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Constitutional Burdens on the Right to Vote: *Crawford v. Marion County Election Board*

I. INTRODUCTION

The year of 2008 may be the most important year in election law jurisprudence for the United States Supreme Court since the landmark case of *Bush v. Gore*¹ in 2000. The much anticipated case of *Crawford v. Marion County Election Board*,² which many commentators hoped would shed some light on the parameters of state election restrictions,³ provides useful guidance on the burdens a plaintiff must show when challenging a state restriction on the right to vote.⁴ *Crawford* develops the Court's burden analysis substantially and therefore is critical for the practitioner in this area of law. The case also provides useful guidance for state policy makers seeking to craft legislation in an attempt to enhance the integrity of the elections process in the future.

1. 531 U.S. 98 (2000).

2. 128 S. Ct. 1610 (2008).

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

4. See *Crawford*, 128 S. Ct. at 1614-20.

II. FACTUAL BACKGROUND

The dispute in *Crawford v. Marion County Election Board*⁵ began in 2005 when the Indiana General Assembly passed the Voter ID Law.⁶ This law was enacted concurrently with a number of similar statutes in other state legislatures⁷ and requires in-person Indiana voters to present a government-issued photo identification card prior to casting their ballots.⁸

Upon enactment, the law was challenged in the United States District Court for the Southern District of Indiana by the Indiana Democratic Party and the Marion County Democratic Central Committee. These plaintiffs sought a judgment declaring the requirements of the Voter ID Law invalid and an injunction to prevent their enforcement.⁹

In the district court, the plaintiffs alleged that (1) the Voter ID Law violates the Fourteenth Amendment to the United States Constitution¹⁰ by placing a substantial burden on the right to vote; (2) the Voter ID Law is not a necessary or appropriate method to avoid election fraud; and (3) the Voter ID Law will arbitrarily disenfranchise qualified voters who do not have and are unable to readily obtain a government-issued photo identification.¹¹ Because plaintiffs failed to meet their burden of production, the district court granted Indiana's motion for summary judgment, finding that "[the plaintiffs] had 'not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Voter ID Law] or who will have his or her right to vote unduly burdened by its requirements.'"¹²

The case became somewhat more politicized when heard by the United States Court of Appeals for the Seventh Circuit.¹³ The Seventh Circuit affirmed the district court's ruling, stating that because no plaintiffs were claiming the requirements would prevent them from voting, an inference is drawn that "the motivation for the suit is simply that the

5. 128 S. Ct. 1610 (2008).

6. IND. CODE ANN. §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (LexisNexis Supp. 2006).

7. See, e.g., O.C.G.A. § 21-2-417 (2008).

8. IND. CODE ANN. § 3-11-8-25.1.

9. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1614 (2008). A separate suit was brought on behalf of two elected officials and a number of organizations representing elderly, disabled, poor, and minority voters. These two cases were consolidated at the district court level. *Id.*

10. U.S. CONST. amend. XIV.

11. *Crawford*, 128 S. Ct. at 1614.

12. *Id.* (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)).

13. See *id.* at 1615.

law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.”¹⁴ The plaintiffs then filed a petition for rehearing en banc, which was denied.¹⁵

Finally, the United States Supreme Court intervened and granted certiorari.¹⁶ In a 6–3 decision, the Court held that the interests of Indiana in requiring government-issued photo identification for in-person voting outweigh the burdens placed on voters by the photo identification requirement.¹⁷

III. LEGAL BACKGROUND

A. *Statutory Background*

The Voter ID Law¹⁸ was passed in the 2005 Session of the Indiana General Assembly.¹⁹ Much of the Voter ID Law was drawn from the recommendations of the Report of the Commission on Federal Election Reform.²⁰ The Voter ID Law applies to all in-person voters and does not apply to persons voting by absentee ballot.²¹ Also, the photo identification requirement does not apply to persons living and voting in state-licensed facilities, such as nursing homes.²² Furthermore, a voter who has the proper photo identification but does not have it present at the polls may cast a provisional ballot, which will be counted upon that voter bringing a photo identification to the court clerk’s office within ten days of the election.²³ This provisional ballot alternative also applies to voters who are indigent or have religious objections to being photographed, but these voters must sign an affidavit explaining why they do not have a photo identification card in lieu of presenting photo identification.²⁴

14. *Id.* (quoting *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008)).

