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### Recommended Citation

Joshua A. Douglas, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations that Adversely Impact an Individual's Right to Vote*, 75 *Geo. Wash. L. Rev.* 372 (2007)

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## **A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations that Adversely Impact an Individual's Right to Vote**

### **Notes/Citation Information**

George Washington Law Review, Vol. 75, No. 2 (Feb. 2007), pp. 372-397

# Note

## A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote

Joshua A. Douglas\*

### *Introduction*

The presidential election on November 2, 2004, was perhaps one of the most watched and contentious elections in recent memory. Both major parties knew that the race would come down to several battleground states, including Ohio.<sup>1</sup> The real battle in Ohio, however, began a day or two before Election Day, when several federal judges clashed over whether to allow partisan challengers at the polls.

On October 31, 2004 and November 1, 2004, two separate district court judges ruled that an Ohio election statute allowing political parties and groups of five or more candidates to place challengers at election precincts to challenge the eligibility of particular voters constituted a "severe burden" on the voters' rights, and that the statute had not met the strict scrutiny standard of review required for

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\* J.D. expected 2007, The George Washington University Law School. I would like to thank Professor Spencer Overton, Tommaso Bencivenga, and Kimberly L. Sikora Panza for their insightful substantive and editorial comments, and Bari Douglas for reading early drafts of this Note and for her overall support.

<sup>1</sup> See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 938–39 (2005) (discussing the importance of the outcome in Ohio to the 2004 presidential election).

severe burdens.<sup>2</sup> In an expedited appeal decided on the morning of the election, the Court of Appeals for the Sixth Circuit reversed in a 2-1 decision, determining that partisan poll challengers did not create a severe burden on voters' rights, and that the statute had survived the lower level of scrutiny.<sup>3</sup> After the Supreme Court declined to review the case,<sup>4</sup> the Republican Party immediately placed its challengers at election sites to challenge voters as they prepared to exercise their constitutional right to vote.<sup>5</sup>

What is striking about these three decisions is not that they came to opposite conclusions regarding whether challengers amount to a severe burden on voters' rights. Instead, the opinions demonstrate that judges have few guidelines to inform their decisions on the severe burden question and can make their determinations on an ad hoc basis.<sup>6</sup> Judges simply review the regulation and subjectively decide whether it seems to impose a severe burden. Thus, the severe burden test is nebulous and unclear, resulting in vague decisions that fail to distinguish between constitutional and unconstitutional state election regulations. Because George W. Bush won Ohio's twenty electoral votes by a slim margin,<sup>7</sup> the Ohio decisions may have greatly influenced the outcome of the presidential election. A judge's subjective interpretation of the burdens a regulation imposes should not have such a significant impact on the U.S. political system, because judges generally should not decide elections.<sup>8</sup> This Note provides a modicum of direction and objectivity to the analysis by suggesting a clear mechanism for determining when a regulation imposes a severe burden on voters' rights.

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<sup>2</sup> *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 536 (S.D. Ohio), *rev'd sub nom.* *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004); *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539, at \*19-21 (N.D. Ohio Oct. 31, 2004), *rev'd*, 388 F.3d 547 (6th Cir. 2004).

<sup>3</sup> *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

<sup>4</sup> *See Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004) (Stevens, J., in chambers).

<sup>5</sup> Associated Press, *Poll Challenges OK'd*, FOXNEWS.COM, Nov. 2, 2004, <http://www.foxnews.com/story/0,2933,137229,00.html>.

<sup>6</sup> *See generally* Richard H. Fallon, Jr., Foreword, *Implementing the Constitution*, 111 HARV. L. REV. 54, 150 (1997) (highlighting the importance of the type of doctrinal test chosen in analyzing the constitutionality of a regulation).

<sup>7</sup> *See* CNN.com Election Results: U.S. President / Ohio, <http://www.cnn.com/ELECTION/2004/pages/results/states/OH/P/00/index.html> (last visited Nov. 8, 2006) (stating that Bush won Ohio by less than two percent of the total vote).

<sup>8</sup> *But see Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (halting the manual recounts in Florida, resulting in the election of George W. Bush as President).

Part I of this Note analyzes the severe burden test and discusses the interplay between a state's right to administer and regulate elections and a citizen's fundamental right to vote. This part also provides a detailed analysis of the Supreme Court's formulation of the severe burden test from its origins in *Anderson v. Celebrezze*<sup>9</sup> to its most recent articulation in *Clingman v. Beaver*,<sup>10</sup> and demonstrates why the severe burden test is too subjective in its current formulation. Part II examines the three Ohio decisions in detail as a case study to demonstrate the courts' vague application of the severe burden test. Part III articulates the proposed solution: the creation of a "five percent rule" for the severe burden test, which stipulates that state regulations that deny more than five percent of the electorate of its right to vote are per se severe and require strict scrutiny review, while regulations that burden less than five percent of voters are subject only to the rational basis test.<sup>11</sup> Part III then discusses why the five percent rule, derived from the Voting Rights Act, will ensure fair and efficient elections while protecting voters' rights. This Part also suggests methods to enact the five percent rule, either through a congressional act as part of an update to the Voting Rights Act or via the Supreme Court in a reformulation of its current judicially created test. Finally, Part III discusses how the five percent rule would have worked in the Ohio cases and demonstrates its application in other voting rights situations. The Note concludes that promulgating a concrete standard for the severe burden test may provide judges, political parties, states, and voters with greater certainty during the inevitable court battles surrounding the upcoming 2008 elections.

### *I. The Severe Burden Test*

#### *A. The Competing Interests*

Cases involving state-mandated election procedures often entail a conflict between an individual's right to vote and the state's interest in regulating elections. On the one hand, an individual's right to vote is perhaps the most important right a citizen has in our democracy. As the Supreme Court stated, "no 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

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<sup>9</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 787–89 (1983).

<sup>10</sup> *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005).

<sup>11</sup> This Note does not analyze the severe burden test as it relates to political party ballot access questions or redistricting. Instead, the solution solely seeks to modify the test when a state regulation affects the ability of an individual voter to cast his or her ballot.

most basic, are illusory if the right to vote is undermined.”<sup>12</sup> In addition, the Court has recognized that “[a] citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution.”<sup>13</sup>

On the other hand, the Constitution allows states to regulate election administration.<sup>14</sup> In *Storer v. Brown*,<sup>15</sup> the Supreme Court affirmed the power of the states to manage elections:<sup>16</sup> “[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.”<sup>17</sup> Similarly, the Court has determined that prevention of election fraud is a compelling interest that permits state regulation of elections.<sup>18</sup> The interplay between a citizen’s fundamental right to vote and the state’s right to regulate elections underlies the Court’s creation of the severe burden test.

