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# Is the Right to Vote Really Fundamental?

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*This Article poses a question at the core of our democracy: Is the constitutional right to vote a fundamental right? The answer, surprisingly, is "not always."*

*For over forty years, the Supreme Court has fostered confusion surrounding the right to vote by creating two lines of election law cases. In one breath the Court calls the right to vote fundamental and applies strict scrutiny review. In another, the Court fails to recognize the right as fundamental and uses a lower level of scrutiny. These two lines of cases have coexisted, leaving lower courts and litigants with little guidance on how to approach future election law disputes. The problem inherent in this approach is that it derogates the value of having an individual right to vote and poses significant questions about the efficacy of our notion of democratic self-governance.*

*The Court's most recent attempt in* Crawford v. Marion County Election Board*, the voter identification case, muddled this question even further. With* Crawford *as a background, this Article closely examines the Court's inconsistent approaches for construing the right to vote. After delineating the negative implications of this fractured methodology, the Article proposes a two-part solution: first, courts should distinguish between cases that directly impact voters from disputes involving indirect burdens on individuals. Regulations involving direct burdens on individuals—such as laws about the value of one's vote or who is eligible for the franchise—impact the fundamental right to vote and deserve strict scrutiny review. Second, courts should customize the approach to strict scrutiny for election law disputes, with an added focus on the narrowly tailored prong, so as to recognize the value of the right to vote while still allowing states to ensure fairness through their election regulations. Thus, instead of grasping for an overarching principle that would bring a semblance of unity to all election law cases, the Article suggests that courts approach the right to vote differently depending on*

* Law Clerk to the Honorable Edward C. Prado, United States Court of Appeals for the Fifth Circuit. I benefitted greatly from the comments and suggestions I received from Professors Heather Gerken, Orin Kerr, Ira "Chip" Lupu, Spencer Overton, Dan Tokaji, Adam Winkler, and Dean Fred Lawrence. Special thanks also to Jonathan Bond, Jessica Golby, Bryan Lammon, Joseph R. Oliveri, Maya Song, and Benjamin Wallfisch for reading early drafts of this Article.

*which political actor suffers the most direct burden from the regulation at issue.*



## INTRODUCTION

When Americans are surveyed about what rights are most valued under their Constitution, the responses inevitably include the right to

vote.[1] Most Americans believe that they have a voice in their democracy because they can exercise that right. Every four years, advocacy groups urge citizens to vote in that year's presidential election.[2] We fight wars overseas in part to help people in foreign countries achieve the freedom that comes with the ability to cast a ballot.[3] In short, the right to vote is part of our ethos for what it means to be an American.

The problem, however, is that our legal system has not always given an individual's right to vote the same venerated status as it has given many other important rights. Although the right to vote is considered a "fundamental" right, courts often treat the right to vote as less than fundamental by employing a low level of scrutiny to election law challenges. Thus, we are faced with a dichotomy: most people believe that the right to vote is one of the most important rights in our democracy, but courts do not always treat the right as such. The Supreme Court has contributed to this confusion by creating two lines of election law cases. In one breath, the Court calls the right to vote "fundamental" and applies strict scrutiny review.[4] In another, the Court fails to give the right the status of a fundamental right by using a lower level of scrutiny.[5] These two lines of cases have coexisted, providing lower courts and litigants with little guidance on how to approach future election law disputes. The right to vote—one of our most cherished rights—is often given short shrift in our constitutional jurisprudence.

This Article challenges that approach by deconstructing key election law cases and positing a new theory for future election law disputes. This new approach has two steps: First, courts should distinguish between laws that directly impact voters from disputes involving indirect burdens. Regulations involving direct burdens on individuals—such as cases about the value of one's vote or who is eligible for the franchise—impact the fundamental right to vote and deserve strict scrutiny review. This is because in the realm of election law, the *fundamental* right to vote is really an individualized concern regarding the exercise of the franchise. In contrast, regulations that merely impact voters indirectly should enjoy a lower level of scrutiny so long as the laws do not impose a "severe burden." Second, courts should customize the approach to strict scrutiny for election law disputes to recognize the value of the right

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[1] *See* Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1533–34 (2003) (showing that 93.2% of survey respondents believe that the right to vote is either the most important or one of the most important rights in a democracy).

[2] *See* Kathy Kiely, *Volunteers Work to Last Minute*, USA TODAY, Nov. 3, 2004, at 3A.

[3] *See, e.g.*, Paul Wiseman, *Taliban on the Run but Far from Vanquished*, USA TODAY, July 26, 2005, at 1A.

[4] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

[5] *See, e.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

to vote while still allowing states to ensure fairness through their election regulations.

Part I of this Article examines what makes a right *fundamental* and identifies the Court's inconsistent approach in several areas of election law jurisprudence. Part II attempts to locate a principled reason for treating the right as sometimes fundamental, sometimes not. Part III examines the implications of the Court's fractured approach by analyzing the resulting confusion among lower courts and the derogation of the importance of the right involved. Finally, Part IV posits that the Court could eliminate this dichotomy through two significant revisions to current election law jurisprudence. First, this Article suggests that the Court should redefine the *fundamental* right to vote as an individual right that is implicated only when a law directly burdens voters, and second, the Court should adopt a particularized form of strict scrutiny review for these cases.

