

**PRECEDENT MISAPPLIED: *CRAWFORD V. MARION COUNTY  
ELECTION BOARD*: A COMPELLING CASE STUDY IN THE  
IMPORTANCE OF BOTH IDENTIFYING APPROPRIATE AND  
RELEVANT CASE LAW AND ESTABLISHING A UNIFORM  
METHODOLOGY OF JUDICIAL REVIEW**

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I. INTRODUCTION

Ironically, both liberal Supreme Court of the United States Justice Stephen Breyer and his conservative counterpart Justice Antonin Scalia proffer methodologies for statutory and constitutional interpretation that recognize the risks associated with the virtually unlimited power and authority of an unrestrained judiciary and suggest applying limitations on judicial review.<sup>1</sup> Both Justices agree that the judiciary should not legislate from the bench by substituting its views for those of elected legislative bodies or the electorate or imposing personal ideological perspectives. Their agreement regarding the need to restrain jurists, however, belies the reality; jurists regularly inject personal political and other ideological preferences into judicial decision making. Even those who recognize the dangers of judicial activism promote starkly contrasting methodologies. For example, while Justice Scalia maintains that the judiciary must be constrained by the text of the legislation, Justice Breyer promotes judicial review bound by the overarching principles of the U.S. Constitution. This Comment argues that the absence of a uniform methodology of judicial review and the regular use of methods all too likely to create con-

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<sup>1</sup> See generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (pointing to the desirability of restraining judicial activism through judicial adherence to the Constitution's overarching goal and principle of assuring liberty); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998) (maintaining that judicial analysis, decision making, and discretion must be constrained by the actual text of the Constitution by using the meaning of words as understood at the time of drafting).

flicting results contribute to and exacerbate the very problems Justices Breyer and Scalia address<sup>2</sup> and thereby encourage the judicial activism each seeks to avoid. The recent Supreme Court decision in *Crawford v. Marion County Election Board*<sup>3</sup> offers a compelling case study in the critical importance of identifying appropriate case law as controlling precedent and establishing a uniform methodology of judicial review. *Crawford* reviewed a piece of Indiana legislation that supporters deemed necessary to prevent voter fraud and maintain the integrity of the voting system and that rivals argued was a gross partisan attempt to chill voter turnout by groups more likely to vote for candidates of the opposing party.<sup>4</sup> The Supreme Court got this one wrong by manipulating and misapplying cases it deemed precedential, ostensibly reaching for a preferred outcome, and ignoring controlling case law almost directly on point. The *Crawford* opinion should serve to rally renewed debate on the wide latitude afforded to the judiciary in regard to judicial review and to urge the judiciary to embrace a methodology consistent with the core values and principles of American democracy memorialized in the Constitution.

Recent attempts at election reform appear to be partisan attacks on voting by political parties hoping to chill voter turnout of groups likely to vote for rival candidates.<sup>5</sup> If true, these legislative actions are a cynical attack on the clear, unambiguous democratic goal of broad citizen participation established by the Constitution.<sup>6</sup> In Indiana, for example, the restrictive election law at issue in *Crawford* arguably was a Republican partisan attempt to manipulate the outcome of elections by adopting a facially neutral law designed to disenfranchise groups of voters (aged, poor, and racial minorities) likely to favor Democratic rivals. The Supreme Court Justices rendered four separate opinions encompassing three distinct analyses yielding two opposite conclusions; no opinion adequately protects the individual,

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<sup>2</sup> See sources cited *supra* note 1.

<sup>3</sup> 128 S. Ct. 1610 (2008).

<sup>4</sup> David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 484 (2008).

<sup>5</sup> Brief of Professor Richard L. Hasen as Amicus Curiae Supporting Petitioners at 2-3, *Crawford*, 128 S. Ct. 1610 (Nos. 7-21 & 7-25) [hereinafter Brief of Hasen].

<sup>6</sup> Over time, the American voting franchise generally has been marked by expansion of voting rights. But repeated periods in American history have been characterized by efforts to restrict or deny the vote. For example, after the Civil War and the adoption of the so-called Civil War Amendments to the Constitution, many Southern states and districts "used Jim Crow laws, poll taxes, literacy tests, grandfather laws, and not so subtle means, such as lynchings, cross burnings, and other techniques to prevent newly freed slaves from voting." Schultz, *supra* note 4, at 484.

fundamental right to exercise the vote, but all four opinions bring to the forefront three critical issues.

First, both the U.S. Court of Appeals for the Seventh Circuit and the Supreme Court applied improper precedents that should not have controlled review of an infringement on the right to vote, which is arguably the most fundamental civil liberty in a democracy. Part II of this Comment provides the background to *Crawford*, which offers a compelling case study in the importance of identifying appropriate precedent. Part III argues that the line of cases upon which the court relied in *Crawford* was never intended to apply to laws that actually preclude or abrogate voting rights; its misapplication to the case at issue actually empowered the courts to apply an inappropriate and erroneous standard for judicial review that enabled an ideologically based decision rather than one based on enduring legal precedent and core constitutional principles. The Supreme Court replaced the longstanding strict-scrutiny standard customarily applied when fundamental rights are at stake<sup>7</sup> with a flexible balancing test previously applied only to rules and processes that had only indirectly impacted voting rights without affecting the ability to vote itself.<sup>8</sup>

Second, even assuming arguendo that appropriate precedents were utilized, the standard established by such precedents proves unworkable and insufficient when applied to fundamental individual rights. Part V demonstrates that this test, drawn largely from the subjective beliefs of particular jurists, is too susceptible to conflicting analyses and outcomes and thus is likely to increase the risk of judicial activism and judges legislating from the bench. The widely diverging results derived from application of the test evidence its failure, especially when fundamental rights are at stake. Moreover, Part VI proves that the Indiana law at issue in *Crawford* would have failed strict scrutiny review because the law was too restrictive and unnecessary to achieve state goals.

Third and finally, Part VII demonstrates that the Court's ultimate decision in *Crawford* exposes the great failure of the judicial system—it is far too susceptible to judicial activism. Part VII argues that the judiciary urgently adopt a uniform methodology of judicial review

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<sup>7</sup> See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); see also *infra* Part IV.

<sup>8</sup> See cases cited *supra* note 7. The flexible balancing test has been applied, for example, where states attempt to establish candidate-eligibility rules, see *Anderson*, 460 U.S. 780, or to restrict the ability to vote for write-in candidates, see *Burdick*, 504 U.S. 428.

consistent with Justice Breyer's concepts of active citizen participation in shaping law<sup>9</sup> that must comport with the overarching core values and goals inherent in the Constitution. In the broader context of the integrity of the Constitution, the *Crawford* decision presents troubling ramifications for the preservation of civil rights and liberties generally and voting rights in particular. Justice Scalia calls for an interpretive methodology that restricts jurists to an examination of the precise words of the text of statutes, as well as state constitutions and the U.S. Constitution and therefore reduces judicial analysis to mere formulaic choices<sup>10</sup> as evidenced in his concurring opinion in *Crawford*.<sup>11</sup> Justice Breyer, in contrast, seeks to limit judicial activism by advocating a jurisprudence that analyzes the law's effects and purposes as guided by the overarching principles and core values of the U.S. Constitution—encouraging and ensuring active liberty.<sup>12</sup> Ultimately, this Comment proposes that to maintain legitimacy of law as well as to protect individual freedom, the courts ought to remain steadfastly loyal to the overarching principles, core values, and framework for democracy that the Constitution established. These values include widespread citizen participation and the maintenance of the active liberty that serves as the central goal of our democratic system.

## II. *CRAWFORD V. MARION COUNTY ELECTION BOARD*

In 2005, Indiana enacted Senate Enrolled Act No. 483 (Indiana SEA 483 or SEA 483)<sup>13</sup> requiring all citizens voting in person to present government-issued photo identification or, subject to certain terms allowing provisional balloting, be barred from voting.<sup>14</sup> Indiana

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<sup>9</sup> See BREYER, *supra* note 1, at 5–7 (stating that a judge would “view the Constitution through a more democratic lens”).