#### B. *Development of the Severe Burden Test—Anderson and Norman*

The Supreme Court’s promulgation of the severe burden test began in *Anderson v. Celebrezze*,<sup>19</sup> and the Court further developed the test in *Norman v. Reed*.<sup>20</sup> In both cases, the Court found that the State’s election regulation imposed an unacceptable burden on voters’ rights and struck down the regulation as unconstitutional.

In *Anderson*, the Court considered the constitutionality of an Ohio statute that required independent parties to declare their candidates in March, while the major political parties could declare their

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<sup>12</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>13</sup> *Baker v. Carr*, 369 U.S. 186, 208 (1962).

<sup>14</sup> See 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 Senators.”).

<sup>15</sup> *Storer v. Brown*, 415 U.S. 724 (1974).

<sup>16</sup> *Id.* at 726, 736 (upholding two California laws that (1) restricted access of independent candidates to the general election if they had been defeated in a party primary and (2) restricted access of candidates to a party primary if they had been registered or affiliated with another political party within one year of that year’s primary election).

<sup>17</sup> *Id.* at 730.

<sup>18</sup> See *Burson v. Freeman*, 504 U.S. 191, 199 (1992); see also JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004) (advocating greater state regulation of elections); Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 278 (2005) (arguing that increased state regulations do “not disenfranchise voters” and claiming that there is “no evidence to suggest otherwise”).

<sup>19</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>20</sup> *Norman v. Reed*, 502 U.S. 279, 288–89 (1992).

nominees closer to Election Day.<sup>21</sup> The Court ruled that the statutory deadline placed an unconstitutional burden on the voting and associational rights of the supporters of independent candidates.<sup>22</sup> To reach this conclusion, the Court created a three-part “balancing of interests” test to analyze state election laws that potentially infringe individual rights while furthering legitimate state interests.<sup>23</sup> First, a reviewing court must “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.”<sup>24</sup> Second, the court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>25</sup> Third, the court must “not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>26</sup> Although the Court recognized that “the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions,” the Court ruled that the State’s regulation here would impose a significant injury to independent voters who may not be able to vote for the candidate of their choice.<sup>27</sup> The Court concluded that the burden on voters outweighed the State’s interests in voter education or political stability.<sup>28</sup>

The Court further developed the severe burden test in *Norman v. Reed* when it determined that a state’s prohibition on new political parties bearing an established party’s name created a severe burden on voters’ rights, because the prohibition could foreclose the opportunity for voters to associate themselves with the established party.<sup>29</sup> Candidates for county office sought to run under the party name “Harold Washington Party,” which was an “established” political

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<sup>21</sup> *Anderson*, 460 U.S. at 790–91.

<sup>22</sup> *Id.* at 806.

<sup>23</sup> *Id.* at 789.

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 788, 795.

<sup>28</sup> *Id.* at 796, 806. Justice Rehnquist dissented, stating that the Constitution does not require that a State allow any particular Presidential candidate to be on its ballot, and so long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere with Ohio’s exercise of its Art. II, § 1, cl. 2 power.

*Id.* at 808 (Rehnquist, J., dissenting).

<sup>29</sup> *Norman v. Reed*, 502 U.S. 279, 282–83, 288–89 (1992).

party in the city of Chicago.<sup>30</sup> The Court ruled that the right of citizens to create and develop new political parties derives from the First and Fourteenth Amendments, and therefore that a state may hinder that right only through a “demonstration of a corresponding interest sufficiently weighty to justify the limitation.”<sup>31</sup> The Court used the word “severe” for the first time in discussing its test, determining that a state must narrowly tailor any “severe” restrictions on voters’ rights and that courts should review a severe burden under the strict scrutiny test.<sup>32</sup> State regulations that are not severe require review only under a lower standard, such as rational basis or intermediate scrutiny.<sup>33</sup> The Court declared that,

[t]o the degree that a State would thwart [citizens’ rights] by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.<sup>34</sup>

Justice Souter, for the majority, concluded that the State’s restriction on political party names imposed a severe burden on voters of new political parties, but the Court failed to explain what made the burden severe.<sup>35</sup> The Court struck down the regulation, ruling that it failed to pass strict scrutiny review because there were other less intrusive mechanisms available to achieve the State’s goals of avoiding voter confusion, such as requiring the county office candidates to obtain formal permission to use the name from the established Chicago “Harold Washington Party.”<sup>36</sup>

### C. *The Nebulous Character of the Severe Burden Test*—Burdick, Timmons, and Clingman

Since the decision in *Norman v. Reed*, the Supreme Court has never again ruled that a regulation imposed a severe burden on vot-

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<sup>30</sup> *Id.* at 283–84.

<sup>31</sup> *Id.* at 288–89.

<sup>32</sup> *See id.* at 289.

<sup>33</sup> *Id.* at 288–89. Courts have not been consistent in applying this lower standard, alternating between rational basis and a higher, intermediate standard of review. *See, e.g.*, *Swamp v. Kennedy*, 950 F.2d 383, 385 (7th Cir. 1991) (failing to identify the level of scrutiny required for a burden that the court considered not to be severe); *Nat’l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 75 (W.D. Tex. 1996) (upholding a state’s “sore loser” statute as “reasonable, nondiscriminatory,” and “not overly burden[some]” on voters’ rights).

<sup>34</sup> *Norman*, 502 U.S. at 288–89 (citation omitted).

<sup>35</sup> *See id.* at 289–90.

<sup>36</sup> *Id.* at 290.



ers' rights, but the Court still has failed to provide a clear mechanism for determining when a state election law is severe.<sup>37</sup> In *Burdick v. Takushi*,<sup>38</sup> the Court upheld a Hawaii ban on write-in voting, reasoning that the state asserted legitimate interests in election administration that outweighed the limited burden the regulation imposed upon voters.<sup>39</sup> In restating the severe burden test, the Court noted:

[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.<sup>40</sup>

The Court explained that subjecting all election regulations to strict scrutiny is inappropriate because doing so would hamper a state's legitimate ability to regulate elections.<sup>41</sup> The Court concluded that the ban on write-in voting did not rise to the level of a severe burden, although the opinion failed to provide concrete reasons for this determination.<sup>42</sup> The Court upheld the law under a lower standard of review based on the State's legitimate interest in election administration.<sup>43</sup>

Justice Kennedy, in dissent, concluded that Hawaii's write-in voting ban significantly burdened voters' rights.<sup>44</sup> He reasoned that "[t]he majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon some individual voters by preventing them from exercising their right to vote in a meaningful manner."<sup>45</sup>

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<sup>37</sup> The Court has, however, struck down an election regulation as severely burdening the associational rights of political parties. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

<sup>38</sup> *Burdick v. Takushi*, 504 U.S. 428 (1992).