The Court recently had the opportunity to examine these questions, but instead of clarifying whether the right to vote is always fundamental, the Court merely contributed to the confusion.[6] In *Crawford v. Marion County Election Board*, the Court upheld Indiana's law requiring voters to show a government issued identification upon voting.[7] Instead of promulgating a coherent approach to election law cases, the Court issued four different opinions that each described the proper methodology in different ways.[8] Conspicuously missing from the Court's decision was a discussion of when an election law implicates the fundamental right to vote. This Article fills that void.

As the fractured methodology of the *Crawford* decision demonstrates, the question this Article poses is vitally important to the future of election litigation. This Article places the Court's approach to the right to vote in the fundamental rights context to demonstrate how the Court has effectively diminished what it means for an individual to possess that right. That is, the Court's current ad hoc jurisprudence for election law cases creates confusion regarding what it means to enjoy the fundamental right to vote.

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6 *See id.*

7 *Id.* at 1623–24.

8 *Id.* at 1613 (plurality opinion); *id.* at 1624 (Scalia, J., concurring in the judgment); *id.* at 1627 (Souter, J., dissenting); *id.* at 1643 (Breyer, J., dissenting).

## I. A FRACTURED APPROACH: THE COURT'S INCONSISTENT TREATMENT OF THE RIGHT TO VOTE

### *A. The Right to Vote Under Equal Protection Jurisprudence*

The Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person . . . the equal protection of the laws."[9] The Supreme Court has promulgated a three-tiered mechanism for analyzing whether a law infringes on the Equal Protection Clause.[10] Laws that impact a suspect class or infringe on a fundamental right must pass strict scrutiny review.[11] Laws that discriminate based on gender are subject to an intermediate level of scrutiny.[12] A court must uphold all other laws under rational basis review if they are rationally related to a legitimate state interest.[13]

The Supreme Court has identified various rights as fundamental based on their importance to ensuring individual liberty and self-governance.[14] That is, certain rights are "preferred" because they are central to providing a check on the power of the government to infringe on particular realms of individual autonomy.[15] Professor Laurence Tribe explains the foundation of "fundamental rights" jurisprudence by noting that certain "particular forms of expression, action, or opportunity perceived as touching more deeply and permanently on human personality . . . [are] regarded as the constituents of freedom."[16] These rights include the right

9 U.S. CONST. amend. XIV, § 1.

10 *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944).

11 *See id.* Although courts often state that infringement of fundamental rights triggers strict scrutiny review, some scholars have disagreed, arguing that this "well-worn adage" is simply not true. *See, e.g.*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227 (2006).

12 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–98 (1976).

13 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) (stating that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985).

14 *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (noting that fundamental rights are those "found to be implicit in the concept of ordered liberty").

15 Winkler, *supra* note 11, at 236 ("The Court has not made clear precisely why some rights are to be preferred over others, but traditional theories emphasize that some rights are so central to self-government and human dignity as to warrant special judicial protection.").

16 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (Foundation Press 1990) (1978).

to marry,[17] the right to procreate,[18] the right to interstate travel,[19] and, supposedly, the right to vote.[20] Some of these fundamental rights, while not enumerated in the Constitution, still receive full constitutional protection.[21] In contrast, the Court has held that other rights are not fundamental, such as the right to government employment[22] or the right to a public education,[23] as these rights do not implicate the core individual interests at the heart of self-governance.

Due to the limited manner in which the government may encroach upon fundamental rights, these rights receive greater constitutional protection. For example, a court must analyze a law that infringes on the fundamental right to travel among the states under strict scrutiny,[24] while a law that infringes on the (non-fundamental) right to public education must withstand only rational basis review.[25] Indeed, the Court has declared that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right," and that otherwise a court should use a lower level of scrutiny.[26] This categorization comports with the notion that certain rights are more important and therefore deserve special protection from governmental infringement.[27]

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17 Zablocki v. Redhail, 434 U.S. 374, 383–84 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967).

18 Skinner v. Oklahoma, 316 U.S. 535, 536–37 (1942). *Skinner* may have been the beginning of the "implied fundamental rights" era of the Court's equal protection jurisprudence. *See* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 207 (2007). Professor Farrell notes:

> [T]o speak of an implied fundamental right "arising under" the Equal Protection Clause is technically inaccurate since that Clause creates no substantive rights. Rather, when the Court speaks of an implied fundamental right in an equal protection case, it is finding a freestanding implied fundamental right—that is, a right independent of the term "liberty" in the Due Process Clause and independent of any other explicit provision in the Constitution—and then imposing a very strict comparative standard of equality on classifications that infringe on such an implied right. What this means is that implied fundamental rights cases under the Equal Protection Clause inevitably involve rights implied from somewhere other than the Equal Protection Clause.

*Id.* at 210 n.42.

19 United States v. Guest, 383 U.S. 745, 759 (1966).

20 Wesberry v. Sanders, 376 U.S. 1, 6–7 (1964); *see also infra* Part I.B.

21 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969) (holding that the right to interstate travel is a fundamental right).