15. *Id.*

16. *Id.*

17. *Id.* at 1624.

18. IND. CODE ANN. §§ 3-5-2-40.5, 3-10.1-7.2, 3-11-8-25.1 (LexisNexis Supp. 2006).

19. Senate Enrolled Act No. 483, 2005 Ind. Acts 109.

20. BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, SEPTEMBER 2005, CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, AMERICAN UNIVERSITY (Sept. 2005) [hereinafter COMMISSION REPORT] (recommending eighty-seven methods to improve the conduct of elections).

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

22. IND. CODE ANN. § 3-11-8-25.1(e).

23. IND. CODE ANN. § 3-11.7-5-2.5(a) (LexisNexis Supp. 2006).

24. IND. CODE ANN. §§ 3-11.7-4-1, 3-11.7-5-2.5(c) (LexisNexis 2002 & Supp. 2006).

B. Historically Significant Caselaw

Election law jurisprudence, like much of the jurisprudence surrounding the Equal Protection Clause of the Fourteenth Amendment,²⁵ is rooted in the racially discriminatory voting requirements utilized by the states throughout much of the history of the United States. The landmark case of *Harper v. Virginia State Board of Elections*²⁶ was one of the first cases in which the United States Supreme Court invoked the Fourteenth Amendment's Equal Protection Clause to strike down a state voting restriction.²⁷

In *Harper* the Court addressed the constitutionality of a Virginia poll tax that required all eligible voters to pay to cast their ballots.²⁸ The Court initially recognized that the right to vote is subject to nondiscriminatory state restrictions.²⁹ It made clear, however, that state restrictions on suffrage had to bear some relation to the promotion of the intelligent use of the ballot.³⁰ The Court explicitly pointed out that the Fourteenth Amendment does not permit the affluence of the voter to be a factor in assessing the qualifications of the voter.³¹ Finally, the Court spoke to the applicable scrutiny level under which voting restrictions should be analyzed when it noted that "classifications which might invade or restrain [the right to vote] must be closely scrutinized and carefully confined."³²

The Court's "close scrutiny" analysis of election restrictions in *Harper* was later qualified by the Court in the case of *Anderson v. Celebrezze*.³³ *Anderson* involved a state elections statute that required independent candidates for president to file certain qualifying documents in March to appear on the November ballot.³⁴ The plaintiffs argued that the early filing deadline placed an unconstitutional burden on the independent candidate's supporters.³⁵

25. U.S. CONST. amend. XIV, § 1.

26. 383 U.S. 663 (1966).

27. *Id.* at 666.

28. *Id.* at 665 n.1.

29. *Id.* at 665 (citing *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959)).

30. *Id.* at 666 (quoting *Lassiter*, 360 U.S. at 51).

31. *Id.* at 666-68 (reasoning that while a state has an interest in regulating the qualifications of its voters, wealth is not germane to a voter's ability to make an intelligent decision).

32. *Id.* at 670.

33. 460 U.S. 780 (1983).

34. *Id.* at 782.

35. *Id.*

Justice Stevens began the majority opinion in *Anderson* by noting that important state regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.³⁶ Justice Stevens said that there was no “litmus-paper test” to determine the constitutionality of a state’s voting restrictions.³⁷ Instead, the Court in *Anderson* set out a balancing test weighing the character and magnitude of the restrictions’ effects on the plaintiff’s First Amendment³⁸ and Fourteenth Amendment rights against the interests of the state in enacting the restrictions.³⁹ The Court then stated that the proper “inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.”⁴⁰ Thus, the Court modified the “close scrutiny” analysis for election restrictions to a more flexible balancing test, albeit a rather undefined one.

The next major attempt by the Court to define permissible state election restrictions and explain how the balancing test of *Anderson* would operate was in the case of *Burdick v. Takushi*.⁴¹ *Burdick* involved a state’s statutory restriction on write-in voting that prevented a voter from writing in the name of a candidate who did not qualify to be placed on the ballot. The plaintiff argued that this ban on write-in votes violated his First Amendment right of expression.⁴²

In *Burdick* Justice White, writing for the majority, began his analysis of the write-in restriction by stating, “Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.”⁴³ Justice White noted that this notion was inconsistent with prior caselaw and that the right to vote in any manner was not absolute.⁴⁴ The Court reiterated language from the United States Constitution granting the states the inherent power to regulate their own elections.⁴⁵

36. *Id.* at 788.