<sup>39</sup> *Id.* at 440.

<sup>40</sup> *Id.* at 434 (internal quotations omitted) (citation omitted).

<sup>41</sup> *Id.* at 433 ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

<sup>42</sup> See *id.* at 434.

<sup>43</sup> *Id.* at 439–40.

<sup>44</sup> *Id.* at 445 (Kennedy, J., dissenting).

<sup>45</sup> *Id.* at 448.

Justice Kennedy, however, did not provide any additional reasons for why he believed the write-in ban severely burdened voters. Thus, neither the majority nor the dissent in *Burdick* adequately provided concrete objective factors to explain why the burden did or did not cross the magical line to become severe.

The confusion continued in *Timmons v. Twin Cities Area New Party*.<sup>46</sup> In *Timmons*, the Supreme Court upheld a Minnesota law prohibiting “fusion” candidates who appear on the ballot for more than one political party.<sup>47</sup> The Court ruled that the regulation did not place a severe burden on voters’ rights because the law did not directly preclude voters affiliated with minor political parties from choosing their candidates, nor did it exclude a particular group of citizens from voting.<sup>48</sup> The Court disagreed with the court of appeals’ decision that the regulation imposed a severe burden, but the majority opinion provided scant reasoning for its different interpretation, solely commenting that “[w]e disagree; given the burdens imposed, the bar is not so high.”<sup>49</sup> Therefore, the State only had to demonstrate that its asserted regulatory interests were “sufficiently weighty” for the regulation to meet the lower standard of review and pass constitutional muster.<sup>50</sup> The Court, however, never provided any reasons for why the regulation did not impose a severe burden beyond its own knee-jerk reaction.

In dissent, Justice Stevens recognized the majority’s failure to provide cogent analysis on the severe burden question, noting that the majority went to great lengths to identify burdens that the statute did *not* inflict but failed to examine the burdens that the statute actually imposed.<sup>51</sup> Justice Stevens reasoned that “[t]he fact that the Party may nominate its second choice surely does not diminish the significance of a restriction that denies it the right to have the name of its first choice appear on the ballot.”<sup>52</sup> Therefore, in Justice Stevens’s

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<sup>46</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

<sup>47</sup> *Id.* at 353–54, 369–70.

<sup>48</sup> *Id.* at 361, 363.

<sup>49</sup> *Id.* at 363–64. The Court did list several potential burdens that it believed the statute did *not* inflict on voters’ rights, but the Court failed to scrutinize sufficiently the actual burdens imposed by the statute. *See id.* at 363.

<sup>50</sup> *Id.* at 364. Again, the Court failed to identify whether it used rational basis or intermediate scrutiny as this lower standard of review.

<sup>51</sup> *Id.* at 371 (Stevens, J., dissenting).

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

view, the fusion candidate ban imposed a severe burden and should have triggered strict scrutiny review.<sup>53</sup>

The Court's latest imprecise analysis of the severe burden issue occurred in *Clingman v. Beaver*.<sup>54</sup> In *Clingman*, the Court held that Oklahoma's "semiclosed" primary system, under which a political party could invite only its own registered members and voters registered as Independents to vote in its primary, did not severely burden the associational rights of the State's citizenry.<sup>55</sup> The Court stated:

These minor barriers between voter and party do not compel strict scrutiny. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.<sup>56</sup>

The Court did not, however, state exactly why the burdens imposed here were only minimal, nor did it clarify whether rational basis or intermediate scrutiny is the appropriate test for burdens that are less than severe.

Justice O'Connor, in her concurring opinion,<sup>57</sup> highlighted the Court's lack of reasoning and the fact that the Court's decision may allow states—whose election systems are often run by partisan operatives—to have too much power in regulating elections:

[T]he State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not

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<sup>53</sup> *Id.* at 374.

<sup>54</sup> *Clingman v. Beaver*, 544 U.S. 581 (2005).

<sup>55</sup> *Id.* at 584–85, 593.

<sup>56</sup> *Id.* at 593 (citation omitted).

<sup>57</sup> *Id.* at 598 (O'Connor, J., concurring in part and concurring in the judgment).

merely a pretext for exclusionary or anticompetitive restrictions.<sup>58</sup>

Justice O'Connor joined the majority, however, because she believed that the semiclosed primary amounted only to a reasonable restriction and did not impose a severe burden upon voters, who simply could affiliate with the political party of their choosing prior to the voter registration deadline.<sup>59</sup>

In dissent, Justice Stevens determined that the State had imposed a severe burden on voters, explaining that “the impact of the Oklahoma statute on the voters’ right to vote for the candidate of their choosing is not a mere ‘burden’; it is a prohibition.”<sup>60</sup> Once again, however, Justice Stevens did not provide a benchmark for determining when an election regulation is severe, but instead simply made an ad hoc, independent determination of the magnitude of the restriction on voters’ rights.

The foregoing discussion demonstrates the inherent subjectivity underpinning the Supreme Court’s promulgation and subsequent imprecise application of the severe burden test.<sup>61</sup> Justices can mold their determinations of what constitutes a severe burden in any way that seems to fit the particular facts of each case.<sup>62</sup> As the case study about

<sup>58</sup> *Id.* at 603.

<sup>59</sup> *Id.* at 603–04.

<sup>60</sup> *Id.* at 610 (Stevens, J., dissenting). Justice Stevens distinguished between an individual’s right to vote and an individual’s associational rights with a political party. *See id.* at 612. This Note analyzes only burdens placed on an individual’s right to cast a ballot.

<sup>61</sup> *See* Lowell J. Schiller, Recent Development, *Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases: Clingman v. Beaver*, 125 *S. Ct.* 2029 (2005), 29 *HARV. J.L. & PUB. POL’Y* 331, 338, 341, 343 (2005) (applauding the result in *Clingman* and the “inherent subjectivity” judges may employ in analyzing the severe burden test, because the test allows judges to uphold “legislatures’ constitutional role in determining the manner in which elections will be conducted”). The author notes, however, that

*Clingman’s* addition to the caselaw of ballot access lays bare two fundamental points. First, the inherent subjectivity of the First Amendment “severity of the burden” test allows for the Justices’ competing views about the role of the courts in promoting an open and competitive democracy to drive what is purportedly an analysis of associational freedoms. Second, whereas individual voters may develop complex associational preferences within the political marketplace, those preferences simply are not mirrored by the current judicial understanding of First Amendment protections.

Employing a “severity” test is an inherently subjective enterprise: Different members of the Court described the same burden on associational rights as either a “minor barrier[ ],” a “modest and politically neutral burden [that was] not altogether trivial,” or a “heavy burden” that might be best classified as a “prohibition” on protected activity.

*Id.* at 338 (alterations in original).