<sup>10</sup> See SCALIA, *supra* note 1, at 23–29.

<sup>11</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1625–26 (2008) (Scalia, J., concurring) (demonstrating a willingness to mechanically analyze important constitutional issues concerning fundamental rights).

<sup>12</sup> See BREYER, *supra* note 1, at 18 (stating that “[s]ince law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including contemporary conditions, social, industrial, and political, of the community to be affected”) (internal quotation marks omitted).

<sup>13</sup> 2005 Ind. Acts 2005. The main provision of the Indiana law, IND. CODE ANN. § 3-11-8-25.1 (West, Westlaw through 2009 1st Special Sess.), was recently held unconstitutional in *League of Women Voters of Ind. v. Rokita*, No. 49A02-0901-CV-40, 2009 WL 2973120, at \*15 (Ind. App. Sept. 17, 2009) (“[T]he Voter I.D. law violates Indiana Constitution Article 1, Section 23, and must be declared void because it regulates voters in a manner that is not uniform and impartial.”).

<sup>14</sup> *League of Women Voters of Ind.*, 2009 WL 2973120, at \*15; see also *Crawford*, 128 S. Ct. at 1613–14.

mandates that a “voter show identification at the polling place that meets four key requirements”: the identification must (1) have a photograph of the voter, (2) contain an expiration date in the future, (3) be “issued by the State of Indiana,” and (4) have the “full legal name of the voter that matches the voter registration records.”<sup>15</sup> The requirements, however, do “not apply to absentee ballots submitted by mail, and the statute contains an exception for persons living and voting in a state-licensed facility like a nursing home.”<sup>16</sup> But “[a] voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will be counted only if he or she executes an appropriate affidavit before the circuit court clerk within ten days following the election.”<sup>17</sup> And “[a] voter who has photo identification but is unable to present that identification on election day may file a provisional ballot that will be counted if she brings her photo identification to the circuit county clerk’s office within 10 days.”<sup>18</sup>

After consolidating separate suits by voters and the Democratic Party challenging the constitutionality of the Indiana law, the U.S. District Court for the Southern District of Indiana granted summary judgment in favor of the defendant state officials,<sup>19</sup> and the Seventh Circuit affirmed.<sup>20</sup> The plaintiffs alleged that although the Indiana law is not overtly discriminatory, it is discriminatory in effect; they asserted that the Republican majority in the state legislature adopted a law intended and likely to chill votes by the old, the poor, and those of racial and ethnic minorities—groups that are least likely to possess the financial or physical wherewithal to comply with the identification requirements.<sup>21</sup> They also claimed that Indiana SEA 483 was designed to disenfranchise precisely those voters most likely to vote for

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<sup>15</sup> Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 8 (Wash. Inst. for the Study of Ethnicity and Race, Working Paper, 2007), available at [http://depts.washington.edu/uwiser/documents/Indiana\\_voter.pdf](http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf).

<sup>16</sup> *Crawford*, 128 S. Ct. at 1613 (citing IND. CODE ANN. § 3-11-8-25.1(e) (West, Westlaw through 2009 1st Special Sess.)).

<sup>17</sup> *Id.* at 1613–14 (citing IND. CODE ANN. §§ 3-11.7-5-1, 3-11.7-5-2.5(c) (West, Westlaw through 2009 1st Special Sess.)).

<sup>18</sup> *Id.* at 1614 (citing IND. CODE ANN. § 3-11.7-5-2.5(b) (West, Westlaw through 2009 1st Special Sess.)).

<sup>19</sup> *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 784 (S.D. Ind. 2006), *aff’d sub nom. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

<sup>20</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008).

<sup>21</sup> Second Amended Complaint at 2, 6–7, *Ind. Democratic Party*, 458 F. Supp. 2d 775 (No. 1:05-cv-00634-SEB-VSS).

non-Republican candidates.<sup>22</sup> After all, SEA 483 is neither narrowly tailored nor likely to effectively reduce the problem the state purported to solve—in-person voter fraud.<sup>23</sup> More importantly, the Indiana law has a disenfranchising effect on voters, especially the elderly,<sup>24</sup> members of racial or ethnic minorities,<sup>25</sup> and the poor.<sup>26</sup>

Despite the obvious implication of fundamental constitutional rights, the Seventh Circuit majority used a standard highly deferential to the state and explained that the fewer the number of people who would be deprived of a right to vote by the law, “the less of a showing the state need make to justify the law.”<sup>27</sup> The majority virtually ignored the fact that the right to vote is an individual one.<sup>28</sup> Judge Evans, dissenting, asserted that Indiana’s voter-identification law imposes a severe burden on the right to vote of some portion of eligible voters and, therefore, should be subject to elevated judicial scrutiny, which, he concluded, the Indiana law fails to satisfy.<sup>29</sup> The Supreme Court granted certiorari, and in April 2008, the Court handed down *Crawford*, a six-to-three decision affirming the Seventh Circuit and upholding the restrictive law.<sup>30</sup> A close analysis of the case and applicable law, however, suggests the Court used inappropriate precedent and erroneously applied an ineffective standard, both of which contributed to judicial activism consistent with and infected by one political party’s agenda.

The issue before the Supreme Court was

the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.

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The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily dis-

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<sup>22</sup> Second Amended Complaint, *supra* note 21, at 6.

<sup>23</sup> *Crawford*, 128 S. Ct. at 1636–37 (Souter, J., dissenting).

<sup>24</sup> See *infra* notes 140–41 and accompanying text.

<sup>25</sup> See *infra* notes 142, 144 and accompanying text.

<sup>26</sup> See *infra* notes 138–39 and accompanying text.

<sup>27</sup> *Crawford v. Marion County Election Bd.*, 472 F. 3d 949, 952 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008).

<sup>28</sup> See *id.* (failing to properly recognize that the right to vote is an individual right).

<sup>29</sup> *Id.* at 954 (Evans, J., dissenting).

<sup>30</sup> *Crawford*, 128 S. Ct. at 1615 (2008).

franchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.<sup>31</sup>

The State of Indiana, however, identified several interests to justify the burdens that SEA 483 imposes on voters and potential voters.

First, Indiana argued that “[t]he State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.”<sup>32</sup> Indeed,

[t]wo recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State’s choice to use government-issued photo identification as a relevant source of information concerning a citizen’s eligibility to vote.<sup>33</sup>

Although neither the Help America Vote Act of 2002 (HAVA)<sup>34</sup> nor the National Voter Registration Act of 1993 (NVRA)<sup>35</sup> required Indiana to create SEA 483, they do “indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”<sup>36</sup> Even so, the manifest goal of HAVA is to increase voter participation.<sup>37</sup>

Second, Indiana asserted that the state had a problem with inflation of Indiana’s voter rolls that legislators feared could lead to voter

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<sup>31</sup> *Id.* at 1614 (citations omitted).

<sup>32</sup> *Id.* at 1617.

<sup>33</sup> *Id.*

<sup>34</sup> 42 U.S.C. §§ 15301–545 (2006). Congress enacted HAVA to establish an Election Assistance Committee to “assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.” Pub. L. No. 107-252, 116 Stat. 1666, 1666 (2002).

<sup>35</sup> 42 U.S.C. §§ 1973gg to gg-10 (2006). The purpose of the NVRA was to make it “easier for Americans to register to vote and to maintain their registration.” U.S. Dep’t of Justice, About the National Voter Registration Act, [http://www.usdoj.gov/crt/voting/nvra/activ\\_nvra.php](http://www.usdoj.gov/crt/voting/nvra/activ_nvra.php) (last visited Aug. 8, 2009).

<sup>36</sup> *Crawford*, 128 S. Ct. at 1618.