37. *Id.* at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

38. U.S. CONST. amend. I.

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

40. *Id.* at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)).

41. 504 U.S. 428 (1992).

42. *Id.* at 430.

43. *Id.* at 432.

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

45. *Id.* (quoting U.S. CONST. art. I, § 4, cl. 1) (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”)

The Court in *Burdick* noted that practical considerations prohibit a strict scrutiny analysis on all election law challenges.⁴⁶ The Court said that to have fair and honest elections, the election process must have some order, and therefore substantial state regulation of the process was necessary.⁴⁷ A strict scrutiny analysis on every election law challenge would work to prohibit a fair and equitable election process because it would place too heavy of a burden on the state trying to administer the process.⁴⁸ While Justice White recognized that the write-in restriction would necessarily impose a burden on individual voters,⁴⁹ he insisted that in this case, the state's interest outweighed these individual burdens.⁵⁰

The Court then defined a more flexible standard of review for election law challenges.⁵¹ The applicable test is the balancing test of *Anderson*.⁵² The Court in *Burdick* gave further guidance in how to apply the balancing test by defining how rigorously the balancing test was to be applied.⁵³ When the challenged state regulation places a heavy burden on Constitutional rights, the balancing test favors the voter, and the Court will require the restrictions to be "narrowly drawn to advance a state interest of compelling importance."⁵⁴ However, in the case of "reasonable, nondiscriminatory restrictions," the state restrictions will generally outweigh the burden on the voters.⁵⁵ Therefore, if the burden imposed by the state restriction is light, there is a presumption that the law is constitutional,⁵⁶ and the state will not have to justify the restriction with a compelling interest.⁵⁷

The dissent in *Burdick* provided an interesting take on the burden analysis used in election law challenges because the three dissenting Justices⁵⁸ viewed the burden in a different light than the Justices in the majority. Justice Kennedy, writing for the dissent, agreed with the majority that the balancing test from *Anderson* is the proper test.⁵⁹

46. *Id.*

47. *Id.* (quoting *Storer*, 415 U.S. at 730).

48. *Id.*

49. *Id.*

50. *Id.* at 441-42.

51. *See id.* at 434.

52. *See id.*

53. *See id.*

54. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

55. *Id.* (quoting *Anderson*, 460 U.S. at 788).

56. *Id.* at 441.

57. *Id.* at 439.

58. Justices Kennedy, Stevens, and Blackmun.

59. *Burdick*, 504 U.S. at 445-46 (Kennedy, J., dissenting).

However, all of the dissenting Justices recognized that a significant burden on individual voters could tip the balance toward a strict scrutiny analysis.⁶⁰ Thus, the dissenting Justices, who included Justices Blackmun and Stevens,⁶¹ were more concerned with the impact of the state regulation on an individual rather than the impact on groups or classes of voters.

The issues left open by the Court after *Burdick* were what constituted a significant burden that would move the Court to a strict scrutiny review of the voting restriction and what evidence must be presented to meet that burden. Also, the question of whether the burden would have to be on an individual as opposed to voters as a whole was left open for further clarification. Thus, litigants bringing constitutional challenges to state election restrictions were left with numerous questions, including what will constitute a severe burden, to whom must this burden apply, and how must this burden be shown?

IV. COURT'S RATIONALE

In *Crawford v. Marion County Election Board*,⁶² the United States Supreme Court granted certiorari to determine whether a state statute requiring in-person voters to show a government-issued photo identification card is valid under the Equal Protection Clause of the Fourteenth Amendment.⁶³ The Court concluded that a nondiscriminatory photo identification restriction is valid when the plaintiffs cannot demonstrate that the restriction excessively burdens any class of voters.⁶⁴

A. *The Majority Opinion*

In *Crawford* Justice Stevens wrote the majority opinion, and he was joined by Chief Justice Roberts and Justice Kennedy,⁶⁵ with Justices Scalia, Thomas, and Alito concurring.⁶⁶ Justice Stevens clarified how much evidence the Court would require to find a burden severe enough to justify a heightened scrutiny review.⁶⁷ Justice Stevens began his opinion by noting that under *Harper v. Virginia State Board of Elections*,⁶⁸ restrictions are invidious and therefore unconstitutional if

60. *See id.* at 448-49.