<sup>62</sup> *Cf.* *Vieth v. Jubelirer*, 541 U.S. 267, 278 (“One of the most obvious limitations imposed

the Ohio election reveals, lower courts also have applied the test in an uneven and imprecise fashion.

## II. Case Study: The 2004 Ohio Election Decisions

### A. The District Court Decisions

Under Ohio law, any voter can challenge any other voter's eligibility to cast a ballot.<sup>63</sup> Prior to the 2004 presidential election, however, the Hamilton County, Ohio Republican Party filed under the applicable statute for permission to place additional challengers at polling places "in order to challenge voters' eligibility to vote."<sup>64</sup> The Republican Party planned to place approximately two-thirds of these challengers in predominantly African-American precincts.<sup>65</sup>

Legally registered African-American voters brought suit, seeking a temporary restraining order and preliminary injunction that would have required Ohio Secretary of State J. Kenneth Blackwell to ban partisan challengers from the polls.<sup>66</sup> The plaintiffs claimed that allowing extra partisan challengers would discriminate against African-American voters and presented an "undue burden" upon the voters' ability to cast their ballots successfully.<sup>67</sup> The plaintiffs presented evidence that only 14% of new voters in a majority white precinct would face a challenger, while 97% of new voters in a majority black precinct would see a challenger.<sup>68</sup> After finding that the Republican Party strategy imposed a severe burden on voters' rights, the U.S. District Court for the Southern District of Ohio granted the plaintiffs' motion because the State's regulation was not narrowly tailored to serve the

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by [the Constitution] is that judicial action must be governed by *standard*, by *rule*. . . . [L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

<sup>63</sup> The Ohio statute provides:

At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint to any of the polling places in the county or city one person, a qualified elector, who shall serve as challenger for such party or such candidates during the casting of the ballots, and one person, a qualified elector, who shall serve as witness during the counting of the ballots; provided that one such person may be appointed to serve as both challenger and witness.

OHIO REV. CODE ANN. § 3505.21 (LexisNexis 2005).

<sup>64</sup> *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio), *rev'd sub nom.* Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547 (6th Cir. 2004).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 529.

<sup>67</sup> *Id.* at 529, 534.

<sup>68</sup> *Id.* at 530. It is not clear why the plaintiffs only presented evidence about the effects of challengers on "new" voters and not all voters.

compelling state interest of preventing election fraud.<sup>69</sup> The decision, handed down one day before the election, banned partisan challengers from the polls on Election Day.<sup>70</sup>

The district court relied on the Supreme Court's severe burden test from *Anderson* and *Timmons* to analyze the lawfulness of Ohio's decision to allow additional partisan challengers at the polls.<sup>71</sup> The court first determined that allowing challengers would inflict a burden on voters' ability to cast ballots.<sup>72</sup> The Ohio scheme amplified this burden because partisan challengers had never before appeared at the polls.<sup>73</sup> Further, the Republican Party challengers had minimal training in Ohio's election laws, negatively impacting voters by creating an "extraordinary and potentially disastrous risk of intimidation and delay."<sup>74</sup> This risk of intimidation and delay imposed a severe burden, the court held, on the voters' right to cast a ballot.<sup>75</sup>

Because the presence of Republican Party challengers would impose a severe burden, the court reviewed the decision to allow challengers under the strict scrutiny test.<sup>76</sup> The court determined that the State had a compelling interest in preventing election fraud,<sup>77</sup> but that the legislature had not narrowly drawn the regulation because there were other reasonable ways for Ohio to achieve its compelling interest of running a fair and efficient election.<sup>78</sup> Under the statute, bipartisan election judges and any elector lawfully at the polling place could challenge the eligibility of any voter.<sup>79</sup> The court reasoned that "[e]lection judges are seasoned, experienced workers in the electoral process," and that their presence alone at the polls would adequately address Ohio's concern of ensuring that only those eligible to vote were able to cast a ballot; thus, the presence of the private challengers was not necessary to satisfy the State's compelling interest.<sup>80</sup>

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<sup>69</sup> *Id.* at 535–37.

<sup>70</sup> *Id.* at 538.

<sup>71</sup> *Id.* at 534.

<sup>72</sup> *Id.* at 535 ("In the absence of any statutory guidance whatsoever governing the procedures and limitations for challenging voters, and the questionable enforceability of the State's and County's policies regarding good faith challenges and ejection of disruptive challengers from the polls, there exists an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.").

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 536.

<sup>77</sup> *Id.* at 536–37.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 536.

<sup>80</sup> *Id.* at 536–37 ("In this situation, the presence and actions of challengers serves the same

In another lawsuit filed to enjoin Republican Party challengers, the U.S. District Court for the Northern District of Ohio came to the same conclusion and determined that challengers would pose a severe burden on voters' rights.<sup>81</sup> The court's analysis mirrored the reasoning of the other Ohio federal district court.<sup>82</sup> The court noted that election judges alone could adequately serve the compelling governmental interest of preventing voting fraud, and that the presence of the partisan challengers "may pose an undue burden on voters and election officials."<sup>83</sup> Therefore, the court decided that the regulation allowing Republican Party challengers at the polls was "not narrowly tailored to serve a compelling state interest."<sup>84</sup>

*B. The Circuit Court Reverses, and the Supreme Court Denies Review*

On the morning of Election Day, the Court of Appeals for the Sixth Circuit reversed both district court decisions and ruled that allowing Republican Party challengers at Ohio polls did not rise to the level of a severe burden, thus requiring analysis only under a lower standard of review.<sup>85</sup> Judge Rogers, for the court, determined that although challengers may cause longer lines or confusion at polling sites, the possibility of increased voter confusion did not amount to a severe burden.<sup>86</sup> Therefore, using a lower standard of review that resembled either rational basis or intermediate scrutiny, Judge Rogers upheld the regulation based on, among other reasons, the State's need to administer the election effectively.<sup>87</sup> Judge Rogers concluded that "[t]here is a strong public interest in smooth and effective administra-

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interest as that of the election judges except that the presence and actions of the former poses an unacceptable risk of impeding the work of the election judges. Since the election judges are the individuals who are knowledgeable and experienced in the process of identifying potential ineligible voters, asking them the relevant questions, and making determinations, disruption of this system by over 1100 lawyers who have no experience in the process cannot be said to be narrowly tailored to serve a compelling state interest in preventing voter fraud.").

<sup>81</sup> *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539, at \*19 (N.D. Ohio Oct. 31, 2004), *rev'd*, 388 F.3d 547 (6th Cir. 2004).

<sup>82</sup> *Id.* at \*18–21.

<sup>83</sup> *Id.* at \*21.

