation of registration lists was probably due to Indiana's own negligence, the inflated voter roll problem nevertheless provided a "neutral and nondiscriminatory reason supporting the State's decision to require photo ID."[90]

Finally, the Court recognized a fourth State interest justifying the use of photo ID for the purpose of voter registration: the State's interest in protecting public confidence in the democratic process. Although, as the Court noted, this interest is intimately related to the State's interest in preventing voter fraud, the Court considered this

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82. *Id.* at 1618.

83. *Id.* (quoting AMERICAN UNIVERSITY, COMMISSION ON FEDERAL ELECTION REFORM, REPORT: BUILDING CONFIDENCE IN U.S. ELECTIONS § 2.5, APP. 136–37 (CARTER-BAKER REPORT)) [hereinafter CARTER-BAKER REPORT].

84. *Crawford*, 128 S. Ct. at 1619. SEA 483 addresses only "in-person voter impersonation at polling places." *Id.* at 1618–19.

85. *Id.* at 1619.

86. *Id.*

87. *Id.* at 1619–20.

88. *Id.*

89. *Id.* at 1620.

90. *Id.*

interest separately because of its independent effect on participation in representative government.[91]

After discussing the various state interests associated with a photo ID requirement, the Court addressed the possible burdens that could be placed on potential Indiana voters.[92] The Court first dismissed the burdens associated with losing one's ID card or perhaps looking different from the picture in the photo ID.[93] Instead, the Court stated that the relevant burdens are those imposed on eligible voters who do not currently possess a valid photo ID under the requirements of SEA 483.[94] With regard to this subset of voters, the Court concluded that "the inconvenience of making a trip to the [Indiana Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . ."[95]

In addition, the Court noted that Indiana, like many other states, provides free voter registration cards. Yet, the Court also noted that one can obtain a "free" ID card only by presenting at least one "primary" document.[96] Most likely, this "primary" document will be a birth certificate, a copy of which can cost anywhere from three dollars to twelve dollars.[97] Despite the fact that the Court mentioned specifically that "a tax or a fee to obtain a new photo identification" would not "save the statute under our reasoning," the Court did not equate the fee necessary to obtain a birth certificate with the fee necessary to obtain new photo ID.[98] Thus, the Court concluded that a photo ID requirement does not place a significant burden on the average Indiana voter.[99]

The Court did admit that the statute may place a heavier burden on a limited number of persons: in particular, the elderly from out-of-state and the poor, who may find it difficult to obtain a birth certificate; the homeless; and people with a religious objection to being photographed.[100] The Court responded to the burdens placed on these particular persons by noting that "voters without photo identification may cast provisional ballots that will ultimately be

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91. *Id.*
92. *Id.* at 1620–21.
93. *Id.* at 1620.
94. *Id.*
95. *Id.* at 1621.
96. *Id.*
97. *Id.*
98. *Id.* at 1620–21.
99. *Id.* at 1621.
100. *Id.*

counted."[101] The Court pointed out that these voters would have to travel to the circuit court clerk's office within ten days to sign an affidavit, but the Court concluded that this additional burden did not pose a constitutional problem.[102]

Justice Stevens concluded the plurality opinion by noting that the petitioners did not provide any "concrete evidence of the burden imposed on voters who currently lack photo identification."[103] More importantly, the plurality maintained, the record does not contain any reliable data "about the difficulties faced by either indigent voters or voters with religious objections to being photographed."[104] Given that the lawsuit concerned a broad attack on the constitutionality of SEA 483, which, if successful, would invalidate the statute in its entirety, the Court concluded that the petitioners' claim must fail.[105] Ultimately, the plurality concluded that the statute did not impose "excessively burdensome requirements on any class of voters'"; therefore, SEA 483 could not be deemed invalid.[106]