<sup>37</sup> 147 CONG. REC. 28,005 (2001) (statement of Rep. Udall); *see also* 148 CONG. REC. 1213 (2002) (statement of Sen. Bond) (“Every American citizen—appropriate age, appropriate qualifications, properly registered—ought to be able to cast a ballot without difficulty.”); 148 CONG. REC. 1205 (statement of Sen. Dodd) (“All of us worked many months to develop legislation that would try to meet one central goal; that was to make it easier to vote in America and much harder to corrupt our Federal election system.”).

fraud.<sup>38</sup> Ironically, SEA 483 addresses only in-person voter-impersonation fraud; “the record contains no evidence of any such fraud actually occurring in Indiana.”<sup>39</sup> Moreover, the plaintiffs “argue[d] that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk” of future occurrences.<sup>40</sup>

Last, the state asserted that it has an interest in ensuring public confidence “in the integrity and legitimacy of representative government.”<sup>41</sup> And “[w]hile that interest is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”<sup>42</sup> Despite such arguments, evidence that strict voter-identification requirements encourage democratic participation is anecdotal at best.<sup>43</sup>

### III. THE SUPREME COURT APPLIED IMPROPER PRECEDENTS THAT EMPLOY AN INSUFFICIENT STANDARD OF REVIEW WHEN A FUNDAMENTAL RIGHT IS IMPLICATED DIRECTLY

To evaluate a law that concerns the right to vote (whether regulating voters, voting, or candidates), the Court has applied the approach set forth in *Anderson v. Celebrezze*<sup>44</sup> and *Burdick v. Takushi*.<sup>45</sup> In *Anderson*, an Ohio law imposed early filing deadlines on independent candidates<sup>46</sup> and thereby only indirectly affected voters’ choices without delimiting the actual exercise of the right to vote. Rather than apply a litmus test, the Court required the state to identify the relevant interests, which the Court then evaluated and weighed against the burdens imposed by the restriction.<sup>47</sup> In *Burdick*, the Court applied the *Anderson* balancing approach to a Hawaiian law that prohi-

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<sup>38</sup> *Crawford*, 128 S. Ct. at 1619.

<sup>39</sup> *Id.* at 1618–19.

<sup>40</sup> *Id.* at 1619.

<sup>41</sup> *Id.* at 1620 (quoting Brief of Respondents at 53, *Crawford*, 128 S. Ct. 1610 (Nos. 7-21 & 7-25)).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750 (2008); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 635 (2007).

<sup>44</sup> 460 U.S. 780, 787–90 (1983).

<sup>45</sup> 504 U.S. 428, 433–34 (1992).

<sup>46</sup> *Anderson*, 460 U.S. at 782–83.

<sup>47</sup> *Id.* at 789–90.



bited voting for write-in candidates.<sup>48</sup> The *Burdick* Court, like the *Anderson* Court before it, dealt merely with an indirect restriction upon voting rights by regulating write-in ballots. Allowing “reasonable, nondiscriminatory restrictions,” the Court upheld the Hawaiian law.<sup>49</sup>

The *Anderson-Burdick* flexible standard calls for deference to “important regulatory interests” in the face of “nonsevere, nondiscriminatory restrictions” and reserves strict judicial scrutiny only for laws deemed to severely restrict the right to vote.<sup>50</sup> *Anderson-Burdick* establishes that “strict scrutiny is appropriate only if the burden” on the right to vote is severe.<sup>51</sup> Legislatively imposed burdens are not considered severe when they are “ordinary and widespread” and impose only “nominal effort.”<sup>52</sup> When a burden is more than “merely inconvenient,” it is considered severe.<sup>53</sup> To conclude that a state law such as Indiana SEA 483, which actually prohibits the exercise of the right to vote under certain circumstances, could be deemed analogous to the laws at issue in *Anderson* and *Burdick*, which relate only to matters ancillary to citizens’ voting rights, seems incredulous and intellectually dishonest. Accordingly, these cases are improperly applied as precedents.

Defining the Indiana law as merely affecting the voting machinery or requiring only nominal efforts for compliance instead of denying or threatening to deny the actual exercise of the voting franchise, the Court in *Crawford* misapplied the *Anderson-Burdick* standard and employed a standard of review actually established for election laws that only indirectly or derivatively impact the right to vote. The Indiana law is, however, clearly distinguishable from the laws reviewed in the earlier cases that applied this flexible standard. Unlike the state laws in Ohio and Hawaii reviewed in *Anderson* and *Burdick*, respectively, and in stark contrast to the facts and limitations in those cases, Indiana imposes a direct burden on and a potential outright denial of the ability of the voter to exercise his or her fundamental right to vote. The Indiana law does not merely pose a burden with the kind of derivative effects felt in Ohio and Hawaii; it threatens the very essence of the exercise of the franchise. While time, place, and

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<sup>48</sup> *Burdick*, 504 U.S. at 433–34.

<sup>49</sup> *Id.* at 434, 440 (quoting *Anderson*, 460 U.S. at 788).

<sup>50</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring).

<sup>51</sup> *Id.* (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005)) (alteration in original omitted).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

manner restrictions can be valid, they may not be used to wholly deny fundamental rights.<sup>54</sup> In *Crawford*, at issue was whether a citizen maintains a reasonable opportunity to cast his vote at all. Nonetheless, the Court applied these cases as precedent, merely balancing state interests against the overall burden imposed on the electorate as a whole without sufficient consideration of the effects on individual liberties. The Court reduced the examination to that of the relative impact on the electorate at large and the aggregate number of voters likely to suffer from restriction. The Court disregarded the actual burden from a denial of the franchise for any individual, restricting its inquiry to a mere analysis of the steps needed to obtain the requisite identification card or to cast a provisional ballot.

In *Crawford*, the Court overreached when it concluded that the line of cases following *Anderson* and *Burdick* actually rejected strict scrutiny of laws imposing a burden on the right to vote and replaced it with the “flexible standard” of *Anderson*.<sup>55</sup> Justice Scalia’s concurrence went even further; it reduced the same line of cases to a mere administrative rule, characterized by a highly deferential standard that permits states far too much leeway in establishing voter restrictions.<sup>56</sup> The majority opinion and Scalia’s concurrence examine the effects on voters generally<sup>57</sup> and ignore the fact that the law directly threatens the individual’s right to vote.

Although the dissent found that the law does not even satisfy *Anderson-Burdick*, the dissent was wrong to apply that flexible standard.<sup>58</sup> The dissent determined that Indiana SEA 483 failed under the balancing test because “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

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<sup>54</sup> *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *see also* *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

<sup>55</sup> *Crawford*, 128 S. Ct. at 1616 n.8.

<sup>56</sup> *Id.* at 1624 (Scalia, J., concurring) (“Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson*’s amorphous ‘flexible standard’ into something resembling an administrable rule.”).

<sup>57</sup> *See id.* at 1623 n.20 (majority opinion) (“While it is true that obtaining a birth certificate carries with it a financial cost, the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates.”). The Court erred in considering only the effects on the electorate as a whole while failing to consider that the right to vote is an individual liberty right; the Court wrote that “on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes excessively burdensome requirements on any class of voters.” *Id.* (internal quotation marks omitted).

<sup>58</sup> *Id.* at 1627 (Souter, J., dissenting).

to its interests outweigh the particular impediments it has imposed.”<sup>59</sup> Moreover, in accepting the state’s interests in ensuring the integrity of the voting system, preventing voter fraud, motivating and ensuring voter participation, and maintaining the integrity of the election results, the Court did not seek proof but relied on mere belief, conjecture, and anecdotes.<sup>60</sup> The Court seemed to “resign itself . . . to its intuition that ‘fear’ of election fraud ‘drives honest citizens out of the democratic process.’ This intuition, however, presents a testable empirical proposition,”<sup>61</sup> and testing was neither part of the record nor required by the Court before it rendered its decision.