61. *Id.* at 442.

62. 128 S. Ct. 1610 (2008).

63. U.S. CONST. amend. XIV, § 1; *see Crawford*, 128 S. Ct. at 1613.

64. *Crawford*, 128 S. Ct. at 1623.

65. *See id.* at 1613.

66. *See id.* at 1624.

67. *See id.* at 1622-23.

68. 383 U.S. 663 (1966).

they are irrelevant to the voter's qualifications.⁶⁹ The Court then confirmed that the appropriate test for evaluating voter regulations was the balancing test established in *Anderson v. Celebrezze*⁷⁰ and clarified in *Burdick v. Takushi*.⁷¹

The Court next analyzed the burdens created by the photo identification requirement.⁷² The Court explicitly recognized that the photo identification requirement imposed a burden on voters separate from other voter identification methods.⁷³ However, the burden imposed by the photo identification requirement was described as a "[b]urden[] . . . arising from life's vagaries," and therefore the burden was insufficient to raise questions about the constitutionality of the requirement.⁷⁴ Furthermore, the Court concluded that the availability of the right to cast a provisional ballot mitigated the burdens on voting caused by the photo identification requirement.⁷⁵

In defining the outer limit of a valid photo identification requirement, the Court stated that under *Harper* any statutory restriction requiring voters to pay a tax or a fee to obtain a photo identification card would be invalid because it would effectively operate as a poll tax on those bearing the regulation's burden.⁷⁶ However, when the photo identification card is issued to qualified voters for free, the Court held that the photo identification requirement does not operate as an impermissible poll tax.⁷⁷ The Court quickly dismissed the plaintiff's argument that there is an inherent burden in obtaining the free cards, noting that the burden of making a trip to obtain a photo identification card and posing for the photograph did not constitute a substantial burden on the right to vote.⁷⁸

The Court next turned to what seemed to be the critical factor in the Court's decision: the lack of evidence of a substantial burden on qualified voters.⁷⁹ Justice Stevens began this discussion by noting that a plaintiff making a broad attack on the constitutionality of a state election law bears a "heavy burden of persuasion."⁸⁰ He characterized

69. *Crawford*, 128 S. Ct. at 1616.

70. 460 U.S. 780 (1983).

71. 504 U.S. 428 (1992); *Crawford*, 128 S. Ct. at 1616.

72. *See Crawford*, 128 S. Ct. at 1620.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1620-21.

77. *Id.* at 1621.

78. *Id.*

79. *See id.* at 1622.

80. *Id.* at 1621.

the position taken by the plaintiffs as asking the Court to “perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State’s broad interests in protecting election integrity.”⁸¹ He stated that the evidence presented in the record failed to quantify the extent of this hypothetical burden placed on this small number of voters.⁸²

The Court pointed to the numerous ways this lack of evidence of a burden manifested itself.⁸³ First, Justice Stevens noted that there was insufficient information to determine the number of registered voters that lacked a photo identification card.⁸⁴ Second, the Court observed that there was no “concrete evidence” of the hardship imposed on voters lacking photo identification.⁸⁵ Third, the Court stated that while there had been at least one recorded issue with the photo identification requirement,⁸⁶ it would take more than one recorded instance to show that the problem was common.⁸⁷ Justice Stevens also chastised the plaintiff’s attorney on this point in a footnote.⁸⁸

Justice Stevens then weighed the state’s regulatory interests against the burdens of the restriction.⁸⁹ Three state interests were identified: (1) the interest in modernizing the election process;⁹⁰ (2) the interest in deterring and detecting voter fraud;⁹¹ and (3) the interest in safeguarding voter confidence.⁹² Regarding the interest in modernizing the election process, the Court examined the arguments put forth by the state and held that the state did have a rational interest in modernizing the election process.⁹³ In arriving at this conclusion, the Court examined the National Voter Registration Act of 1993 (NVRA),⁹⁴ which requires state motor vehicle driver’s license applications to serve as voter

81. *Id.* at 1622.

82. *Id.*

83. *See id.* at 1622-23.

84. *Id.* at 1622.

85. *Id.*

86. *Id.* at 1622-23. A homeless woman was denied a photo identification card because she did not have an address. *Id.*

87. *Id.* at 1623.

88. *See id.* at 1623 n.20 (noting that “Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication”).