In a concurring opinion, joined by Justice Thomas and Justice Alito, Justice Scalia maintained that the petitioners' premise that SEA 483 may impose a special burden on some voters is irrelevant, since the law's overall burden is "minimal and justified."[107] He agreed that the Court should follow the approach set out in *Burdick v. Takushi*, but he did not interpret the *Burdick* test to be a mere balancing approach. Instead, Justice Scalia stated that the *Burdick* test involves a "deferential 'important regulatory interests' standard for benign, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote."[108] In other words, under Scalia's view, whether an election law is valid depends first and foremost on the severity of the burden on the voter.[109] If the burden is severe, then strict scrutiny ought to be applied and the law must be narrowly tailored to serve a compelling government interest.[110] If the burden is ordinary and widespread and thus benign, then the Court should apply a deferential standard that will most likely grant validity to the statute

101. *Id.*
102. *Id.*
103. *Id.* at 1622.
104. *Id.*
105. *Id.* at 1621.
106. *Id.* at 1623 (citing Storer v. Brown, 415 U.S. 724, 738 (1974)).
107. *Id.* at 1624 (Scalia, J., concurring).
108. *Id.*; *accord* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992).
109. *Id.* at 1624.
110. *Id.*

at issue.[111] Unlike Justice Stevens' view that slight burdens still need to be justified by legitimate state interests under a flexible balancing standard, Justice Scalia argued that an election law that places a minimal burden on a small number of people should be granted deferential treatment and need not be overturned.[112] Using this approach, Justice Scalia concluded that the burdens were not severe, and that the State's interests were "sufficient to sustain that minimal burden."[113] With Justice Scalia, Thomas and Alito joining the plurality opinion, Indiana's SEA 483 was held to be valid by a 6-3 vote.[114]

Justice Souter, in a dissenting opinion joined by Justice Ginsburg, maintained that the statute was unconstitutional under the *Burdick* balancing test.[115] Quoting from *Burdick*, Justice Souter stated that "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate, or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."[116] Like the plurality, Justice Souter agreed that *Burdick* set up a balancing test to replace the rigid analysis under the three levels of scrutiny.[117] However, under the *Burdick* balancing test, Justice Souter believed that the plurality inadequately assessed the magnitude of the burden placed on voters in Indiana.[118]

Justice Souter outlined four distinct burdens that the Indiana law imposes on likely voters: 1) the travel costs and fees necessary to obtain a valid form of photo ID; 2) the unduly burdensome provisional ballot system that requires voters to travel long distances to their circuit court clerk's office; 3) the likely affect that the law will have on approximately 43,000 voting age residents that lack proper photo ID; and 4) the fact that compared to other states that effectively administer fair election procedures, the law—as the most restrictive voting requirement in the country—unnecessarily retards the right to vote.[119] Given these diverse burdens, Justice Souter maintained that SEA 483

111. *Id.*

112. *Id.* at 1627.

113. *Id.*

114. *Id.* at 1624.

115. *Id.* at 1627 (Souter, J., dissenting).

116. *Id.*

117. *Id.* at 1628 ("Given the legitimacy of interests on both sides, we have avoided pre-set levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.").

118. *Id.*

119. *Id.* at 1628–35.

places "nontrivial burdens" on the voting rights of tens of thousands of Indiana citizens.[120]

Justice Souter then proceeded to take a closer look at the State's claimed interests as discussed in the lead opinion.[121] Addressing each of the four interests individually—the need to modernize election procedures; the need to combat voter fraud; the need to address bloated voter rolls; and the need to protect voter confidence in the integrity of the electoral process—Justice Souter concluded that the State's interests did not justify the unnecessary restriction on voting.[122] He emphasized that the State proffered "no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide. . . ."[123] Justice Souter concluded that the Indiana Voter ID Law was 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."[124]

Justice Breyer also wrote a dissenting opinion, noting that the Court failed to adequately consider alternative methods of registration that are superior to Indiana's current law.[125] To support this position, Justice Breyer quoted the Carter-Baker Commission,[126] an extensive report on federal election reform, consisting of eighty-seven recommendations to help improve future elections.[127] The report conditioned its recommendations upon "the States' 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."[128] Justice Breyer contrasted Indiana's system to the systems in Florida and Georgia, two states that have implemented photo ID requirements far less restrictive than Indiana's.[129] As a result, Justice Breyer concluded that Indiana's law

120. *Id.* at 1627.

121. *Id.* at 1635–43.