Empirical tests conducted by legal commentators reveal that the conventional wisdom that the mere perception of election fraud actually leads to voter disengagement is not supportable.<sup>62</sup> Such studies demonstrate that perceptions of voter fraud actually have no relationship to an individual’s likelihood of turning out to vote.<sup>63</sup> Further, the need to preserve public confidence in elections, by itself, does not justify a voter-identification law that risks suppressing the voting right.<sup>64</sup> Accordingly, before restricting the exercise of the fundamental right to vote, policymakers and jurists have the obligation to test the validity of the rationales for the restrictive laws:

[B]efore jumping on the photo-identification bandwagon, policymakers should closely examine empirical data about the magnitude of voter fraud and the extent to which a photo-identification requirement would reduce participation by legitimate voters. While a small amount of voter fraud hypothetically could determine a close election, the exclusion of twenty million Americans who lack photo identification could erroneously skew a larger number of elections.<sup>65</sup>

To be sure, other cases, in addition to *Burdick* and *Anderson*, have applied this flexible analysis. In *Timmons v. Twin Cities Area New Par-*

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<sup>59</sup> *Id.* (citation omitted).

<sup>60</sup> See, e.g., Ansolabehere & Persily, *supra* note 43, at 1739 (noting a “scarcity of empirical findings to settle some of the factual issues central to this debate” presents “risk that the Court will resign itself” to the existence of election fraud and citizens opting out of the democratic process as a result).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1750–57.

<sup>63</sup> *Id.*

<sup>64</sup> Cf. Schultz, *supra* note 4, at 486 (citing U.S. SENATE REPUBLICAN POLICY COMM., THE NEED FOR NEW FEDERAL REFORMS: PUTTING AN END TO VOTER FRAUD (2005), available at [http://rpc.senate.gov/public/\\_files/Feb1504VoterFraudSD.pdf](http://rpc.senate.gov/public/_files/Feb1504VoterFraudSD.pdf) (arguing that the threat of voter fraud is real and that voter-identification laws are necessary to control this problem)).

<sup>65</sup> Overton, *supra* note 43, at 634 (footnotes omitted).

ty,<sup>66</sup> for example, the Court appropriately subjected a Minnesota ban on fusion candidates to a flexible standard.<sup>67</sup> Electoral fusion is an arrangement where two or more political parties support a common candidate in hopes of pooling the votes so that all those parties may secure a controlling majority.<sup>68</sup> Thus, the ban in the Minnesota law did not affect an individual citizen's ability to cast his or her vote. Rather, it was merely an indirect burden on the right to vote and was appropriately subject to the *Anderson-Burdick* standard of review.

Similarly, a California law that required independent candidates to have disaffiliated from a political party at least one year before running as an independent was appropriately subjected to the flexible standard.<sup>69</sup> In addition, the Court in *Rosario v. Rockefeller*<sup>70</sup> used a flexible standard similar to the *Anderson-Burdick* test to uphold a New York law that required voters in a party primary to register with that party by a certain deadline.<sup>71</sup> All of these cases, however, involve laws that create only indirect effects on voting rights. None burdens the franchise directly or impacts it in the manner or to the degree that Indiana SEA 483 does.

#### IV. SUBSTANTIVE DUE PROCESS MANDATES THAT STRICT SCRUTINY BE APPLIED BECAUSE VOTING IS A FUNDAMENTAL RIGHT

A long line of cases provides that the right to vote is a fundamental one.<sup>72</sup> Similarly, the Supreme Court has a rich history and tradition of applying strict scrutiny to laws restricting or denying fundamental rights.<sup>73</sup> Under substantive due process, some rights are so

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<sup>66</sup> 520 U.S. 351 (1997).

<sup>67</sup> *Id.* at 363–64.

<sup>68</sup> Note, *Political Combinations in Elections*, 45 HARV. L. REV. 906, 906 (1932).

<sup>69</sup> *Storer v. Brown*, 415 U.S. 724, 736 (1974).

<sup>70</sup> 410 U.S. 752 (1973).

<sup>71</sup> *Id.* at 761–62.

<sup>72</sup> Brief of Professor Erwin Chemerinsky as Amicus Curiae Supporting Neither Party and Providing Applicable Legal Standard at 3–4, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (Nos. 7-21 & 7-25) [hereinafter Brief of Chemerinsky] (citing *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Evans v. Cornman*, 398 U.S. 419 (1970); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

<sup>73</sup> KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 378 (16th ed. 2007); see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (privacy in intimate relations); *Troxel v. Granville*, 530 U.S. 57 (2000) (privacy in family matters); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (privacy in family matters); *Roe v. Wade*, 410 U.S. 113 (1973) (privacy in procreation decisions); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy in marital intimacy).

fundamental that a state may not restrict them without a sufficiently compelling interest and a showing that any imposed burden is no more intrusive than is necessary to achieve such interest.<sup>74</sup> Judicial deference does not extend to laws that interfere with fundamental rights or discriminate against “discrete and insular minorities” and instead mandates a “more searching judicial inquiry.”<sup>75</sup> Voting rights are indeed fundamental, and a line of precedential cases clearly is consistent with the longstanding application of strict scrutiny to laws involving denial of voting rights.<sup>76</sup>

In *Dunn v. Blumstein*,<sup>77</sup> the Court determined that state election laws alleged to completely deny a citizen or group of citizens the right to vote must be analyzed under close constitutional scrutiny, which requires that the state law in question be narrowly tailored to serve a compelling state interest.<sup>78</sup> A state election law does not survive close scrutiny if the state does not have a “substantial and compelling reason” for the restriction imposed by the law.<sup>79</sup> Even then, the mere showing of such an interest is not, by itself, dispositive. The statute must be narrowly drawn to serve that interest. As the *Dunn* Court noted,

[i]t is not sufficient for the State to show that [its statutory requirements] further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with “precision,” and must be “tailored” to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose “less drastic means.”<sup>80</sup>

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<sup>74</sup> SULLIVAN & GUNTHER, *supra* note 73, at 378.

<sup>75</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>76</sup> See generally Brief of Chemerinsky, *supra* note 72 (providing the line of cases).

<sup>77</sup> 405 U.S. 330 (1972).

<sup>78</sup> *Id.* at 337, 343; see also *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (“[I]f a challenged state statute grants the right to vote . . . to some . . . but denies it to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’” (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969))).

<sup>79</sup> *Dunn*, 405 U.S. at 335.

<sup>80</sup> *Id.* at 343 (citations omitted); see also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more

Where a state election law denies the right to vote to a certain group of otherwise-qualified citizens but grants the right to others, as in Indiana, “the purpose of the [state law’s] restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.”<sup>81</sup>

The Court noted in *Harper v. Virginia State Board of Elections*<sup>82</sup> that “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.”<sup>83</sup> For example, in *Evans v. Cornman*,<sup>84</sup> the Court applied close constitutional scrutiny to a restriction in Maryland that denied the right to vote to individuals living on the grounds of a federal enclave.<sup>85</sup> Further, unjustified limitations placed on who may exercise the right to vote compromise the very foundation of our democracy.<sup>86</sup> As held in *Wesberry v. Sanders*,<sup>87</sup> “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>88</sup>

Since the inception of our representative democracy, “the right to choose a representative is every man’s portion of sovereign power.”<sup>89</sup> The cumulative effect and legacy of this line of cases is the judicial recognition of voting as a fundamental right, and legislative attempts to restrict or deny such right must be subjected to strict judicial scrutiny. Collectively, these cases create overwhelming precedent that interference with or regulation of the fundamental right to vote, such as the direct infringement on exercising the franchise permitted by Indiana SEA 483, should be subject to strict scru-

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narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.”).

<sup>81</sup> *Dunn*, 405 U.S. at 336 (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)).

<sup>82</sup> 383 U.S. 663 (1966).

<sup>83</sup> *Id.* at 667 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964)).

<sup>84</sup> 398 U.S. 419.

<sup>85</sup> *Id.* at 422.

<sup>86</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”).

<sup>87</sup> 376 U.S. 1 (1964).

<sup>88</sup> *Id.* at 17.