89. *See id.* at 1616-17.

90. *Id.* at 1617.

91. *Id.*

92. *Id.*

93. *Id.*

94. 42 U.S.C. §§ 1973gg to 1973gg-10 (2000).

registration applications.⁹⁵ Justice Stevens also noted that the Report of the Commission on Federal Election Reform⁹⁶ suggests that photo identification cards were needed for a task as important as voting.⁹⁷

The second state interest addressed by the majority was the interest in preventing voter fraud.⁹⁸ Justice Stevens noted that the only kind of voter fraud that the photo identification requirement would prevent would be in-person voter impersonation; however, he did point out that this type of voter fraud is known to occur in parts of the United States and therefore the prevention of such fraud is a proper interest of the state.⁹⁹ The Court also noted that as a matter of policy, the state has an interest in counting only the votes of eligible voters and an interest in the orderly administration and accurate recordkeeping of the election.¹⁰⁰ Both interests provide a justification for being able to properly identify all voters in an election.¹⁰¹

Therefore, in light of the record presented with the case, the Court held that it could not conclude that the statute imposed “‘excessively burdensome requirements’ on any class of voters.”¹⁰² In fact, Justice Stevens held that the broad application of the Indiana statute imposed only a limited burden on voters because the state’s precise interests outweighed the facial challenge to the law.¹⁰³ Justice Stevens also noted that it is extremely important to demonstrate the severity of the burden the regulation places on voters because “[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”¹⁰⁴

Third, the majority addressed the state interest in safeguarding voter confidence.¹⁰⁵ Indiana argued that it had an interest in promoting confidence “in the integrity and legitimacy of representative government.”¹⁰⁶ Justice Stevens deemed this to be a proper interest that

95. *Id.* § 1973gg-3; *Crawford*, 128 S. Ct. at 1617 (noting that the NVRA contains provisions restricting a state’s ability to remove names from the voter roles and therefore works to inflate the voter lists).

96. COMMISSION REPORT, *supra* note 20.

97. *Crawford*, 128 S. Ct. at 1618 (quoting COMMISSION REPORT, *supra* note 20, at § 2.5).

98. *Id.* at 1618-19.

99. *Id.* at 1619.

100. *Id.*

101. *Id.*

102. *Id.* at 1623 (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

103. *Id.*

104. *Id.* (alteration in original) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006)).

105. *See id.* at 1620.

106. *Id.*

could justify state regulations of the electoral process because public confidence in the integrity of representative government promotes participation in the government by citizens.¹⁰⁷

The last issue addressed by Justice Stevens's majority opinion was the effect that the politicization of the photo identification requirement would have on its validity.¹⁰⁸ The plaintiffs argued that in the vote on the bill creating the photo identification requirement, all of the Republicans in the Indiana General Assembly voted in favor of the measure while all of the Democrats voted against the measure.¹⁰⁹ Justice Stevens acknowledged that partisan considerations were involved but held that this fact was not enough to invalidate a law that was nondiscriminatory and supported by valid neutral justifications.¹¹⁰ However, the Court did state that if partisan considerations had been the only justification for the requirement, the law would be invalid.¹¹¹

B. Justice Scalia's Concurrence

Justice Scalia, joined by Justices Thomas and Alito, wrote a concurrence that was more direct and concrete than the majority opinion.¹¹² Justice Scalia took the position that the burden analysis was not concerned with a severe burden on an individual voter but rather was concerned with the burden on voters as a whole.¹¹³ Justice Scalia began his concurring opinion by noting that Justice Stevens's majority opinion was decided on the fact that the plaintiffs had not presented enough evidence to show that the burden was sufficiently severe to warrant strict scrutiny.¹¹⁴ Justice Scalia then agreed with Justice Stevens's assessment of the lack of evidence but went on to decide the case as if there had been enough evidence to show a minimal and justified burden on voters.¹¹⁵

The concurring opinion first acknowledged that the *Burdick* test was indeed the proper method to evaluate the validity of the photo identification requirement and thus argued that strict scrutiny is only appropriate when the restriction places a severe burden on the right to vote.¹¹⁶ Justice Scalia then went into a burden analysis to determine the

107. *Id.*

108. *See id.* at 1623-24.

109. *Id.* at 1623.

110. *Id.* at 1624.