122. *Id.*

123. *Id.* at 1642. Justice Souter continued: "Without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo identification requirements in the country." *Id.*

124. *Id.* at 1643.

125. *Id.* at 1643–45 (Breyer, J., dissenting).

126. CARTER-BAKER REPORT, *supra* note 83.

127. *Id.*

128. *Crawford*, 128 S. Ct. at 1644 (quoting CARTER-BAKER REPORT, *supra* note 83, at App. 139, 140).

129. *Id.*

placed a disproportionate burden on those voters without valid photo IDs.[130]

V. ANALYSIS

The Court addressed the petioners' voting-rights claim by applying the appropriate *Burdick* balancing standard, but the Court gave too much weight to the State's vague allegations of fraud.[131] Additionally, the plurality failed to adequately account for the disproportionate effect that the statute will have on the poor, elderly and disabled.[132] In doing so, the plurality ignored many other voting systems around the nation that provide the same protection against fraud without the disparate impact on the poor and disadvantaged.[133]

A. The Court Misapplied the Burdick Balancing Test

In holding Indiana's voter ID law to be valid, the Court correctly used the *Burdick* balancing test but inappropriately applied the test to the facts at hand.[134] This test, as stated earlier, requires the Court to weigh the character and magnitude of the voting restriction against the "*precise interests* put forward by the State as justifications for the burden imposed by its rule."[135] As Justice Souter said in his dissent, the State may not burden the right to vote "merely by invoking abstract interests," but must make *particular factual showings* that its interest in administering a fair election outweighs the voter's interest in freely accessing the polls.[136] The State, then, has an initial burden to offer concrete evidence in support of its restrictive voting law.[137]

The State imposed its voter ID law primarily to prevent voter fraud.[138] As stated in the Supreme Court case *Purcell v. Gonzalez*[139] "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government."[140] However, a distinction must be made between voter fraud *generally* and the specific *type* of voter

130. *Id.* at 1645.
131. *See infra* Part V.A.
132. *See infra* Part V.B.
133. *See infra* Part V.C.
134. *Crawford*, 128 S. Ct. at 1616.
135. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added).
136. *Crawford*, 128 S. Ct. at 1627 (Souter, J., dissenting).
137. *Id.*
138. *Id.* at 1617.
139. 549 U.S. 1 (2006).
140. *Id.* at 4.

fraud that a photo ID will help to prevent. As the plurality opinion admits, the only type of voter fraud that Indiana's statute addresses is in-person voter impersonation at the polling places.[141] Of all the various forms of voter fraud that exist, voter ID laws have no effect on most forms, including "vote buying, double voting, ballot box stuffing, or voting by convicted felons."[142] Fully aware of the limited impact that the law could have on preventing in-person voter fraud, the plurality made a striking, and frightfully blunt confession: "The record contains no evidence of any such [in-person] fraud actually occurring in Indiana at any time in its history."[143] No evidence of in-person voter fraud whatsoever in Indiana. Instead, the State relies on out-of-state newspaper reports of multiple voting and general instances of fraud as its "empirical proof" of voter fraud.[144] Granted, petitioners too, failed to present concrete data on the number of likely voters to be deterred from voting as a result of the new photo ID law, but such precise empirical data has never been required for a plaintiff to prevail on a voting-rights claim.[145] There is no doubt that such data would aid the

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141. *Crawford*, 128 S. Ct. at 1618–19. In other words, this law will only attack those people who attempt to show up at the polls to cast a vote for someone else, which is no easy task. Not only must the impersonator be certain that the other person has not already voted, but he must also be certain that the other person is registered in that particular precinct.

142. At-Tauhidi, *supra* note 70, at 245; *see also* BRENNAN CTR. FOR JUSTICE, ANALYSIS OF ELIGIBLE VOTERS POTENTIALLY BARRED FROM THE POLLS BY RESTRICTIVE NEW ID REQUIREMENTS IN MISSOURI SENATE BILLS NOS. 1014 & 730, *available at* http://www.brennancenter.org/page/-/d/download_file_10172.pdf ("The report identified 114 alleged votes by convicted felons (not solved by photo ID); seventy-nine voters allegedly registered with vacant-lot addresses (not solved by photo ID); forty-five people who allegedly voted twice (not solved by photo ID); and fourteen votes allegedly by deceased persons (potentially solved by photo ID, but also solved by HAVA's new database provisions). Even if these allegations proved true –and several were debunked upon further investigation–at most 0.01% of these identified problems might have been prevented by photo ID requirements.").