22 Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312–13 (1976).

23 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

24 *See Shapiro*, 394 U.S. at 630–31.

25 *See Rodriguez*, 411 U.S. at 28.

26 *Murgia*, 427 U.S. at 312 (applying rational basis to a challenge of a state law that mandated retirement of uniformed police officers at age fifty).

27 As one commentator has noted,

> The doctrine of fundamental rights and protected liberty interests has been a recurring theme in the Anglo-American legal tradition. The doctrine simply holds that

Most scholars have assumed that the right to vote is a fundamental right. This is not surprising considering that voting represents the epitome of self-governance. Additionally, the Supreme Court has included the right to vote in its list of fundamental rights and has never explicitly stated that the right is *not* fundamental.[28] Professor Lani Guinier describes the right to vote as "a claim [to] the fundamental right to express and represent ideas."[29] Professor Erwin Chemerinsky notes that "the Supreme Court repeatedly has declared that the right to vote is a fundamental right protected under equal protection,"[30] while Professor Pamela Karlan states, in the context of felon disenfranchisement, that "[t]oday, of course, the Court has recognized the right to vote as a fundamental right."[31] Professor Richard Hasen has come closest to acknowledging that the Court does not always treat the right to vote as fundamental.[32]

> there are certain rights which emanate from considerations of fairness or universal principles of justice superior to the sources of positive law. Fundamental rights and liberty interests were entitled to special protection from government intrusion by virtue of their own "*intrinsic excellence*." A powerful reason for recognizing the "intrinsic excellence" of these rights is that they reconcile government power with individual autonomy by identifying their relative positions in society.

Jeffrey A. Van Detta, *Constitutionalizing* Roe*,* Casey *and* Carhart*: A Legislative Due-Process Anti-Discrimination Principle that Gives Constitutional Content to the "Undue Burden" Standard of Review Applied to Abortion Control Legislation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 211, 219 n.21 (2001) (citations omitted).

28 *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). Even Congress, in the National Voter Registration Act, called the right to vote a "fundamental right." 42 U.S.C. §1973gg ("The Congress finds that (1) the right of citizens of the United States to vote is a fundamental right.").

29 LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 93 (1994). Professor Guinier continues by noting that "[v]oting is not just about winning elections. People participate in politics to have their ideas and interests represented, not simply to win contested seats." *Id.*

30 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 842 (Aspen Law & Business 2002) (1997) (citations omitted).

31 Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1368 n.136 (2003) ("Thus, to the extent that the characterization of disenfranchisement as nonpunitive depends on its depriving individuals of something that is never a right in the first place, that characterization is no longer valid."); *see also* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 923 (2007) ("The Supreme Court has recognized that the right to vote is a (conditional) fundamental right—that is, '[o]nce the franchise is granted to the electorate,' the state cannot exclude qualified citizens from participating. However, the constitutional right remains, at its core, a negative right protected only against state interference." (citations omitted)). Professor Spencer Overton also assumed that the right to vote is fundamental when analyzing the impact of voter identification laws. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 664 (2007) ("[A] photo-identification requirement may unduly burden the fundamental right to vote that stems from the First and Fourteenth Amendments.").

32 Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378–79 (2001).

He argues that even though *Bush v. Gore*[33] involved a "fundamental right," the Court's analysis was "superficial" because it "[spoke] the language of strict scrutiny but appl[ied] something much less than strict scrutiny."[34] Professor Christopher Elmendorf also recognizes that "[o]n first glance, it may be puzzling that any class of laws that burden fundamental rights would receive light-touch judicial review."[35] After pointing out this discrepancy, Professor Elmendorf describes his view of the Court's current approach: "[L]aws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon fundamental rights of voting and political association."[36] However, if an analysis of the law reveals "something alarming," then "the presumption of constitutionality may be reversed, and the Court will take a close look at the law's tailoring and the justifications asserted for it."[37] No scholar, however, has taken an in-depth look at the Court's election law cases from a fundamental rights perspective to determine when, and how often, the Court deviates from its declaration that the right to vote is a fundamental right.

The Court first alluded to the right to vote as fundamental as far back as 1886 in *Yick Wo v. Hopkins*.[38] In discussing the concept of sovereignty, the Court noted that the right to vote, although not "strictly" a "natural right," "is [still] regarded as a fundamental political right, . . . preservative of all rights."[39] The Court reiterated this theme in 1932 in *Smiley v. Holm*, noting that the Constitution provides authority for the state to "enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[40] However, history would not repeat itself. In several key areas of election law jurisprudence, the Court has vacillated between analyzing the right to vote as a fundamental right and treating it as something other than fundamental.

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33 Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

34 Hasen, *supra* note 32, at 378–79 ("Moreover, the Court's own analysis was superficial. It failed to explain or justify its large extension of precedent, and, most importantly, given the fact that a 'fundamental right' was involved, the Court appeared to speak the language of strict scrutiny but apply something much less than strict scrutiny."). R

35 Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 327 (2007). Professor Elmendorf delineates several "litmus-paper tests" that the Court has created for setting the level of scrutiny in cases involving electoral mechanics. *Id.* at 322–23.

36 *Id.* at 336.