111. *Id.*

112. *See id.* (Scalia, J., concurring).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

severity of the burden imposed by the photo identification card requirement in Indiana.¹¹⁷ He laid out a baseline for what the Court would consider severe by stating that “[o]rdinary and widespread burdens, such as those requiring ‘nominal effort’ of everyone, are not severe.”¹¹⁸ Justice Scalia plainly stated that “[b]urdens are severe if they go beyond the merely inconvenient.”¹¹⁹

In his analysis of the burden the Indiana law placed on voters, Justice Scalia noted that the differing burdens on voters advanced by the plaintiffs were merely “the law’s different *impacts* of the single burden that the law uniformly imposes on all voters.”¹²⁰ These differing impacts, however, were not relevant to determining the severity of the burden imposed by the law.¹²¹ Rather, Justice Scalia argued that the burden of a voting regulation should be determined by its impact on the voting public generally and not by its burden on a single plaintiff.¹²² Furthermore, Justice Scalia noted that weighing the burden of a nondiscriminatory voting law on individual voters and requiring exceptions from the law for vulnerable voters would overturn “decades of equal-protection jurisprudence.”¹²³

Justice Scalia’s concurring opinion also noted a number of practical issues cautioning against finding an election regulation invalid.¹²⁴ The first of these considerations was the need for certainty in the voting process.¹²⁵ Furthermore, Justice Scalia noted that because voting regulations are unlikely to improve everyone’s lot, any burden analysis at the level of the individual voter would create endless litigation.¹²⁶

Finally, Justice Scalia advanced an argument for the validity of the voting regulation based on structural postulates of federalism.¹²⁷ He emphasized the importance of judicial restraint in this area of regulation, which is granted specifically to the states by the United States Constitution.¹²⁸ Justice Scalia stated that the judgments of state

117. *See id.* at 1624-25.

118. *Id.* at 1624.

119. *Id.* at 1625.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1626.

124. *See id.*

125. *Id.* (stating that “the dos and don’ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive”).

126. *Id.*

127. *See id.*

128. *Id.*

legislatures regarding election regulations should be upheld unless they impose “a severe and unjustified overall burden upon the right to vote, or [are] intended to disadvantage a particular class.”¹²⁹

C. Justice Souter’s Dissent

The first dissent was written by Justice Souter and joined by Justice Ginsburg.¹³⁰ Justice Souter’s dissenting opinion took a decidedly different tone than either the majority or concurring opinions when it stated that the Voter ID Law threatened to impose serious burdens on “tens of thousands of the State’s citizens.”¹³¹ Justice Souter focused on the *Burdick* balancing test like the Justices in the majority opinion,¹³² however, he emphasized the interests of the state in enacting the law.¹³³ Justice Souter would require a state to “make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.”¹³⁴

Unlike Justice Scalia’s concurring opinion, Justice Souter’s dissenting opinion took an individualized approach to the burden analysis. Justice Souter noted a number of burdens that could be severe on some voters.¹³⁵ One of these burdens was the necessary travel to the Bureau of Motor Vehicles to obtain the identification card.¹³⁶ However, Justice Souter explicitly recognized that the travel burden inherent in the law is not a severe burden under *Burdick*.¹³⁷ Most importantly, in a footnote, Justice Souter said that this serious burden might be mitigated by a mobile license branch program implemented by the state.¹³⁸

Justice Souter noted that, adding to the burden caused by the necessity of travel to get the photo identification card, voters must also be able to produce certain documents, such as “a birth certificate, a certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.”¹³⁹ He reasoned that this added to the burden because the two most common documents, a

129. *Id.* at 1626-27.

130. *See id.* at 1627.

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

132. *See id.*

133. *See id.*

134. *Id.*

135. *See id.* at 1628-31.

136. *Id.* at 1628-29 (reasoning that the required travel could have a prohibitive effect on poor, old, and disabled voters).

137. *Id.* at 1630.

138. *Id.* at 1630 n.14.