143. *Crawford*, 128 S. Ct. at 1619.

144. *See id.* at 1619–20. "The lack of evidence of in-person voter impersonation fraud is not for failure to search." *Id.* at 1637 n.28 (Souter, J., dissenting). *See, e.g.*, Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1 ("Five years after the Bush Administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.").

145. *Crawford*, 128 S. Ct. at 1634 (Souter, J., dissenting); *see also* Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1197 (2008) (Roberts, C. J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score . . . ."); Dunn v. Blumstein, 405 U.S. 330, 335 n. 5 (1972) ("[I]t would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements . . . ."); Bullock v. Carter, 405 U.S. 134, 144 (1972) (taking account of "the obvious likelihood" that candidate filing fees "would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs . . . .").

plaintiffs in making their case, but they do not carry such a weighty burden.[146]

Given the dearth of evidence on voter fraud, one would assume that the State used this justification as one of its minor points to defend its voter ID statute, but instead the State used the possibility of voter fraud as its primary argument.[147] The three other reasons that the State offered in support of its voter ID law—modernizing election procedures, addressing the consequences of the State's bloated voter rolls, and protecting public confidence in the integrity of the electoral process—are all abstract, non-particular interests that are only scarcely related to the protections afforded by a voter ID law.[148] Although inaccurate registration lists are cause for very real concern, the problem usually arises when local authorities fail to account for voters who have died or moved away, not because of any form of fraudulent conspiracy.[149]

As a result, the Court misapplied the *Burdick* balancing test. Because voting is arguably a fundamental right, and because the State failed to present any concrete factual evidence to justify the overly-restrictive voter ID law, the statute should have been struck down as unconstitutional.

B. The Statute is Unduly Burdensome on the Poor, Disabled and Elderly

The plurality opinion openly admits that if Indiana required voters to pay a fee for their voter ID cards, then this would be an unconstitutional restriction on the right to vote.[150] In this case, the plurality is satisfied with Indiana's voter ID law because the photo ID cards are offered to citizens free of charge.[151] However, this is not the full story. In order to obtain a "free" voter ID card, "a person must present at least one 'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport."[152]

146. *Crawford*, 128 S. Ct. at 1634 (Souter, J., dissenting).

147. *Id.* at 1617 (plurality opinion).

148. *Id.*; *see also* At-Tauhidi, *supra* note 70, at 245–46.

149. *See* At-Tauhidi, *supra* note 70, at 245.

150. *Crawford*, 128 S. Ct. at 1620–21. The statute would be unconstitutional under *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding Virginia's poll tax unconstitutional under the Equal Protection Clause of the Fourteenth Amendment). *Crawford*, 128 S. Ct. at 1620–21.

151. *Id.* at 1621.

152. *Id.* at 1621 n.17 (quoting Ind. Admin. Code, tit. 140, § 7-4-3 (2008)).

Unfortunately, one cannot obtain any of these documents without paying a fee.[153] In order to obtain a birth certificate in Indiana, one must pay between $3 and $12.[154] The total fees for a passport are upwards of $100.[155] In the end, if an Indiana resident wants to vote in the next election, she must either have a valid photo ID or she will need to spend at least $3.

The reality, however, is that people without a photo ID will need to spend quite a bit more than $3 in order to vote in the next Indiana election. On top of the $3 fee that is needed to obtain a birth certificate, there are travel costs associated with visiting a branch of the Indiana Bureau of Motor Vehicles (BMV). This extra burden may seem trivial, and in fact, probably is trivial for the vast majority of voters. But for the poor, elderly, and disabled voters who do not drive a car, the burden will prove to be especially prohibitive.[156] In fact, the voters who lack proper photo ID are probably the same poor, elderly and disabled voters who will find the travel to be disproportionately burdensome.[157] Many of these people will not own cars, and the public transportation in Indiana is limited.[158] Without easy access to the BMV

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153. *Id.*

154. *Id.*

155. *Id.* at 1631 (Souter, J., dissenting).