<sup>84</sup> *Id.*

<sup>85</sup> *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) (2-1 decision).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

tion of the voting laws that militates against changing the rules in the hours immediately preceding the election.”<sup>88</sup>

Judge Rogers assumed, without deciding, that the plaintiffs had standing to bring suit against the State.<sup>89</sup> Judge Ryan, however, concurred in the judgment solely because he believed that the plaintiffs lacked standing due to their failure to show that they had suffered any “injury in fact” that was “actual or imminent, not conjectural or hypothetical.”<sup>90</sup> Judge Ryan thus did not consider the severe burden question.

In contrast, Judge Cole offered a vigorous dissent in which he faulted the other judges for not recognizing the burden and “dramatic effect” that challengers would have on voters.<sup>91</sup> Judge Cole expressed particular concern with the potential effects of challengers on minority voters, stressing that “partisan challengers, for the first time since the civil rights era, . . . [would] target precincts that have a majority African-American population.”<sup>92</sup> Judge Cole also criticized Judge Rogers’s opinion for not examining the district court’s decision under an “abuse of discretion” standard, which is the appropriate appellate court standard of review when a trial court grants a temporary restraining order.<sup>93</sup>

The effect of the Sixth Circuit’s judgment was to stay the district courts’ decisions disallowing partisan challengers, paving the way for the Republican Party to place its challengers at the polls.<sup>94</sup> On the morning of the election, the Supreme Court immediately denied the plaintiffs’ application to reinstate the district courts’ rulings.<sup>95</sup> Justice Stevens declared that the decision not to review the Sixth Circuit’s opinion was based solely on “practical considerations” regarding the Court’s inability to properly review the parties’ submissions given the few hours left before the polls opened in Ohio.<sup>96</sup> Justice Stevens added, however, that “[t]he allegations of abuse made by the plaintiffs are undoubtedly serious—the threat of voter intimidation is not new

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

<sup>89</sup> *Id.* at 550.

<sup>90</sup> *Id.* at 551–52 (Ryan, J., concurring) (quotations omitted) (“The plaintiffs have offered no evidence that the injury they allege will occur tomorrow, has ever occurred before in an Ohio election or that there has been any threat by the defendants or anyone else that such injury will occur.”).

<sup>91</sup> *Id.* at 552, 554 (Cole, Jr., J., dissenting).

<sup>92</sup> *Id.* at 552.

<sup>93</sup> *Id.* at 553.

<sup>94</sup> *Id.* at 551.

<sup>95</sup> See *Spencer v. Pugh*, 543 U.S. 1301, 1303 (2004) (Stevens, J., in chambers).

<sup>96</sup> *Id.* at 1302.



to our electoral system—but on the record before me it is impossible to determine with any certainty the ultimate validity of the plaintiffs' claims."<sup>97</sup>

Thus, while analyzing the exact same issue, two district court judges and one court of appeals judge ruled that allowing Republican Party challengers at the Ohio polls constituted a severe burden on voters' rights, while one court of appeals judge ruled that challengers imposed only a minimal burden. None of the decisions, however, provided an objective analysis of the scope of the burden on the entire electorate, instead simply concluding that the burden was or was not severe based on the judges' subjective impressions. For example, Judge Rogers's opinion stated that challengers would not impose a severe burden, but he failed to analyze the actual effect of the challengers on individual voters or the possible negative impact challengers would place on entire segments of the electorate. In dissent, Judge Cole found merit in the voters' claims, but he could only guess as to the law's impact on actual voters. Indeed, all of the judges demonstrated the messy and nebulous character of the Supreme Court's severe burden test, because the judges had no mechanism to apply the test in a coherent and consistent manner.

### *III. The Five Percent Rule: Using Empirical Evidence for the Severe Burden Test when Analyzing Voter Access to the Polls*

#### *A. The "Five Percent Rule" for Election Regulations*

The "five percent rule," which derives from the Voting Rights Act,<sup>98</sup> is a solution to the nebulosity of the severe burden test for laws that impact an individual's right to vote. This rule provides judges with a benchmark to analyze state election regulations: both a voter and the state must present empirical evidence suggesting that an election regulation will or will not burden more than five percent of the voters, or 10,000 voters, whichever is less, in a covered jurisdiction.<sup>99</sup> If the regulation imposes a burden that exceeds either of these triggers, the regulation is per se severe and must survive strict scrutiny review.<sup>100</sup> If, however, the regulation does not burden the voting

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<sup>97</sup> *Id.*

<sup>98</sup> See 42 U.S.C. § 1973aa-1a(b)(2)(i) (2000).

<sup>99</sup> The triggers of five percent or 10,000 voters are referred to in this Note solely as the "five percent rule," although either measure can apply depending on the size of the "covered jurisdiction" as defined by the Voting Rights Act. See *infra* Part III.B.

<sup>100</sup> The rule will not invalidate all state regulations that impact five percent of the electorate; the state just has a higher burden to demonstrate the necessity of the regulation.

rights of five percent or 10,000 voters, the state law must pass only the rational basis test. Rational basis is the appropriate test for minimal burdens because this standard of review provides wide leeway to states to impose election regulations that burden only a small number of voters. Therefore, this new rule also eliminates the confusion over whether to analyze minimal burdens under a rational basis or intermediate scrutiny standard.<sup>101</sup>

Plaintiffs who bring a suit challenging an election regulation will have the initial requirement of demonstrating, through a valid study, that the regulation burdens the requisite number of voters. Empirical evidence that can demonstrate a severe burden includes data that a regulation intimidates five percent or more of voters from going to the polls, causes so much confusion that voters are unable to vote, or somehow restricts voters from successfully casting a ballot. This data can be based on surveys, studies of similar election systems from other jurisdictions, or common voting models, to name just a few examples of acceptable empirical evidence. If the plaintiff is unable to offer empirical data demonstrating a burden on five percent or more of voters, the regulation is considered not to be severe and must withstand only rational basis review.

Once the plaintiff meets this initial threshold, however, the evidentiary requirement shifts and the state must present its own study that the burden imposed reaches less than five percent of voters. If the plaintiff presents a valid study and the state is unable to refute the five-percent showing, the burden is considered *per se* severe and the regulation must survive strict scrutiny review to be upheld. Should the parties offer conflicting data, a judge must determine which side presented more persuasive evidence, using the five percent rule as a guideline. Thus, a judge no longer can simply look at a regulation and decide whether it seems severe. Instead, the judge must examine hard data and empirical evidence to guide his or her analysis.

The definition of “burden” is “that which is borne with difficulty; obligation; onus.”<sup>102</sup> A plaintiff, therefore, must present data that an election regulation creates the requisite difficulty, obligation, or onus on the voting rights of five percent or more of the electorate for the burden to be considered severe. Under this definition, a burden on the ability to vote might come in many shapes and sizes, such as a regulation that hinders the ability of voters to make an educated deci-

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<sup>101</sup> See *supra* note 33.