139. *Id.* at 1631.

birth certificate and a passport, were only available for a price that could be prohibitive for some voters.¹⁴⁰ Justice Souter reasoned that the combination of travel costs and fees for obtaining necessary documents would fall disproportionately on the poor, old, and disabled and would likely deter them from voting, which would amount to a severe burden.¹⁴¹

Justice Souter next addressed the provisional-ballot exception to the photo identification requirement.¹⁴² He said that such an exception could, in theory, mitigate the burden on voters by providing a way around the costs of procuring a photo identification card.¹⁴³ However, Justice Souter concluded that the Indiana provisional-ballot exception did not mitigate the burden because of the requirement that the voter casting the provisional ballot return to the court clerk's office within ten days of the election to sign an affidavit.¹⁴⁴

Importantly, Justice Souter took a different approach than Justice Stevens in considering the number of people affected by the photo identification requirement. Justice Souter admitted that the plaintiffs failed to precisely identify the number of voters that would be deterred; however, he recognized that the data presented to the district court showed that tens of thousands of voters could be affected because they lacked the necessary photo identification cards.¹⁴⁵ Justice Souter would hold that empirical precision is not necessary to raise a voting-rights claim; rather, the plaintiff need only show that serious burdens on voters are likely.¹⁴⁶

In the second part of the burden analysis, Justice Souter would require the state to advance much more precise interests to justify placing such burdens on voters.¹⁴⁷ While Justice Souter acknowledged the "abstract importance[] . . . of combating voter fraud," he determined that the photo identification requirement was under-inclusive in addressing this issue.¹⁴⁸ Furthermore, Justice Souter noted that not one instance of in-person voter fraud in Indiana was documented, and Indiana's argument that in-person voter fraud is hard to detect was an insufficient justification.¹⁴⁹ For the same reason, Justice Souter

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1634.

146. *Id.*

147. *Id.* at 1636.

148. *Id.*

149. *Id.* at 1637.

concluded that the state could not justify the restrictions on the argument that the perception of in-person voter fraud hurt public confidence in the election process.¹⁵⁰

D. Justice Breyer's Dissent

Justice Breyer wrote a dissenting opinion that was much more open to accommodating a voter identification requirement in certain circumstances, specifically when a state makes greater attempts to inform and facilitate voters' acquisition of the requisite photo identifications.¹⁵¹ Justice Breyer agreed with the majority opinion that a photo identification requirement is not inherently unconstitutional.¹⁵² However, he determined that the Indiana voter identification requirement was invalid because it imposed burdens that outweighed the state's interest under the *Burdick* balancing test.¹⁵³

First, Justice Breyer objected to the manner in which the Indiana photo identification requirement was implemented.¹⁵⁴ Justice Breyer stated that these objections could be remedied by the state, thereby making the requirements constitutionally valid.¹⁵⁵ Justice Breyer cited the Georgia Voter ID Law¹⁵⁶ as an example of a voter identification regulation that would withstand constitutional scrutiny because the Georgia requirement allows for a wider range of underlying documentation to get a photo identification card.¹⁵⁷ Justice Breyer also commended Georgia because it “has undertaken a serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [State-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID.”¹⁵⁸

150. *Id.* at 1642.

151. *Id.* at 1644 (Breyer, J., dissenting).

152. *Id.*

153. *See id.* at 1644-45.

154. *See id.* at 1644 (stating that the law has the greatest impact on the poor, elderly, and disabled, who will find it hard to travel to the Bureau of Motor Vehicles and afford the cost of the required documentation).

155. *Id.*

156. O.C.G.A. § 21-2-417 (2008).

157. *Crawford*, 128 S. Ct. at 1644.

158. *Id.* at 1645 (alteration in original) (quoting Common Cause/Georgia v. Billups, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007)).

V. IMPLICATIONS

*Crawford v. Marion County Election Board*¹⁵⁹ is likely to become important for practitioners in election law because it demonstrates how the current Supreme Court views the *Burdick* balancing test. Primarily, the case illustrates the fine distinctions in an election law challenge and establishes what a plaintiff's burden is in bringing such a challenge. Furthermore, the case gives guidance to policy makers seeking to draft election regulations, particularly the ever-popular photo identification requirements.

Concerning the applicable balancing test, *Crawford* clarifies for plaintiffs what they must show to convince the Court that there is a substantial burden outweighing the important state interest in regulating elections. The Court in *Crawford* reiterated that the appropriate test to apply in challenging a state election law is the balancing test of *Anderson v. Celebrezze*¹⁶⁰ and *Burdick v. Takuski*;¹⁶¹ however, *Crawford* also makes it clear that merely alleging a substantial burden on the right to vote will not suffice to outweigh a nondiscriminatory election regulation that is relevant to voter qualifications.¹⁶² The Court demands specific empirical evidence showing the gravity of the burden imposed on voters by the state election law.¹⁶³ It is no longer sufficient for a plaintiff making a broad attack on the validity of an election regulation to allege that an added inconvenience to voting constitutes a substantial burden.