156. *Id.* at 1629. For a comparable study done in Missouri, *see* BRENNAN CTR. FOR JUSTICE *supra*, note 142 ("The impact of this photo ID requirement is even greater for the elderly . . . people with disabilities, low-income individuals, and people of color. At least eleven percent of Missouri seniors do not have a current driver's license. Almost twelve percent of Missouri residents live below the poverty line, and are less likely to own an automobile; moreover, African-American Missourians are more than twice as likely as whites to be poor. More than twenty-one percent of Missouri's African-American households—more than four times the rate of white households—have no car, and therefore little need for a driver's license.") (internal citations omitted); *see also Crawford*, 128 S. Ct. at 1634 n.25 ("Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities."); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 659 (2007) ("In 1994, the U. S. Department of Justice found that African-Americans in Louisiana were four to five times less likely than white residents to have government-sanctioned photo identification"); *id.* at 659–60 (describing June 2005 study by the Employment and Training Institute at the University of Wisconsin-Milwaukee, which found that while seventeen percent of voting-age whites lacked a valid driver's license, fifty-five percent of black males and forty-nine percent of black females were unlicensed, and forty-six percent of Latino males and fifty-nine percent of Latino females were similarly unlicensed).

157. *Crawford*, 128 S. Ct. at 1630 (Souter, J., dissenting); *see also Crawford*, 472 F.3d 949, 951 (7th Cir. 2007) ("No doubt most people who don't have photo ID are low on the economic ladder"); *cf.* Bullock v. Carter, 405 U.S. 134, 144 (1972) ("[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status.").

158. *Crawford*, 128 S. Ct. at 1630 (Souter, J., dissenting) ("According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92

stations, many of these disadvantaged voters will see the various costs associated with obtaining a voter ID as simply too hefty to justify participating on Election Day.

To counter many of these worthy arguments, the state of Indiana points to its provisional ballot system as an adequate supplement for those who find it difficult to obtain a photo ID.[159] Indiana's provisional-ballot system grants an exception to the ID requirement "for individuals the State considers 'indigent.'"[160] The exception allows voters who show up to the polls without ID to cast a provisional ballot.[161] This sounds easy enough, but unfortunately, casting a provisional ballot requires a great deal of additional work.[162] To have the provisional ballot counted, a voter must show up in person before the circuit court within ten days after the election.[163] Unlike the trip to the BMV (which only needs to be made once every four years for renewal of non-driver photo ID), this trip must be taken every time an indigent person wishes to vote since the State does not allow an affidavit to count in successive elections.[164] And unlike the trip to the BMV (which can have multiple branches per county), a county has only one county seat.[165] Again, this puts a disproportionate burden on those voters who may find it hard to travel, particularly the poor, elderly and disabled.[166] Certainly, the provisional ballot system does not come close to compensating those persons without a valid photo ID.[167]

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counties have no public transportation system at all, and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties.").

159. *Id.* at 1631.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1631–32.

165. *Id.* at 1632.

166. *Id.* "That the need to travel to the county seat each election amounts to a high hurdle is shown in the results of the 2007 municipal elections in Marion County, to which Indiana's Voter ID Law applied. Thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk's Office within the ten days. All thirty-four of these aspiring voters appeared at the appropriate precinct; thirty-three of them provided a signature, and every signature matched the one on file; and twenty-six of the thirty-two voters whose ballots were not counted had a history of voting in Marion County elections." *Id.*

167. *Id.* "And even if that were not so, the provisional-ballot option would be inadequate for a further reason: the indigency exception by definition offers no relief to those voters who do not consider themselves (or would not be considered) indigent but as a practical matter would find it hard, for nonfinancial reasons, to get the required ID (most obviously the disabled)." *Id.*