<sup>102</sup> RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 279 (Spec. 2d ed. 1996).

sion by banning all written material in a voting booth,<sup>103</sup> a law that allows political parties to intimidate the opposing party's voters,<sup>104</sup> or a regulation that bans voters from writing-in a candidate of their choice.<sup>105</sup> Some voters will undoubtedly face these types of burdens when a state seeks to regulate an election. The five percent rule stipulates that a state may still impose these burdens on voters as part of its quest to ensure free and fair elections, but that once a burden begins to impact five percent of the electorate in a covered jurisdiction, the state likely has gone too far.

### B. Why Five Percent?

The Voting Rights Act requires states and localities to provide language assistance to non-English-speaking voters if the number of these voters exceeds five percent of the electorate or 10,000 voters in a covered jurisdiction.<sup>106</sup> A covered jurisdiction is defined as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."<sup>107</sup> Covered jurisdictions that must provide language assistance are those in which (1) more than five percent or 10,000 of their voting-age citizens speak one of the listed foreign languages and have limited English proficiency, and (2) the illiteracy rates among those language minorities exceed the national average.<sup>108</sup> In short, the language assistance provision provides that if an inability to speak the English language burdens at least five percent of the electorate (or 10,000 voters) who speak one of the listed languages in exercising their right to vote, the state must step in to provide language assistance in all aspects of the voting process.<sup>109</sup>

Congress selected five percent or 10,000 voters as triggers because it determined that these two distinct measures closely "mir-

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<sup>103</sup> See *Cotham v. Garza*, 905 F. Supp. 389, 391, 400–01 (S.D. Tex. 1995) (holding that although this election regulation did not impose a severe burden on voters' rights, the State had not presented enough evidence to pass constitutional muster under a lower standard of review).

<sup>104</sup> See *supra* Part II.

<sup>105</sup> See *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (holding that such a restriction is not a severe burden on the right to vote).

<sup>106</sup> See 42 U.S.C. § 1973aa-1a(b)(2)(i) (2000). The "five percent rule" is modeled on this provision of the Voting Rights Act, and although this Note only refers to the five-percent requirement, a plaintiff can also use the 10,000 voter trigger to demonstrate that an election regulation imposes a severe burden.

<sup>107</sup> See 28 C.F.R. § 55.1 (2005).

<sup>108</sup> *Id.* § 55.6.

<sup>109</sup> See generally *id.* § 55.

ror[ed] the differences in the evidentiary record on the severity of voting discrimination against language minorities.”<sup>110</sup> That is, five percent or 10,000 voters is a sufficiently low bar to ensure access to groups that typically encounter language barriers while voting, but high enough to allow states to regulate elections effectively. Because these same principles apply to all election regulation questions, it makes sense for Congress or the Supreme Court to import the five-percent requirement into the severe burden test for all election law challenges.

Since 2000, the U.S. Department of Justice has filed fifteen claims against jurisdictions in California, Florida, Massachusetts, New York, Pennsylvania, Texas, and Washington, for failing to provide the required bilingual assistance for non-English-speaking voters.<sup>111</sup> Most of these cases resulted in a consent decree whereby the jurisdiction agreed to implement language assistance mechanisms.<sup>112</sup> In these jurisdictions, at least, the Voting Rights Act has removed burdens imposed by English-only ballots where the lack of language assistance burdened five percent or more of the electorate (or at least 10,000 voters) in the covered jurisdiction.

Federal law should guarantee fewer obstacles not only for non-English-speaking voters, but also for all voters who face election practices that create burdens on voters’ rights.<sup>113</sup> Combined with the severe burden test’s rational basis / strict scrutiny dichotomy, this rule will safeguard voters’ rights and will continue to allow states to promote fair and free elections. Additionally, this rule permits states to promulgate regulations that impact more than five percent of the electorate in the covered jurisdiction by demonstrating a narrowly tailored, compelling reason for the regulation. Thus, the five percent rule will provide guidance to courts and will protect both voters and states.

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<sup>110</sup> S. REP. NO. 94-295, at 31 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 798.

<sup>111</sup> See U.S. Dep’t of Justice, Civil Rights Div., *Litigation Brought by the Voting Section: Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, <http://www.usdoj.gov/crt/voting/litigation/caselist.htm#sec203cases> (last visited Dec. 21, 2006).

<sup>112</sup> See U.S. Dep’t of Justice, Civil Rights Div., *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, <http://www.usdoj.gov/crt/voting/litigation/percent203.htm> (last visited Dec. 21, 2006).

<sup>113</sup> See generally SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 11–16, 121–47 (2006).

### C. *Advantages of the Five Percent Rule*

There are several advantages that the five percent rule has to offer. First, the rule will remove a judge's subjectivity in analyzing election regulations, because the rule will require both sides to present empirical evidence regarding the challenged regulation's impact on voters. Under the rule, a judge no longer will be able simply to speculate about whether a regulation will or will not impose a particular burden. The test, therefore, is closely associated with the burdens actually imposed on voters.

Second, the five percent rule will encourage states to create election regulations that they know will not adversely impact a significant percentage of the covered jurisdiction. Although there is little empirical evidence to suggest that states will conform their behavior to the five percent rule, it is presumable that states seek to avoid costly litigation and are proactive in their efforts to comply with the law.<sup>114</sup> Thus, with the five percent rule in place, states will be more careful in their election administration and will conduct studies before promulgating a regulation in order to determine proactively the regulation's validity. Furthermore, the five percent rule may decrease the number of lawsuits voters bring against a state, or at least will ease the disposition of these cases, because voters will know that if they cannot meet the initial five-percent threshold, the regulation automatically will be reviewed under the rational basis test (and thus will make their case much more difficult to win). Therefore, the five percent rule will bring more clarity both to the election administration process and to judicial review of election regulations.

Finally, the five percent rule protects voters and provides a strong indication of the true meaning and scope of what the right to vote really entails, which is absent under current ad hoc election law jurisprudence. That is, the rule affirms that states may burden the right to vote by regulations that adversely impact only a trivial segment of the electorate, and only to the extent that allows states to administer fair and free elections effectively. Without such a rule in place, a judge's subjective determination as to whether a regulation seems severe provides the only indication of the scope of the right to vote. The five percent rule thus verifies the fundamental notion that an individual's right to vote is usually paramount, subject only to the state's need to

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<sup>114</sup> The fact that the Department of Justice website lists only fifteen lawsuits since 2000 stemming from violations of the Voting Rights Act's language assistance provision likely suggests that many jurisdictions are complying with the law. *See generally id.* at 125-47.

promote fair elections and only to an extent reasonably based on empirical evidence.