37 *Id.* at 336–37.

38 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

39 *Id.*

40 Smiley v. Holm, 285 U.S. 355, 366 (1932); *see also* Cook v. Gralike, 531 U.S. 510, 524 (2001) (quoting this same passage).

### *B. Shifting Principles: The Court's Inconsistent Approach to the Right to Vote*

#### 1. Who Can Vote?

Election law cases involving eligibility to cast a ballot demonstrate a dichotomy of approaches. At one time, the Court always construed the right to vote in the context of voter eligibility as a fundamental right, but now the jurisprudence is not as clear.

In *Harper v. Virginia Board of Elections*, the Court struck down a poll tax that directly restricted the exercise of the *fundamental* right to vote in state elections.[41] The Court used the mantra of fundamental rights because the law made distinctions concerning who was eligible for the franchise.[42] Similarly, in *Kramer v. Union Free School District No. 15*, the Court considered whether New York could limit individuals who were eligible to vote in school district elections to property owners and parents.[43] The Court held that restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest to survive constitutional attack.[44] Indeed, the Court's language in many of these cases is particularly telling regarding the importance of the right involved. In *Dunn v. Blumstein*, where the Court struck down a Tennessee durational residence requirement for voting while using the language of fundamental rights, the Court noted, "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[45]

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41 Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966). Professor Farrell notes that because the Constitution does not explicitly convey the right to vote to anyone, the Court was engaging in an "implied fundamental rights" analysis. *See* Farrell, *supra* note 18, at 215–16 ("[T]he comparative nature of the equal protection mandate means that, if the state wants to deprive certain individuals of the right to vote, it has to treat everyone that way.").

42 *See Harper*, 383 U.S. at 667–68.

43 Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

44 *Id.* at 627; *cf.* Dunn v. Blumstein, 405 U.S. 330, 362 (1972) (Blackmun, J., concurring in the result) (surmising that *Kramer* elevated the level of scrutiny for voting rights cases from the Court's previous jurisprudence under McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802, 807–08 (1969)). Justice Blackmun's comment makes little sense if one considers that the Court in *McDonald* used a lower level of scrutiny because it determined that the statute at issue did not infringe on the fundamental right to vote but instead involved the less important privilege to receive absentee ballots. *See McDonald*, 394 U.S. at 807–08. Indeed, in the same year that the Court decided *Kramer*, the Court reiterated that strict scrutiny is the appropriate level of scrutiny for a challenge to a statute that created a limited purpose election and granted the right to vote in that election to certain otherwise qualified voters but not to others. *See* Cipriano v. City of Houma, 395 U.S. 701, 704 (1969); *see also* Carrington v. Rash, 380 U.S. 89, 96–97 (1965) (holding that a state may not prohibit military personnel stationed in the state from voting because this amounted to invidious discrimination on the basis of how people of a certain occupation may vote).

45 *Dunn*, 405 U.S. at 336; *see also* Evans v. Cornman, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental

However, the Court has not always used a fundamental rights approach when considering a state election regulation that distinguishes eligible voters from non-eligible voters. As early as 1959, in *Lassiter v. Northampton County Board of Elections*, the Court upheld a literacy requirement for eligibility for the franchise and noted that the state enjoys "[a] wide scope for exercise of jurisdiction" when adopting requirements for the right to vote.[46] Because the literacy requirement did not directly discriminate on the basis of race, creed, color, or sex, the Court did not employ strict scrutiny review.

Stemming from the approach in *Lassiter*, the Court began to recognize the "integrity of the electoral process" as a legitimate (as opposed to compelling) state interest in election law cases.[47] In *Rosario v. Rockefeller*, the Court upheld a New York scheme that required an otherwise-eligible voter to enroll in a political party before the previous general election to participate in the next primary election.[48] The effect of the statute was to require a voter to enroll in the party of his or her choice at least thirty days before the general election in November to vote in the subsequent primary.[49] Upholding the law, the Court noted that "preservation of the integrity of the electoral process is a legitimate and valid state goal," and that the statute helped the state achieve this goal by deterring party raiding in a primary election.[50] In sum, the Court concluded that the statute "is thus tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary."[51] Notably, the Court upheld the law not because the state demonstrated that the regulation was narrowly tailored to achieve a compelling state interest, but instead because the state showed that the law achieved merely a legitimate goal.[52]

In *Burdick v. Takushi*, a case involving whether the state of Hawaii could prohibit its voters from writing-in a candidate of their choice,[53] the Court explicitly rejected its earlier reliance on strict scrutiny to analyze

rights and privileges. And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." (internal citations omitted)).

46 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–53 (1959). Congress's passage of the Voting Rights Act of 1965 and the Court's interpretation of the Act in relation to New York's literacy requirement effectively overruled the decision in *Lassiter*. Katzenbach v. Morgan, 384 U.S. 641, 654–56 (1966).

47 *See* Rosario v. Rockefeller, 410 U.S. 752, 761 (1973). Demonstrating that it was not relying on strict scrutiny review, the Court used the words "legitimate and valid" as opposed to "compelling" when describing the required state interest. *Id.*

48 *Id.* at 753–54, 762.

49 *Id.* at 754.