<sup>89</sup> *Bd. of Estimate v. Morris*, 489 U.S. 688, 693 (1989) (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 30 (1849)).

tiny. The right to exercise the franchise may be limited only if a compelling government interest exists and if the limitation imposed by government is no more burdensome than is necessary to achieve such a compelling interest.<sup>90</sup>

The language of *Anderson* and *Burdick* and their respective progeny has created confusion as to whether *Dunn* and its progeny still apply in those cases in which the state election law is alleged to completely deny the right to vote to any citizen.<sup>91</sup> The strict scrutiny analysis applied in *Dunn*, however, remains the appropriate binding precedent and should be applied to cases involving any direct burden on voting—that is, any burden that threatens denial, undue restriction, or abrogation of the right to vote. The Court in *Crawford*, therefore, should have applied *Dunn*. After all, the facts and issues at stake in *Crawford* more closely resemble those of the *Dunn* line of cases than the *Anderson-Burdick* line. In addition, *Dunn* has not been overruled, so state election laws that threaten to completely deny citizens the right to vote remain subject to strict scrutiny.<sup>92</sup> *Crawford* clearly is a substantive due process case involving not incorporation but fundamental rights.<sup>93</sup> Where a state election law, like Indiana SEA 483, is alleged to completely deny the right to vote to certain citizens instead of merely affecting representational interests, the mechanics of voting, or candidate eligibility, a fundamental right is threatened and strict scrutiny must be applied.

Recent federal legislation seeks to make the voting power more, not less, accessible for America's eligible voters. As noted by Senator Dianne Feinstein and Representatives Robert A. Brady and Zoe Lofgren, federal legislation, HAVA in particular, was intended to make the franchise easier to exercise; however, *Crawford* demonstrates that the practical implications of HAVA have made it more difficult for constituents to cast their ballot. They explained that “[r]ather than protecting a citizen’s right to vote, Indiana has used the federal re-

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<sup>90</sup> Schultz, *supra* note 4, at 490.

<sup>91</sup> *Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (en banc) (Wood, J., dissenting) (“[T]he panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in *any* election case. As Judge Evans makes clear, however, *Burdick* holds no such thing.”), *aff d*, 128 S. Ct. 1610 (2008).

<sup>92</sup> See Brief of Chemerinsky, *supra* note 72, at 3–6.

<sup>93</sup> Although “the right to vote is not expressly protected in the United States Constitution,” it clearly is a fundamental right. Samuel Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 767 & n.210 (2008) (citing DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW 29 (3d ed. 2004) (“[T]he right to vote in elections is a central democratic right and the act of voting is the most elemental form of democratic participation.”) (internal quotation marks omitted)).

quirement from HAVA to create an additional impediment to voting.”<sup>94</sup> The extensive requirements set forth in the Indiana statute “stand as an obstacle to the execution of federal purpose and intent.”<sup>95</sup> Where such fundamental interests encounter interference at the state level, a heightened level of scrutiny is required to ensure that such direct barriers are reasonably necessary to serve an important regulatory interest.<sup>96</sup>

In one such case, *Burson v. Freeman*,<sup>97</sup> state election law prohibited the solicitation of votes or the display and distribution of campaign materials within one hundred feet of polling place entrances.<sup>98</sup> The Supreme Court applied a strict-scrutiny analysis when the law was challenged on First and Fourteenth Amendment grounds.<sup>99</sup> The Court found the boundary restriction constitutional and held that the statutory provision constituted a permissible compromise between two competing fundamental interests—the exercise of free speech and the right to cast a ballot in an election free from the taint of intimidation and fraud.<sup>100</sup> The Court wrote that to survive strict scrutiny, a state must do more than assert a compelling state interest; the state must demonstrate that its law is necessary to serve the asserted

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<sup>94</sup> Brief of U.S. Senator Dianne Feinstein, U.S. Representative Robert A. Brady, and U.S. Representative Zoe Lofgren as Amici Curiae Supporting Petitioners at 6–7, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (Nos. 7-21 & 7-25) [hereinafter Legislators’ Brief].

It should not be forgotten that Congress passed HAVA in response to egregious aspects of the administration of elections in this country that were exposed in the wake of the 2000 presidential elections. First and foremost, the goal was to protect the franchise—to make it easier, not harder, for every eligible citizen to vote, and to have his or her vote counted.

*Id.*; see H.R. REP. NO. 107-329, pt. 1, at 38 (2001) (“Studies of the nation’s election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.”).

<sup>95</sup> Legislators’ Brief, *supra* note 94, at 7. Although HAVA does not preclude a state from establishing its own election administration and technology requirements, the state requirements must not be “inconsistent” with the requirements established under HAVA. See 42 U.S.C. § 15484 (2006). The provisions of the Indiana statute at issue in this case are inconsistent with the federal requirement, as the burdensome requirements of the statute make it more difficult for individuals to exercise their right to vote, rather than easier, as HAVA intended. Legislators’ Brief, *supra* note 94, at 6–8.

<sup>96</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>97</sup> 504 U.S. 191 (1992).

<sup>98</sup> *Id.* at 193–94.

<sup>99</sup> *Id.* at 199–200.

<sup>100</sup> *Id.* at 211.



interest.<sup>101</sup> The Court concluded that a state has a compelling interest in protecting voters from confusion and undue influence.<sup>102</sup> Upholding the state statute, the Court found that a restricted zone was necessary to serve the state's compelling interest in preventing these evils.<sup>103</sup> As to the narrowly tailored requirement, the Court found that widespread abuse and the persistent battle against voter intimidation and election fraud demonstrate that the state's approach was appropriate.<sup>104</sup> By analogy, applying strict scrutiny in *Crawford* was necessary because the Indiana law created an even more direct and immediate threat to a voter's right to exercise the franchise. The Court should have continued to demand that laws that deny or threaten to deny completely a right as fundamental as the right to vote must be narrowly tailored and necessary to promote a compelling state interest.<sup>105</sup>

V. THE *ANDERSON-BURDICK* STANDARD IS AN UNWORKABLE SOLUTION THAT DOES NOT ADEQUATELY PROTECT THE FUNDAMENTAL SUBSTANTIVE DUE PROCESS RIGHT OF VOTING, IS HIGHLY SUSCEPTIBLE TO CONFLICTING OUTCOMES, AND ENCOURAGES JUDICIAL ACTIVISM

Even if the *Anderson-Burdick* standard has appropriate precedential value, the test does not adequately protect the fundamental substantive due process right of voting in our democracy. Moreover, it creates an unworkable solution in cases of direct limitations on voting. As evidenced in the Supreme Court's *Crawford* decision, it is, for example, all too likely to result in highly subjective analyses of each of the state interests, the extent of the burdens imposed on voters, and the weight and relative value assigned to each.<sup>106</sup> Accordingly, its use creates uncertainty and conflicting results, which insufficiently protect the fundamental right to vote.<sup>107</sup>

This standard also greatly heightens the risk of judges legislating from the bench and is inconsistent with the concept of judicial restraint. Election-reform efforts by many states have become decidedly partisan, and reviewing courts also have been divided along partisan

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<sup>101</sup> *Id.* at 197–98.

<sup>102</sup> *Id.* at 199.

<sup>103</sup> *Burson*, 504 U.S. at 208–09.

<sup>104</sup> *Id.* at 210–11.

<sup>105</sup> Brief of Chemerinsky, *supra* note 72, at 15.