*D. Potential Drawbacks to the Five Percent Rule*

The empirical data requirement of the five percent rule may be problematic in the context of a last-minute election challenge. In such a situation, the parties would argue that obtaining empirical evidence is impossible. The burden-shifting nature of the five percent rule contemplates this situation, however, by making voters who seek to change the status quo first overcome the five-percent threshold. A voter may complain that challenging a newly enacted election regulation is difficult because voters do not have the resources to commission empirical studies. A meritorious voting rights claim, however, will likely gain the attention of public interest groups or political parties, who will probably assist the voter in his or her challenge and may already possess empirical data regarding similar election schemes from other jurisdictions.<sup>115</sup> Additionally, the five percent rule mitigates the difficulty that an empirical evidence obligation may impose on states by requiring a state to present a study only after the plaintiff overcomes the initial five-percent burden. Because the consequence to the state for failing to present a valid study refuting the voters' five-percent claim is strict scrutiny review of the regulation, states are best off if they pass election regulations only after gathering empirical data on a regulation's impact.<sup>116</sup> Thus, the five percent rule protects voters from onerous election laws, provides states with the ability to regulate

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<sup>115</sup> The Ohio partisan challenger cases provide just one example of a last-minute challenge where voters had empirical data to support their claim. See *supra* Part II. Groups such as the American Civil Liberties Union regularly compile statistics on election law issues. See ACLU, Voting Rights, <http://www.aclu.org/votingrights/index.html> (last visited Nov. 8, 2006). The five percent rule would also create an incentive for public interest groups to conduct these studies proactively, providing another independent source of election protection. Additionally, the U.S. Constitution and federal statutes supply a layer of protection beyond the five percent rule. See *infra* notes 119–20 and accompanying text. Should Congress believe that voters need even more protection, legislators can pass a law that limits or completely bans certain state election regulations, irrespective of the five percent rule. In light of the five percent rule's data requirement, Congress may want to protect other rights associated with voting that do not lend themselves to easy calculation. That is, Congress can decide that specific burdens already are per se severe, triggering strict scrutiny review. Thus, the empirical evidence requirement should not pose a barrier to voters bringing a claim.

<sup>116</sup> This solution will likely require states to spend more money in administering elections because a state must undergo empirical review of every election regulation that the state believes a voter can successfully challenge. While this is a potential shortcoming of the five percent rule, it is a small price to pay for a democracy that highly values the right of an individual to cast his or her ballot.

elections, and encourages both sides to obtain empirical data before bringing or defending a voting rights lawsuit.

Another potential weakness of the five percent rule is that the rule does not completely eliminate the subjectivity surrounding the assessment of election regulation challenges. If both the voter and the state present valid and compelling empirical studies, a judge must decide which study is more persuasive to resolve the severe burden question.<sup>117</sup> But a judge still must provide reasons why one study is better than another. That is, it is impossible to take away all judicial subjectivity in an election regulation case, especially because there is arguably a certain degree of subjectivity in any judicial decision.<sup>118</sup> Judges often weigh competing evidence and determine which side's case is stronger. This judicial role is no different with the five percent rule. The five percent rule offers a distinct advantage to the analysis, however, by providing judges with a benchmark from which to make this determination, instead of requiring judges to surmise subjectively whether the regulation imposes a severe or more reasonable burden on voters' rights. While complete objectivity is impossible, the five percent rule supplies needed structure to a judge's analysis and therefore offers a marked improvement over the status quo.

A final potential limitation of the five percent rule is that it is a numerical benchmark. Because the five percent rule imposes only rational basis review for regulations that burden five percent or less of the electorate, a state might be able to enact a regulation that still unfairly burdens a significant number of voters. It is important, therefore, to remember that the five percent rule operates in conjunction with all other election laws. For example, a state cannot create a regulation that burdens 4.9% of black voters or women voters: under section 2 of the Voting Rights Act, states cannot administer elections in a racially discriminatory manner,<sup>119</sup> and the Nineteenth Amendment to the Constitution guarantees voting rights for women.<sup>120</sup> Congress also

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<sup>117</sup> Judges also must disregard unreliable studies or "junk science," which in this context can include studies backed solely by a political agenda. *Cf.* *Kumho Tires v. Carmichael*, 526 U.S. 137, 152, 158 (1999); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592–93 (1993).

<sup>118</sup> See generally Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 344 (1997) (citing Judge Cardozo's maxim that "the role of a judge is one of creation," which "underscores the subjectiveness of the judicial decision-making process"); Paul Gewirtz, *On "I Know It when I See It,"* 105 YALE L.J. 1023, 1042, 1044 (1996) ("Law is not all reasoning and analysis—it is also emotion and judgment and intuition and rhetoric. It includes knowledge that cannot always be explained, but that is no less valid for that.").

<sup>119</sup> 42 U.S.C. § 1973(a) (2000).

<sup>120</sup> U.S. CONST. amend. XIX.

may choose to protect against other unfair election regulations irrespective of the five percent rule's requirements,<sup>121</sup> especially if Congress determines that voters or states are unable to quantify the impact of certain practices.<sup>122</sup> Moreover, voting rights, which are fundamental to the success of a democracy, should have multiple layers of protection. Therefore, the five percent rule, when combined with other election laws, will ensure that state regulations are not aimed at disenfranchising any particular group and are implemented only for the purpose of ensuring fair and smooth elections.

#### *E. Enacting the Five Percent Rule*

A congressional act is the best method to promulgate the five percent rule, especially because the rule derives from the Voting Rights Act's language assistance provision.<sup>123</sup> Congress should determine that it must protect the right to vote from state regulations that severely hamper electoral access, much like it determined that non-English speakers need language assistance to vote.<sup>124</sup> Therefore, Congress should enact the five percent rule as part of an update to the Voting Rights Act. Because discrimination in election administration is still a problem, Congress should use its power to regulate elections to protect voter rights through the five percent rule.<sup>125</sup>

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<sup>121</sup> See, e.g., Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (to be codified at 42 U.S.C. §§ 15301–15306).

<sup>122</sup> Most voting rights protections can be evaluated by a study or other empirical evidence. See *supra* Part III.A. Recognizing that Congress can vindicate rights regardless of the empirical evidence requirement simply demonstrates that the five percent rule adds an additional layer to—but does not eliminate—protections for voters.

<sup>123</sup> See *supra* Part III.B.

<sup>124</sup> Congress explicitly stated its reasons for enacting the language assistance provisions in the statute itself:

[T]hrough the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

42 U.S.C. § 1973aa-1a(a).

<sup>125</sup> See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 733 (1998) (stating that Congress has the power to remedy discrimination and regulate state elections through the Voting Rights Act). But see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 178–79 (2005) (arguing that election



Alternatively, the judiciary can act to modify the severe burden test to encompass the five percent rule. The Supreme Court has already enacted similar judicial standards in the voting rights arena. For example, the Court created the judicially manageable standard of “one person, one vote” for redistricting cases.<sup>126</sup> If courts can create judicially manageable standards for election regulation questions, there is no reason why the judiciary cannot also modify these standards to guide the review process. Moreover, the severe burden test is already a Court-made standard, suggesting that the Court is perfectly within its bounds to update the test should Congress fail to act.