50 *Id.* at 761–62.

51 *Id.* at 762.

52 *Id.*

53 Burdick v. Takushi, 504 U.S. 428, 430 (1992).

most voting rights claims.[54] The Court stated, "[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."[55] Instead, only laws that impose a "severe" burden warrant strict scrutiny review.[56] Laws that impose "reasonable, nondiscriminatory" burdens are constitutional if the state demonstrates an "important regulatory interest."[57] Thus, the Court no longer considered the right to vote to be fundamental at all times, even though the law in question directly affected a voter's ability to express his or her choice at the polls.

One particularly telling point that brings out the dichotomy from *Burdick* is that in the very same year, the Court decided *Burson v. Freeman*, which also was a case about a voter's experience at the polls.[58] In *Burson*, the Court analyzed a law that restricted advertising within a certain zone around a polling place, noting that the law involved a "clash" between two fundamental rights—the right to vote and the right to freedom of expression.[59] The Court upheld the law because, for the purposes of that case, the right to vote was paramount.[60] Thus, within a matter of months, the Court held both that the right to vote is a fundamental right (*Burson*)[61] and that not all voting rights cases require strict scrutiny review (i.e., that the right to vote is not necessarily fundamental) (*Burdick*).[62] Although the cases contained different facts—*Burdick* involved a limitation on voters' choices[63] while *Burson* involved a voter's experience while waiting in line to vote[64]—it seems particularly surprising that the Court would not even cite *Burson* in *Burdick* given the Court's bold language in *Burson* about the importance of the right to vote.[65] Somehow, by the time the Court decided *Burdick*, it seemed to have forgotten that the right to vote is usually considered a fundamental right.

Whether a state can require a voter to present photo identification to be able to vote is a recent contentious issue implicating voter eligibility. Laws that require voters to show photo identification to vote directly

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54 *Id.* at 433.

55 *Id.*

56 *Id.* at 434.

57 *Id.*

58 *See* Burson v. Freeman, 504 U.S. 191, 194–95 (1992).

59 *See id.* at 196.

60 *See id.* at 211.

61 *See id.*

62 *See Burdick*, 504 U.S. at 433–34.

63 *See id.* at 430.

64 See *Burson*, 504 U.S. at 196.

65 "This Court has recognized that the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'" *Id.* at 199 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

impact individuals, as those eligible voters who do not present identification are precluded from voting.[66] When considering this question last term in *Crawford v. Marion County Election Board*, the Court very easily could have clarified that when it comes to voter eligibility, the right to vote is a fundamental right.[67] Unfortunately, however, the Court failed to articulate the scope of the right to vote and provided little guidance for future election law disputes.

The Court's failure to consider whether the voter identification law implicated a fundamental right had its roots in its unfaithful description of *Harper v. Virginia Board of Elections*, which invalidated a law requiring voters to pay a poll tax.[68] The lead opinion in *Crawford*, written by Justice Stevens on behalf of himself, Chief Justice Roberts, and Justice Kennedy, purportedly relies on *Harper*, but the opinion actually misconstrues *Harper* from the outset.[69] The opinion states that *Harper* applied a "stricter standard" of review that was rooted in the determination of whether a statute "invidiously discriminate[s]."[70] The Court reasoned, "However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[71] Notably, the words "relevant and legitimate state interests"—typically the language of rational basis[72]—do not appear in *Harper*. Thus, by importing this language into *Harper*, the lead opinion in *Crawford* signaled its belief that *Harper* did not actually use strict scrutiny.[73]

The language in *Harper* and the way subsequent Supreme Court and circuit court cases have construed *Harper*, however, belies this contention. On several occasions, the Court has described *Harper* as requiring strict scrutiny for laws that infringe on the right to vote.[74] Lower courts have also relied on *Harper* for the proposition that strict scrutiny applies

66 *See, e,g.*, Overton, *supra* note 31, at 660 (presenting data to suggest that "a photo-identification requirement would exclude some legitimate voters and would have a disparate demographic impact").

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

68 Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

69 *See Crawford*, 128 S. Ct. at 1615–16 (plurality opinion).

70 *Id.* at 1615.

71 *Id.* at 1616.

72 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).

73 *Compare Crawford*, 128 S. Ct. at 1616 (describing *Harper* as requiring "relevant and legitimate state interests"), *with Harper*, 383 U.S. at 670 (requiring the law to be "closely scrutinized and carefully confined").

74 *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982); Bullock v. Carter, 405 U.S. 134, 142 (1972). In his dissent in *San Antonio Independent School District v. Rodriguez*, Justice Marshall noted—citing *Harper*—that strict scrutiny is appropriate when "discrimination affects an important individual interest." 411 U.S. at 102 n.61 (Marshall, J., dissenting). Justice Douglas, who wrote the opinion in *Harper*, joined Justice Marshall's dissent. *Id.* at 70. Thus, even the author of *Harper* agreed with the assessment that *Harper* employed strict scrutiny review.

to classifications that burden fundamental rights.[75] Thus, the Court in *Crawford* was disingenuous in implying that *Harper* simply required "relevant and legitimate state interests"[76] as opposed to a narrowly tailored, compelling governmental interest pursuant to traditional strict scrutiny review.