Justice Stevens's majority decision seems to hinge on the fact that no clear evidence showed that the photo identification law placed a substantial burden on the right to vote.¹⁶⁴ Thus, the plaintiff's assertion to that effect is not enough to outweigh the state's important interest in regulating the conduct of elections.¹⁶⁵ Plaintiffs must be precise in demonstrating that the regulation will in fact prevent eligible voters from exercising their right to vote. Some important factors to show are (1) the number of eligible voters that will be affected by the regulation; (2) concrete evidence of the hardships on eligible voters that

159. 128 S. Ct. 1610 (2008).

160. 460 U.S. 780 (1983).

161. 504 U.S. 428 (1992); *Crawford*, 128 S. Ct. at 1616.

162. *Crawford*, 128 S. Ct. at 1623.

163. *Id.* at 1622.

164. *Id.* at 1623.

165. *Id.*

the law will impose; and (3) hardships imposed by the law that are a common problem.¹⁶⁶

A second matter of import in this case is the determination of whom the substantial burden of a state election law has to affect before the Court will find that the burden on voters outweighs the interests of the state. The majority opinion did not explicitly address this issue. It was, however, addressed by Justice Scalia's concurring opinion and the dissenting opinions. Justice Scalia, along with Justices Thomas and Alito, would hold that substantial burdens on individuals are irrelevant; rather, it is the overall burden on voters as a whole that the Court must weigh against the interests of the state.¹⁶⁷ Conversely, Justices Breyer, Souter, and Ginsburg would hold that substantial burdens on individual voters would be enough to outweigh the important interests of the state in promulgating and enforcing its election laws.¹⁶⁸

Thus, whether the interests of the state could be outweighed by substantial burdens on individual voters would be decided by Justices Stevens, Kennedy, and Chief Justice Roberts. While Chief Justice Roberts has not addressed this issue yet, Justices Kennedy and Stevens have in *Burdick*.¹⁶⁹ There, Justice Kennedy wrote for the dissent, and was joined by Justice Stevens, concluding that a significant burden on individual voters could tip the balancing test against the state's interest and invalidate the state election law.¹⁷⁰ Therefore, a plaintiff bringing a challenge to a state election law will likely be successful by showing that the law substantially burdens the voting rights of a number of individual voters. Any responsible attorney should try to show that the election law places a substantial burden on voters as a whole and should only rely on individual impacts out of necessity.

Finally, *Crawford* is an important case for policy makers seeking to implement new election law restrictions. It is clear that a state legislature has the authority to impose restrictions on elections that are rationally related to the relevant qualifications of voters as long as those restrictions are nondiscriminatory. Furthermore, it is equally clear that a photo identification requirement is proper and even encouraged as a means of insuring the validity and reliability of the election process. In *Crawford* Justice Breyer noted that it is preferable for policy makers to approach this task methodically and not in a hasty manner.¹⁷¹ A

166. *Id.* at 1622-23.

167. *Id.* at 1625 (Scalia, J., concurring).

168. *Id.* at 1645 (Breyer, J., dissenting).

169. *See Burdick*, 504 U.S. at 442-50 (Kennedy, J., dissenting).

170. *See id.*

171. 128 S. Ct. at 1644 (Breyer, J., dissenting).

phase-in period for such a requirement is preferable to a quick change.¹⁷² Conspicuous notice of the new requirements and adequate opportunities to mitigate the effect of the requirement on qualified voters who are unable to comply go a long way to stem fears that such requirements will be used to disenfranchise voters. Even Justice Breyer approved of a similar voter identification law in Georgia because of the concerted notice efforts and procedural safeguards used by Georgia in implementing its voter identification law.¹⁷³ Thus, state legislatures may effectively implement and avoid challenges to voter identification requirements when they do so in a concerted effort to ensure that the requirements are clear, anyone that does not have an appropriate identification card receives one at no cost, and there are appropriate safeguards in place to allow those who are unable to get a photo identification card to vote.

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172. *Id.*

173. *Id.* at 1645.