<sup>106</sup> See generally *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

<sup>107</sup> See Schultz, *supra* note 4, at 491–92.

lines.<sup>108</sup> Many recent efforts at election-administration reform have become mired in partisan controversy.<sup>109</sup> Generally speaking, Republican state legislators have proposed and adopted laws purportedly aimed at preventing voter fraud while Democratic legislators have proposed laws aimed at preventing voter intimidation and removing barriers to voting.<sup>110</sup> Each party claims that the other's proposed reforms are designed primarily to gain partisan advantage.<sup>111</sup> The greatest controversy has been in the realm of voter-identification laws:

With the exception of Arizona, which enacted its voter identification law through a voter initiative (aimed more broadly at issues of benefits for illegal immigrants), every state that has enacted or tightened its requirements for voters to show identification at the polls has done so through the support of a Republican-dominated legislature. Democrats have uniformly opposed the efforts to impose new voter identification requirements, as in Pennsylvania, where the Democratic governor vetoed a new voter identification law passed by the Republican-dominated legislature, and in Missouri, where the newly elected Democratic Secretary of State has opposed voter identification laws and argued against them in a report on the 2006 election.<sup>112</sup>

Perhaps most disconcerting is not the partisan split within legislatures but the clearly partisan decision making among judges. An unmistakable split has developed along party lines among judges deciding challenges to voter-identification laws; this split reveals the need for appropriate application of precedent and the propriety, and perhaps the necessity, of a uniform judicial-review methodology.<sup>113</sup> In Michigan, for example, the five Republican judges on the state's highest court voted to uphold the state's voter-identification law, and the two Democrats voted to strike it down.<sup>114</sup>

In *Crawford*, a similar result occurred in the court of appeals. The majority of Seventh Circuit judges were appointed by a Republican president.<sup>115</sup> The dissenting judge was appointed by a Democrat-

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<sup>108</sup> Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 14–15 (2007).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 18.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 19 (footnotes omitted).

<sup>113</sup> See Brief of Hasen, *supra* note 5, at 15.

<sup>114</sup> *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007); see Hasen, *supra* note 108, at 42 n.201.

<sup>115</sup> Chief Judge Easterbrook, who wrote the *Crawford* panel opinion for the Seventh Circuit, was appointed by Republican President Ronald Reagan. See U.S.

ic president.<sup>116</sup> With one exception, the vote denying en banc rehearing split along party lines.<sup>117</sup> While this does not suggest that judges seek partisan advantages, it does indicate that judges bring subjective analyses to these cases consistent with their political affiliation. And that demonstrates the need for strict scrutiny and application of a uniform judicial review methodology.

The *Crawford* case, and the application of the *Anderson-Burdick* standard, reveals a great weakness of judicial review—the absence of core guiding principles. For example, instead of considering the impact of the state law on the principles at the core of our democratic values, the Court took a highly deferential view and weighed state interests over the rights of each individual voter. Rather than encouraging greater democratic participation, statutes that purport to target voter fraud seem merely to use such fraud as “a pretext for a broader agenda to disenfranchise Americans and rig elections.”<sup>118</sup> As a result, a high risk of disenfranchisement exists.

#### VI. APPLICATION OF STRICT SCRUTINY WOULD HAVE EXPOSED INDIANA SEA 483 AS TOO RESTRICTIVE AND UNNECESSARY TO ACHIEVE STATE GOALS

While even the *Anderson-Burdick* test contemplates increased scrutiny under certain circumstances, given the seemingly uncontroversial determination that the right to vote is a fundamental one, the Supreme Court in *Crawford* erred by not applying strict scrutiny. Indiana SEA 483 directly restricts the power of an individual citizen to exercise his or her right to vote, while the precedent cases of *Anderson* and *Burdick* relate merely to indirect burdens such as candidate eligibility.<sup>119</sup>

##### A. *Indiana's Compelling State Interests Are Illusory*

Applying strict scrutiny, the Court first would have examined whether compelling state reasons justify the burdens on an individu-

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COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SEVENTH CIRCUIT JUDGE CHRONOLOGY 11 (2008), available at [http://www.lb7.uscourts.gov/Judges\\_Chronology.pdf](http://www.lb7.uscourts.gov/Judges_Chronology.pdf). Only three of the sixteen judges sitting on the Seventh Circuit were appointed by a Democratic president. See *id.* at 12.

<sup>116</sup> Circuit Court Judge Diane Pamela Wood was appointed by Democratic President Bill Clinton. See *id.*

<sup>117</sup> Hasen, *supra* note 108, at 42.

<sup>118</sup> Schultz, *supra* note 4, at 486.

<sup>119</sup> See generally *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

al's fundamental right to vote imposed by Indiana's SEA 483.<sup>120</sup> As previously noted, Indiana's stated reasons for enacting the law included election modernization, preventing election fraud, and safeguarding voter confidence.<sup>121</sup> In this case, the plaintiffs did not argue that the state lacked a compelling interest in preserving voter confidence. In fact, preventing election fraud unquestionably constitutes a compelling state interest.<sup>122</sup> But notably, "[a]lthough a sizable share of the population believes that vote fraud commonly or occasionally occurs, there is little or no relationship between beliefs about the frequency of fraud and electoral participation."<sup>123</sup> Moreover, it does not appear "that universal voter identification requirements will raise levels of trust in the electoral process. Such fears appear unaffected by stricter voter ID laws, given that individuals asked to produce ID seem to have the same beliefs about the frequency of fraud as those not asked for ID."<sup>124</sup> Similarly, the evidence suggesting the prevalence of voter fraud is illusory.<sup>125</sup>

Based on the foregoing, mere acceptance of the state's asserted interests as compelling is inappropriate and not sufficiently protective of voting rights. The Court too readily accepted without question or independent evidence the State's expressed rationales for SEA 483. These underlying rationales were not subjected to rigorous empirical analysis and verification. To the contrary, the facts reveal that Indiana did not confront a voter-impersonation-fraud problem sufficient to validate the compelling justification required for the resulting legislation.

*B. The Indiana Law Is Not Narrowly Tailored*

Even if it demonstrated a compelling interest, Indiana did not prove that the law, as adopted, is necessary to achieve its goals. The law will be constitutional only if the constraint on voting represents the least restrictive means possible.<sup>126</sup> Indiana's law applies far too broad a restriction relative to the reality of Indiana's purported problems. In addition, despite being facially neutral, the law's actual impact is to disenfranchise large numbers of otherwise qualified voters, especially the old, the poor, and minorities.

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<sup>120</sup> See *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

<sup>121</sup> *Crawford*, 128 S. Ct. at 1617.

<sup>122</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006).

<sup>123</sup> *Ansolahehere & Persily*, *supra* note 43, at 1759.

<sup>124</sup> *Id.*

<sup>125</sup> *Schultz*, *supra* note 4, at 531.

<sup>126</sup> *Dunn*, 405 U.S. at 343.

1. The Law Does Not Effectively Reduce the Problem Alleged by the State

Initially, requiring a voter to show photo identification before casting a regular ballot addresses only in-person voter-impersonation fraud. The photo-identification requirement leaves untouched the problems of absentee-ballot fraud, which, unlike in-person voter impersonation, is a documented problem in Indiana.<sup>127</sup> As noted in *Dunn*, the Supreme Court long has emphasized that, “as a general matter, ‘before [the] right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.’”<sup>128</sup> The state’s purported interest in this case—the prevention of voter fraud—cannot meet that test. While combating voter fraud certainly is a compelling governmental interest, the law cannot be sustained merely because Indiana has articulated hypothetical fraud as its concern. Indiana conceded that it had never prosecuted a case of voter-impersonation fraud that its voter-identification law would likely prevent.<sup>129</sup> Further, evidence of prosecutions for any instances of in-person voter-impersonation fraud within the state is lacking.<sup>130</sup>

In fact, studies demonstrate that in-person voter-impersonation fraud is an extremely rare phenomenon anywhere; no evidence of it, for example, exists in Florida, Illinois, Michigan, Missouri, or Washington State.<sup>131</sup> Election fraud actually is “very rare,” is not more than a “minor problem,” and “rarely affects election outcomes.”<sup>132</sup>

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<sup>127</sup> See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1636–37 (2008) (Souter, J., dissenting).

<sup>128</sup> *Dunn*, 405 U.S. at 336 (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970)).

<sup>129</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting), *aff’d*, 128 S. Ct. 1610.

<sup>130</sup> Rick Hasen, *The Extremely Weak Evidence of Voter Fraud in Crawford, the Indiana Voter ID Case*, ELECTION LAW BLOG, May 2, 2007, <http://electionlawblog.org/archives/008378.html> (“[T]here’s been a great deal of attention nationally from the DOJ to the question of voter fraud in recent years, and still almost none of it has been found . . .”).