After misconstruing the level of scrutiny in *Harper*, Justice Stevens' lead opinion describes the inquiry into burdens for election law cases in a novel way. Instead of referring to "severe burdens," which is the language the Court had typically used post-*Burdick*, the Court discussed whether the voter identification law imposed a "substantial burden."[77] Furthermore, to justify this burden, the Court held that the state merely has to show a "sufficient justification," or that the state interests are "neutral" and "sufficiently strong."[78] Therefore, Justice Stevens' lead opinion seems to apply a form of intermediate scrutiny, because the burden on voters was only "limited," and the state justified the photo identification law with "valid neutral justifications."[79] Instead of first determining whether the law imposed a severe burden, and then using strict scrutiny for severe burdens and a lower standard for other burdens—which had been the Court's approach under *Burdick*—the Court employed a balancing test from the outset. This balancing test attempted to measure both the magnitude of the burden and the state's justifications for the law.[80]

Justice Scalia's concurring opinion in *Crawford* at least remained consistent with previous case law.[81] He simply set forth the *Burdick* framework and concluded that Indiana's photo identification law did not impose a severe burden on voters.[82] However, Justice Scalia also suggested that the *Burdick* test is appropriate for any law "respecting the right to vote," failing to distinguish between types of burdens and their affect on various actors in the political scheme.[83] This position seems untenable given that election laws burden different groups in different ways, as discussed below. But Justice Scalia was correct in one respect,

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75 *See, e.g.*, Belitskus v. Pizzingrilli, 343 F.3d 632, 645 (3d Cir. 2003); Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158 F.3d 1335, 1340 (D.C. Cir. 1998); Greidinger v. Davis, 988 F.2d 1344, 1349–50 (4th Cir. 1993).

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

77 *Id.* at 1621.

78 *Id.* at 1619, 1620, 1624.

79 *Id.* at 1623, 1624.

80 *Id.*; *see also* Chris Elmendorf, *Judicial Review of Electoral Mechanics After* Crawford (May 6, 2008), http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=417 ("Much to my surprise, six Justices unequivocally affirmed that *Burdick* requires open-ended balancing, rather than a threshold classification of the challenged requirement as 'severe' or 'not severe.'").

81 *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment).

82 *Id.* at 1624–25.

83 *Id.* at 1624.

stating that the lead opinion provides "no certainty" for future election law disputes.[84]

The only place where the words "fundamental right" appear in *Crawford* is in Justice Souter's dissent.[85] However, even though Justice Souter called the right to vote a "fundamental right," he did not apply typical strict scrutiny review.[86] Instead, he stated that election law cases "avoid[ ] pre-set levels of scrutiny in favor of a sliding-scale balancing analysis."[87] Thus, Justice Souter was more explicit than Justice Stevens in shifting the analysis to a weighing of the various interests from the outset. But Justice Souter seemed equivocal in his approach to the balancing test. He described the burdens of Indiana's voter identification law as "nontrivial," "particularly onerous," a "high hurdle," and "serious," but never "severe."[88] Although he used strong language to describe the burdens at issue, he never explained what made the burdens "serious" but not "severe." Based on this language, it is surprising that Justice Souter did not apply strict scrutiny, especially given his statement that the "unfettered" right to vote is a "fundamental right" and his description of the burdens of the photo identification law, which suggest he believed the burdens actually were "severe."[89] The upshot of Justice Souter's opinion is that it remains unclear, under his approach, what types of burdens would be "severe" enough to trigger strict scrutiny review.

Justice Breyer's dissent adds little to discern how to approach future voting rights cases.[90] He agreed that election law cases now require a balancing test, and he believed that Indiana's photo identification law imposed a "disproportionate" burden on eligible voters who lacked identification.[91] However, Justice Breyer did not extrapolate on how to apply this balancing test.

The import of *Crawford* is as follows: Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy), Justice Souter (joined by Justice Ginsburg), and Justice Breyer believe that some type of balancing test applies to election law disputes. However, in their opinions, Justice Stevens and Justice Breyer failed to define how to apply that balancing test, and Justice Souter described the burdens in the case in a manner that suggests he actually believed they were "severe" and would require strict scrutiny review. Justice Scalia (joined by Justice Thomas and Justice

84 *Id.* at 1627.
85 *Id.* at 1627 (Souter, J., dissenting).
86 *Id.* at 1628.
87 *Id.*
88 *Id.* at 1632, 1634.
89 *Id.* at 1627, 1628, 1629–31.
90 *Id.* at 1643 (Breyer, J., dissenting).
91 *Id.*

Alito) adhered to *Burdick*, which requires a threshold inquiry into the magnitude of the burden and calls for strict scrutiny only for burdens that are "severe." Only Justice Souter (joined by Justice Ginsburg) described the right to vote as a "fundamental right." Given all of this, if nothing else, the legacy of *Crawford* certainly will not be clarity.