C. Alternative Methods

When a given state places a serious restriction on the right to vote—and especially when that restriction falls disproportionately on the poor, elderly and disabled—perhaps the most important question that a court can answer is whether the particular set of voting requirements is necessary amid the wide variety of similarly effective procedures that exist around the nation.[168] This notion was solidified in *Anderson v. Celebrezze*.[169]

> [E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict a constitutionally protected liberty. . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.[170]

Not surprisingly, since Indiana's new voter ID law is one of the most restrictive in the country, there are other guidelines in place throughout the country that offer some valuable guidance and perspective. In fact, twenty-eight states and the District of Columbia, which account for about two-thirds of the U.S. population, do not require voters to show ID when casting their ballot.[171] Most of these states follow the federal guidelines set forth in HAVA.[172] HAVA addresses a wide range of election issues including voting system technology, computerization of voting lists, audit procedures, and provisional balloting.[173] Whereas HAVA allows for multiple forms of free and readily available ID (a current photo ID, a bank statement, a paycheck), Indiana only allows a state or federal issued photo ID card.[174] Only one other state, Georgia, has ID requirements as strict as

168. *See* At-Tauhidi, *supra* note 70, at 244.

169. 460 U.S. 780 (1983).

170. *Id.* at 806 (quoting Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973)).

171. *See* Overton, *supra* note 156, at 640.

172. 116 Stat. 1666, 42 U.S.C. § 15301 et seq. (2006).

173. *See* At-Tauhidi, *supra* note 70, at 223. "HAVA's identification requirement was designed to provide basic safeguards while simultaneously minimizing the potential for disenfranchising voters: (1) only newly-registered, first-time voters who register by mail need to prove their identity; (2) where documentary proof is required, it may be satisfied by providing one of numerous forms of *photo* or *non-photo* identification; and (3) when all else fails, voters will be allowed to cast a provisional ballot, which will be counted as long as the voter's eligibility and registration can be subsequently verified." *Id.* at 223–24.

174. *Crawford*, 128 S. Ct. at 1635 n.26 (Souter, J., dissenting)

Indiana's; however, in Georgia, a birth certificate is not needed to obtain a voter ID card.[175]

Then there are other states that prescribe similarly effective, yet less restrictive means of preventing voter fraud. For instance, the state of Florida requires photo ID, but "permits the use of several forms, including a debit or credit card; military identification; student identification; retirement center identification; neighborhood center identification; and public assistance identification.[176] Florida also has provisional ballots for those lacking the proper ID.[177] However, instead of requiring voters to then show up at a clerk's office like Indiana, Florida voters simply provide their signature to have their ballots counted.[178] In fact, every other state that requires ID on Election Day either allows many different forms of ID or allows voters to cast a regular ballot after signing an affidavit explaining their situation.[179]

Lastly, it cannot be ignored that HAVA now requires each state to develop a single, computerized, statewide voting list that may be accessed by any election official in the state at any time.[180] States are required to keep these computer databases current by removing the deceased and those who lose their right to vote.[181] These new databases will not only be able to gather actual empirical data on the prevalence of voter fraud, but their very existence will help deter possible deviants from attempting to take part in voter fraud.[182]

VI. CONCLUSION

The Supreme Court has long recognized that the right to vote demands special protection from the judiciary.[183] While states have a genuine interest in administering fair elections, a photo ID requirement can only be upheld when it does not adversely affect certain vulnerable minorities. States should not pass arbitrarily strict election laws when less intrusive measures are available that are equally effective in

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. 42 U.S.C. § 15483(a)(2006); *see also* Overton, *supra* note 156, at 680 (explaining how a statewide voter registration database would lead to better election administration practices).

181. 42 U.S.C. § 15483(a); *see also* Overton, *supra* note 156, at 680.

182. *See* 42 U.S.C. § 15483(a); *see also* Overton, *supra* note 156, at 680.

183. *See supra* Part III.A.

eliminating voter fraud. Most importantly, courts must resist the temptation to rely on unsubstantiated factual assumptions and instead, must honestly weigh the costs and benefits of various types of election regulations. Until a state can produce empirical data that clearly justifies a restrictive photo ID requirement, courts should refuse to uphold the use of photo ID as a legal means to screen potential voters.