<sup>131</sup> *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 793–94 (S.D. Ind. 2006), *aff’d sub nom. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); see Brief of Hasen, *supra* note 5, at 7, 30; Brief of Brennan Ctr. for Justice at NYU School of Law as Amicus Curiae Supporting Plaintiffs-Appellants at 6–18, *Crawford*, 472 F.3d 949 (No. 06-2218) [hereinafter Brief of Brennan Ctr.].

<sup>132</sup> DAVID CALLAHAN & LORRAINE C. MINNITE, *SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD* 4, 17 (2003), available at [http://archive.demos.org/pubs/EDR\\_-\\_Securing\\_the\\_Vote.pdf](http://archive.demos.org/pubs/EDR_-_Securing_the_Vote.pdf).

Voter-impersonation fraud is even less common.<sup>133</sup> Virtually all of the evidence intending to prove that voter fraud is a major national problem has been anecdotal, unproven, disproved, or has pertained to a different type of fraud unrelated to the restrictions that the state imposed.<sup>134</sup> Given that courts have the duty to determine the legitimacy and strength of the state's interest,<sup>135</sup> the state has an obligation to present some evidence to demonstrate the legitimacy of its fraud concerns. Indiana failed in this obligation.<sup>136</sup>

## 2. The Law Has a Disenfranchising Effect On Voters

A significant number of Indiana voters—comprised primarily of elderly, racial and ethnic minority, lesser-educated, and poor residents—will face a greater burden on their ability to exercise their voting franchise because of the state's strict voter-identification law. Over 12 percent of Indiana's voting population is sixty-five or older.<sup>137</sup> In addition, more than five hundred thousand residents, or 8.4 percent, are African American, another approximately two hundred thousand, or 3.5 percent, are Hispanic, and an additional 3 percent are foreign born.<sup>138</sup> Finally, lower-income individuals earning less than \$20,000 per year constitute 21 percent of Indiana households, and 18 percent of adults in Indiana do not have a high school diploma.<sup>139</sup> Because the elderly, racial minorities, low-income, and lesser-educated populations often possess fewer resources and lower levels of political knowledge, these groups “are more susceptible to be disenfranchised through additional layers of bureaucratic regulations, [such] as voter identification laws.”<sup>140</sup> The effect of this disenfranchisement results in an advantage for Republican candidates because those without identification are more likely to identify themselves as Democrat than Republican.<sup>141</sup> Further, Democrats, more likely to in-

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<sup>133</sup> Brief of Brennan Ctr., *supra* note 131, at 10.

<sup>134</sup> *Rokita*, 458 F. Supp. 2d at 793–94; *see* Brief of Brennan Ctr., *supra* note 131, at 6–18 (analyzing and refuting each piece of evidence cited by the district court in support of its holding on the prevalence of voter-impersonation fraud).

<sup>135</sup> *See* *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>136</sup> Brief of Petitioners at 42, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (No. 7-25).

<sup>137</sup> *Barreto*, *supra* note 15, at 6.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 24.

clude the aforementioned groups, generally have a lower rate of access to photo identification.<sup>142</sup>

A survey conducted by the Brennan Center for Justice revealed that a substantial percentage of lower-income citizens lack documentation proving their citizenship. For example, those earning more than \$25,000 per year were found to be more than twice as likely as those earning under \$25,000 per year to possess ready documentation of their citizenship.<sup>143</sup> The Brennan Center survey reported that at least 12 percent of eligible voters earning less than \$25,000 per year do not have a readily available U.S. passport, naturalization document, or birth certificate.<sup>144</sup>

Similarly, the survey showed that elderly citizens also are far less likely to possess the requisite identification.<sup>145</sup> Using 2005 Census information, the Brennan Center found that 18 percent of citizens over the age of sixty-five, or approximately six million people, do not have current photo identification meeting the requirements of the restrictive law.<sup>146</sup>

Like the poor and the elderly, minority citizens disproportionately lack the documentation required by some restrictive voting laws and, therefore, will be unable to exercise their voting right.<sup>147</sup> Reportedly, 25 percent of African-Americans otherwise eligible to vote have no current government-issued photo identification; starkly in contrast, only 18 percent of white eligible voters lack the required documentation.<sup>148</sup> Using 2000 census figures, a staggering 5.5 million adult African-Americans lack photo identification and, therefore, could be barred from voting.<sup>149</sup>

Although opportunities exist to obtain the necessary documents for those without the required government-issued photo identification, the travel costs and fees associated with obtaining such documents can be prohibitive.<sup>150</sup> For example, Indiana counties will issue

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<sup>142</sup> *Id.* at 15.

<sup>143</sup> BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006), available at [http://www.brennancenter.org/page/-/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/download_file_39242.pdf).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> BRENNAN CTR. FOR JUSTICE, *supra* note 143, at 2.

<sup>150</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1628 (2008) (Souter, J., dissenting).

a birth certificate but only upon a payment of \$10.<sup>151</sup> Passports similarly require payment of a fee, including the costs of obtaining a copy of a birth certificate required to prove U.S. citizenship, as a precondition to obtaining a U.S. passport.<sup>152</sup> The total fees for a passport can exceed \$100.<sup>153</sup> As a result, most voters will incur a fee simply to obtain identification to be eligible to vote.<sup>154</sup> In addition, travel time and expense to the Bureau of Motor Vehicles are unavoidable because the statutory provisions preclude use of an affidavit in successive elections.<sup>155</sup>

### 3. Less-Restrictive Alternatives Exist

Other state laws demonstrate less burdensome ways to achieve Indiana's objective. Indiana's voter-identification requirements are the most stringent in the nation.<sup>156</sup> Forty-eight states, the District of Columbia, and the federal government do not have photo identification as a mandatory requirement for voting.<sup>157</sup> These jurisdictions provide other, far less-restrictive means for confirming voters' identity, and given the absence of any meaningful evidence of impersonation fraud, their alternatives are adequate to prevent voter fraud.<sup>158</sup> According to one study, only three states—Georgia, Florida, and Indiana—have photo-identification requirements that are a prerequisite to casting a regular ballot.<sup>159</sup> Four other states prefer photo identification but allow a signed affidavit as a substitute.<sup>160</sup> Eighteen other states require identity documentation but do not insist on photo identification.<sup>161</sup>

Florida and Georgia have put into practice photo-identification requirements that are significantly less restrictive than those of Indiana. Florida, for example, has more permissible forms of photo identification; even in the absence of picture identification, a voter may

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<sup>151</sup> Ind. State Dep't of Health, Application for Search and Certified Copy of Birth Record (2007), available at <http://www.in.gov/icpr/webfile/formsdiv/49607.pdf>.

<sup>152</sup> *Crawford*, 128 S. Ct. at 1631 (Souter, J., dissenting).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1632.

<sup>156</sup> Brief of Brennan Ctr., *supra* note 131, at 4.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> THE PEW CTR. ON THE STATES, VOTER ID LAWS 1 (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/voterID.laws.6.08.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*



nonetheless vote, and the vote will be counted provided the voter's signature matches the one on their voter-registration forms.<sup>162</sup> Georgia also accepts a broader range of underlying documentation than does Indiana.<sup>163</sup> In addition, Georgia has a serious, concerted program to notify voters who may lack photo identification,<sup>164</sup> while Indiana undertakes no such effort whatsoever. These programs ought to raise skepticism about the validity of the Indiana voter-identification requirement.