The foregoing demonstrates that in cases involving who can vote in an election or a voter's experience at the polls, the Court sometimes considers the right to vote as fundamental and sometimes conspicuously omits any fundamental rights language. While each case has its own permutations, at the core the questions presented are the same: how far may the state go in enacting regulations to determine eligibility for the franchise or impact a voter's experience at the polls? A coherent approach that is consistent with both history and the importance of voting in our democracy would always use a fundamental rights approach when the rights of individual voters are at stake. But that is not the reality of how the Court currently handles election law cases involving laws that directly burden individual voters.

2. Who May Be a Candidate?

In cases involving access to the ballot, the Court has exhibited the same trend of vacillating between using strict scrutiny and a lower level of scrutiny depending on whether the Court considers the right in the particular case to be fundamental. In *Williams v. Rhodes*, the Court struck down a series of Ohio ballot access laws that made it virtually impossible for any candidate of a party except the Republican and Democratic parties to qualify for the ballot.[92] In its opinion, the Court noted that a state must demonstrate a compelling governmental interest to justify a law that places an unequal burden on minority voting groups.[93] Similarly, in *Illinois State Board of Elections v. Socialist Workers Party*, the Court invalidated a state law that imposed a different signature requirement for access to the ballot for new political parties in statewide elections as opposed to elections in political subdivisions.[94] The Court noted that laws that restrict access to the ballot also "implicate the right to vote" because these laws "limit[ ] the choices available to voters," and that the law under consideration was not the "least restrictive means" of achieving the state's goal of ensuring that candidates on a ballot are actually serious candidates who have a modicum of support.[95] Thus, when

92 *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968).

93 *See id.*

94 *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 175–77, 187 (1979). The upshot of the regulations was to make appearing on the ballot in Chicago much more difficult than appearing on the ballot for a statewide position. *Id.*

95 *Id.* at 184, 186. The Court also noted in *Bullock v. Carter*,

the "vital individual right[ ]" to vote is at stake, "a State must establish that its classification is necessary to serve a compelling interest."[96]

The story was quite different, however, in *Storer v. Brown*, which involved a similar ballot access question involving a California law that required independent candidates to be disaffiliated with a prior political party for one year before the primary.[97] In *Storer*, the Court in effect shifted the level of scrutiny for most cases where a plaintiff asserts the infringement of the franchise:

> It has never been suggested that [the rule from previous case law] automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress. . . . Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. . . . It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.[98]

Thus, a reviewing court need not always use strict scrutiny to analyze an election law claim, because states are allowed to engage in "substantial regulation of elections."[99] After *Storer*, it was clear that election law cases must be analyzed on a case-by-case basis, but it was not clear when strict scrutiny was appropriate as opposed to a lower level of scrutiny.

The Court attempted to provide some guidance in *Anderson v. Celebrezze* when it promulgated what is now known as the "balancing of the interests" or "severe burden" test.[100] In *Anderson*, the Court analyzed an

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> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.

405 U.S. 134, 142 (1972).

96 *Ill. State Bd.*, 440 U.S. at 184; *see also Bullock*, 405 U.S. at 144 (using strict scrutiny to strike down Texas's scheme of requiring all candidates to pay a filing fee because the law had a "real and appreciable impact on the exercise of the franchise").

97 *See* Storer v. Brown, 415 U.S. 724, 726–27 (1974).

98 *Id.* at 729–30 (citations omitted).

99 *Id.* at 730.

100 Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983). I have previously criticized the Court's application of the severe burden test. *See* Joshua A. Douglas, 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*, 75 GEO. WASH. L. REV. 372 (2007); *see also*

Ohio election statute that required independent candidates for president to register for an election well before the two major parties had even determined their nominees.[101] The Court attempted to create a formula to consider a challenge to a state's election laws:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first 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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[102]

Thus, *Anderson* confirmed that the Court no longer approached an election law case from a fundamental rights framework. Instead, the Court employed a balancing test to weigh the various interests of the voters with the interests of the state.[103] Importantly, the balancing test applied to laws that burdened voters, not just candidates.[104] Clearly, a requirement that a state law meet a "compelling state interest" was absent from the *Anderson* scheme.[105]

However, the Court changed its tune once again (back to a fundamental rights approach), when it considered a law regulating political

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Elmendorf, *supra* note 35. Here, I do not criticize the severe burden test itself but instead question its very existence for analyzing a right that purportedly is *fundamental*.

101 *See Anderson*, 460 U.S. at 782–83.

102 *Id.* at 789.

103 *See id.*

104 *Id.* at 806 ("We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused.").

105 The Court struck down the law in *Anderson* based on this balancing test because the law placed a "particular burden on an identifiable segment of Ohio's independent-minded voters." *Id.* at 792, 806; *see also* Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986) (upholding a state law that required a candidate to receive at least one percent of the vote in the primary to include the candidate's name on the general election ballot); Am. Party of Tex. v. White, 415 U.S. 767, 782 (1974) (upholding a one-percent petition-signature requirement, because "the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support" (citation omitted)).

parties. In *Tashjian v. Republican Party*, the Court struck down a Connecticut statute mandating a "closed" primary system under the First Amendment, because the statute violated a political party's right to freedom of association.[106] The Court noted that the law also implicated the constitutional right to vote, stating that "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote."[107] However, in *Timmons v. Twin Cities Area New Party*, the Court determined that even though the law in question imposed a burden on a party's access to the ballot and its associational rights, the burden was not "severe" and could be analyzed under a lower standard.[108] Similarly, the Court ruled in *Clingman v. Beaver* that an Oklahoma law that provided for a "semiclosed" primary system burdened voters' rights only "minimally."[109] The Court reiterated that "not every electoral law that burdens associational rights is subject to strict scrutiny."[110] Instead, the Court upheld Oklahoma's semiclosed primary system because the state presented "important regulatory interests," such as preserving political parties as viable interest groups and deterring party raiding and "sore loser" candidacies.[111]

In sum, in cases involving access to the ballot or regulating political parties, the Court sometimes uses a fundamental rights approach and alternatively uses a lower level of scrutiny.