*F. The Five Percent Rule in Action*

The situation in Ohio before the 2004 election would have been immensely different under the five percent rule. Instead of issuing markedly different opinions that failed to provide reasons to support their severe burden analyses, the judges reviewing the cases could have used a clear principle to inform their decisions, and the opinions would have been much more objective and well reasoned.

The voters initially would have had to show that the State’s decision to allow challengers at the polls would burden five percent or more (or 10,000 or more) of the voters in the county. The plaintiffs could have presented a study to demonstrate that challengers intimidate, confuse, or delay the requisite number of voters to meet this threshold requirement. If the plaintiffs had presented this data, Ohio would then have had to show that allowing Republican Party challengers would not produce this onus on five percent of the electorate (or 10,000 voters). The State could have supported its case through historical models of voting patterns, empirical evidence that challengers do not intimidate blacks or other voters from going to the polls, or data showing that challengers do not improperly challenge voters. The judge would have then decided which side had submitted the most persuasive evidence. If the plaintiffs had provided the most convincing study and proved that allowing challengers would burden more than five percent of the electorate, the court would have viewed the regulation under the lens of strict scrutiny; on the other hand, if the State had offered the most compelling evidence and demonstrated that challengers would burden less than five percent of voters, the court would have evaluated the regulation using rational basis review.

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administration discrimination is not widespread and that congressional action to regulate local elections violates principles of federalism).

<sup>126</sup> See *Reynolds v. Sims*, 377 U.S. 533, 558, 568 (1964).

The Supreme Court's severe burden jurisprudence also would be clearer and more consistent under the five percent rule. For example, in *Burdick*, the Court ruled that a ban on write-in voting constituted only a limited burden and therefore was valid so long as it was reasonably related to a legitimate state goal.<sup>127</sup> Under the five percent rule, the question would have been whether five percent or more of voters were going to use a write-in ballot to cast a vote for a candidate not on the ballot in that election. This evidence could have been shown through political surveys or other empirical data. If write-in candidates would have received five percent or more of the votes from the electorate in the covered jurisdiction, the write-in ban would have imposed a severe burden on voters and would have been subject to strict scrutiny review. Thus, instead of simply ruling that a write-in ballot is only a limited burden on individual voters, the Court would have had to examine the implications of its ruling on the entire electorate affected by its decision.

A similar inquiry would have taken place in *Timmons*. In *Timmons*, the Court upheld a Minnesota law prohibiting "fusion" candidates who appeared on the ballot for more than one political party because the burden did not seem severe, but the Justices failed to provide concrete reasons why the regulation imposed only minimal burdens on voters' rights.<sup>128</sup> Under the five percent rule, the Court would have assessed the actual effect of the ban after reviewing hard data: if five percent or more of the electorate in the covered jurisdiction would not have been able to vote for their candidate of choice because that candidate was not listed under the voters' political party preference, the burden would have been severe. On the other hand, voters who supported minor parties and fringe candidates may not have suffered this burden or may not have made up five percent of the electorate, in which case the fusion candidate ban would not have been severe. The point is not that the Supreme Court made an improper decision regarding the merits of the case. Rather, it is that the Court's opinion and analysis should have been based on concrete standards that addressed the actual impact felt by a significant number of voters.

Other election regulations that impact the ability of voters to cast ballots would face the same consistent evaluation. For example, a judge analyzing the magnitude of the burden imposed on voters from reducing the number of poll machines at an election site would evalu-

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<sup>127</sup> *Burdick v. Takushi*, 504 U.S. 428, 436–40 (1992).

<sup>128</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–63 (1997).

ate empirical evidence presented by the parties. This data must demonstrate the impact created by fewer polling machines to determine if the regulation burdens more than five percent of voters. Similarly, the five percent rule can be used for voter identification requirements, a current “hot topic” in election law.<sup>129</sup>

### *Conclusion*

Under this new formulation of the severe burden test, “five percent” can act as a guiding light for “severe burden” in a judge’s analysis, taking away some of the subjectivity and requiring judges to evaluate hard evidence. Although the five percent rule is not perfect in removing all subjectivity from the severe burden question, it changes the scope of the analysis and provides a clear benchmark for a judge’s decision. The five percent rule removes the ability of a judge to look at a regulation and decide for herself, on an ad hoc basis, whether it imposes a severe burden. In the end, the five percent rule is a mechanism to bring some certainty to the severe burden test, articulate the scope of the right to vote, and define the extent to which states can regulate elections.

George W. Bush won the State of Ohio in 2004 by only two percent of the total vote,<sup>130</sup> and won Hamilton County, the jurisdiction impacted by one of the voter challenger decisions, by less than 23,000 votes out of over 420,000 ballots cast.<sup>131</sup> Perhaps the outcome would have been different had the courts prevented the Republican Party from challenging individuals’ eligibility to vote.<sup>132</sup> More ominously for the future, the courts’ decisions regarding Republican Party challengers failed to articulate what types of state election laws are constitutional. Under the current severe burden test, when (and not “if”) the 2008 presidential election produces an election regulation challenge, voters and states will still face uncertainty regarding the types of burdens that states may impose on voters’ rights. Judges will make specu-

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<sup>129</sup> Voter identification is a hotly contested topic and could be the entire subject of another article. See, e.g., *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1144–54 (2006). For purposes of this Note, it is sufficient to state that beyond satisfying the severe burden test through the five percent rule, a voter identification requirement—like any other election regulation—will also have to pass the Voting Rights Act’s section 2 discriminatory impact test. See 42 U.S.C. § 1973(a)–(b) (2000).

<sup>130</sup> See CNN.com Election Results: U.S. President / Ohio, <http://www.cnn.com/ELECTION/2004/pages/results/states/OH/P/00/> (last visited Nov. 8, 2006).

<sup>131</sup> See CNN.com Election Results: U.S. President / Ohio / County Results, <http://www.cnn.com/ELECTION/2004/pages/results/states/OH/P/00/county.001.html#39061> (last visited Nov. 8, 2006).

<sup>132</sup> There is no available data on the actual impact of Republican Party challengers in Ohio.

lative decisions regarding the extent to which a regulation actually burdens voters. Millions of dollars will be spent on election law litigation, with so much at stake but so little clarity as to how judges should review a state election regulation. The five percent rule will help to provide some needed certainty as the United States veers toward what promises to be another contentious election season.