In addition to its extreme outlier status, a clear partisan element to the Indiana law exists that is masked by the cynical statements about reducing voter fraud and ensuring the integrity of the vote: all Republicans voted for the law, and all Democrats voted against it. Further, the law includes a punitive two-trip accommodation for indigents unable to obtain qualifying identification without paying a fee.<sup>165</sup> This demonstrates the exclusionary motive because poor people are more likely to vote for Democrats.<sup>166</sup>

#### VII. THE IMPORTANCE OF THE *CRAWFORD* DECISION BEYOND INDIANA LAW

The power of the Supreme Court is substantial, and decisions reached by it are difficult to overturn. But individuals may take some recourse to reverse the effects of *Crawford*. Such micro-solutions include lobbying for reversal in a subsequent case, for a constitutional amendment to expressly protect and ensure the right to vote, or for federal legislation to preempt state law and effectively reverse the decision. Alternatively, political parties and concerned constituents may turn to practical solutions, such as mass mobilization, to ensure that eligible voters obtain the requisite photo identification or are provided transportation and assistance. Given the difficulty in successfully overturning recent precedent and securing enough states to ratify a constitutional amendment, legislative action by Congress may

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<sup>162</sup> FLA. STAT. ANN. §§ 101.043(1), .043(2), .048(2)(b) (West, Westlaw through 2009 1st Regular Sess.).

<sup>163</sup> GA. CODE ANN. § 21-2-417 (West, Westlaw through 2009 Regular Sess.); GA. COMP. R. & REGS. 183-1-20.01 (Westlaw through Aug. 2009 amendments).

<sup>164</sup> Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007).

<sup>165</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008) (explaining that the statute imposes a requirement that indigent voters seeking to obtain documentation without paying a documentation-issuance fee travel to government offices on two separate occasions and that the statute therefore requires such voters to incur travel costs and time).

<sup>166</sup> *Cf. Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that the exclusion of a sector of the population because of the way it votes is constitutionally impermissible).

be the most effective means to implement appropriate voter-identification requirements,<sup>167</sup> which ought to preserve important government interests without trampling upon the right to vote. Although these actions may alleviate some of the burdens on voters and address the current, specific problems of the *Crawford* case, they do not address the greater problem of partisan politics on the Court or judicial activism generally.

Perhaps, then, the most effective long-term solution would be the adoption of a uniform method of judicial review. The two most well-known methods are textualism and active liberty, which are proffered by Justice Scalia and Justice Breyer, respectively. Justice Scalia extols the benefits of textualism and originalism as interpretation methodologies for judges to use in deciding statutory and constitutional matters.<sup>168</sup> He asserts that judicial review must be limited to give appropriate effect and deference to legislative power; judges, therefore, should rely solely on the chosen words of those who are constitutionally charged with creating law—elected legislators.<sup>169</sup> Doing so, he maintains, requires that judges apply the precise meaning of the statutory and constitutional text as they were commonly understood at the time of drafting by giving effect to the context in which they were used.<sup>170</sup> According to Justice Scalia, the regularly used common-law methodology encourages too much judicial discretion by invoking unreasonable reliance on thoughts, ideas, and debate that are not part of the language of the laws to which the legislators agreed.<sup>171</sup> For example, current methodology encourages judges to supplement text with examination of evidence of legislative intent, history, expectations, and goals, as well as with consideration of evolving societal standards, perspectives, and sensibilities, to ascertain the meaning and effect of legislative text.<sup>172</sup>

Where Justice Scalia sees the Constitution as largely fixed by its text, subject to amendment by citizen and legislative action at the majority's discretion, Justice Breyer views the Constitution primarily as an expression of a framework for governance that is bound by under-

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<sup>167</sup> Langholz, *supra* note 93, at 797.

<sup>168</sup> See generally SCALIA, *supra* note 1.

<sup>169</sup> *Id.* at 10–11 (referencing Robert Rantoul, who stated that “[j]udge-made law is ex post facto law, and therefore unjust. . . . The judiciary shall not usurp the legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power”).

<sup>170</sup> *Id.* at 23–29.

<sup>171</sup> *Id.* at 17–18.

<sup>172</sup> See *id.*

lying principles, the interpretation of which must be applied to ever-changing facts, issues, circumstances, and realities.<sup>173</sup> Moreover, Justice Breyer recognizes that the primary purpose for the formation of the U.S. liberal democracy—memorialized in the Constitution—was to protect and enhance individual freedom of sovereign citizens to participate in the government (active liberty) and to be free of governmental and majoritarian tyranny (modern liberty).<sup>174</sup> Justice Breyer points out that the very text of the Constitution suggests that the Constitution's principles are far broader than its text and includes the provision that the enumeration of some rights "shall not be construed to deny or disparage others retained by the people."<sup>175</sup> Instead of a strict, precise, and fulsome document, the Constitution creates a "framework that foresees democratically determined solutions, protective of the individual's basic liberties. It assures each individual that the law will treat him or her with equal respect. It seeks a form of democratic government that will prove workable over time."<sup>176</sup>

No one simple interpretive methodology or generalized theory of interpretation, such as textualism or originalism, can fully capture the nuances incorporated by the Constitution or ensure development of a body of law that is consistent with our core values of democracy and liberty. Instead, governed primarily by the driving goal of liberty, judges must rely on text, related language, legislative history, statutory and constitutional goals, tradition and precedent, and, most importantly, the purposes and values that the Constitution embodies. Lastly, judges must consider the likely consequences of their decisions. If judges remain steadfastly loyal to the overarching principles, core values, and framework for democracy established by the Constitution, they will maintain legitimacy of the law in a manner that does not subject individual sovereignty to the will of the majority and the captive legislature it elects.

Justice Breyer's methodology considers the impact of laws on the constitutional imperative to advance active liberty<sup>177</sup> by believing that the greater priority should be on overall consistency to democratic

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<sup>173</sup> See generally BREYER, *supra* note 1.

<sup>174</sup> *Id.* at 8–9.

<sup>175</sup> U.S. CONST. amend. IX.

<sup>176</sup> BREYER, *supra* note 1, at 134.

<sup>177</sup> Similarly, the Elmendorf brief argues that consequences do matter. Brief of Christopher S. Elmendorf and Daniel P. Tokaji as Amici Curiae Supporting Petitioners at 2, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (Nos. 7-21 & 7-25).

ideals.<sup>178</sup> The consideration of active liberty methodology is far more likely than textualism and originalism to result in a body of case law that furthers, rather than inhibits, civil liberties and minority protections in a manner consistent with the goals of democratic governance and individual liberty.<sup>179</sup> As a result, most essential liberty rights (such as privacy, control over one's own body, and sexual freedom), civil rights for racial and ethnic minorities, and equal rights for women, many of which involve politically sensitive and emotionally charged issues that divide the electorate, have been recognized first in the courtroom and only later found their way into statutory law.<sup>180</sup> The majority in *Crawford* engaged in judicial activism by picking precedent to achieve a desired outcome and ignoring precedent directly on point. Justice Breyer's "active liberty" theory, if applied, would have found the statute to be unconstitutional because the law seeks to reduce, rather than enhance, participation. Accordingly, to ensure a system of law capable of timely and appropriate change, the law itself must continue to be developed by both legislative and judicial means.

#### VIII. CONCLUSION

In *Crawford*, the Supreme Court, by perhaps reaching for precedent most likely to permit its desired result, applied a line of cases and analyses never intended to govern the direct right to vote. Simultaneously, the Court ignored longstanding precedent requiring that state restrictions on fundamental rights be subjected to strict judicial scrutiny. The selected line of cases applied by the Court actually empowered it to uphold a statute that directly denies the ability to exercise a fundamental right by relying upon a standard for judicial review intended only for restrictions on voting that are indirect or derivative in nature. Moreover, the solution applied proved unworkable and resulted in disparate, starkly contrasting results that failed to protect the fundamental right to vote, mirrored the ideologies of the Justices rendering the opinions, and created the very judicial activism and unrestrained judicial power abhorred by both Justice Scalia and Justice Breyer. In addition to being wrongly decided and dilutive of fundamental constitutional rights, the *Crawford* case exposes the failure of our judicial system, its susceptibility to judicial

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<sup>178</sup> See generally BREYER, *supra* note 1, at 21–34.

<sup>179</sup> *Id.* at 28 (stating that the Constitution's structural complexity was a conscious effort to "prevent a single group of individuals from exercising too much power, thereby helping to protect an individual's fundamental liberty").

<sup>180</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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activism, and the urgent need to adopt a uniform methodology for judicial review.