3. One Person-One Vote

The Court has had a tremendous impact on the layout of electoral maps by decreeing that every person's vote must be "worth" the same.[112] The Court first explicitly applied a fundamental rights rationale for voting rights in *Wesberry v. Sanders*[113] and *Reynolds v. Sims*,[114] both of which involved the apportionment of seats in legislative districts. In these cases, the Court sought to ensure that elections were fair by requiring states to value each person's vote the same through equally populated

106 Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986).

107 *Id.* at 217; *see also* Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (noting that a law that burdens the rights of political parties must survive strict scrutiny review).

108 Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363–64 (1997).

109 Clingman v. Beaver, 544 U.S. 581, 590 (2005).

110 *Id.* at 592.

111 *Id.* at 593–94.

112 *See, e.g.*, Guy-Uriel E. Charles, *Election Law and the Roberts Court: Redistricting: Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1202 (2007).

113 Wesberry v. Sanders, 376 U.S. 1 (1964).

114 Reynolds v. Sims, 377 U.S. 533 (1964). In 1963, the Court noted that "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded," Gray v. Sanders, 372 U.S. 368, 381 (1963), but at that point the Court had still not explicitly defined the right to vote as a fundamental right.

electoral districts.[115] Demonstrating the importance of the right involved, the Court used particularly strong language in *Wesberry*:

> 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 most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[116]

Similarly, in *Reynolds*, the Court analyzed the apportionment of seats in the Alabama legislature and stated that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."[117]

In contrast, *Bush v. Gore*[118]—perhaps the most famous election law case involving the "worth" of one's vote—did not take this same categorical fundamental rights approach to the right to vote.[119] This case considered whether Florida's recount procedure gave equal weight to each vote cast in the presidential election, which, at its core, is the same question presented in *Wesberry* and *Reynolds*: did the state's election regulation and recount procedure value every vote equally?[120] To be sure, the Court used the words "fundamental right" in its decision.[121] However, the Court was careful not to define the right to vote as categorically fundamental, even though it cited *Reynolds* several times.[122] Most importantly, the Court did not apply the same form of strict scrutiny as it did in *Wesberry* and *Reynolds*, instead using a more relaxed standard.[123]

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115 *Reynolds*, 377 U.S. at 561–62; *Wesberry*, 376 U.S. at 17–18.

116 *Wesberry*, 376 U.S. at 17–18.

117 *Reynolds*, 377 U.S. at 561–62. The Court continued, "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Id.* at 555, 561–62. One commentator opined that after *Wesberry* and *Reynolds*, "it may be appropriate to treat the right to vote as a supreme value in this nation." Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 957 (1988).

118 Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

119 For a discussion of the constitutionality and practical effects of *Bush v. Gore*, see Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1728 (2001).

120 *See Bush*, 531 U.S. at 105 (stating that the recount had to be "consistent with [the] obligation to avoid arbitrary and disparate treatment of the members of [Florida's] electorate").

121 *Id.* at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

122 *Id.* at 105, 125.

123 *See* Elmendorf, *supra* note 35, at 331 n.66 (arguing that the Court used "rational basis plus" review in *Bush v. Gore*); Hasen, *supra* note 32, at 389 (arguing that the Court did not

*Bush v. Gore* thus exemplifies an important shift in how the Court now approaches cases that consider the way in which states value or count each vote: the Court no longer views the right to vote as always fundamental in this context.

Of course, there are many ways to reconcile *Bush v. Gore* with the one person-one vote cases. For example, *Wesberry* and *Reynolds* involved the apportionment of legislative districts before an election, not how to count the votes after a statewide election that would decide the presidency.[124] Nevertheless, if the Court strives to achieve consistency and adhere to precedent, its failure to make a clear statement in *Bush v. Gore* that the right to vote is a fundamental right is surprising given that the case involved the same basic principles as these previous cases. The facts may have been different, but the key issue was the same—what procedures may a state use to ensure that every person has an equal say in the outcome of an election? *Bush v. Gore* thus shows that the right to vote, while once viewed as a fundamental right, no longer enjoys this same status.[125]

The foregoing demonstrates that even though the Court has declared the right to vote to be a fundamental right, the Court approaches election law disputes in various ways. For some cases, the Court will invoke the severe burden test, decide that a state election law imposes a burden that is less than severe, and employ a standard that is lower than strict scrutiny.[126] As another variation, in *Crawford*, the controlling opinion employed some form of balancing from the outset.[127] Interestingly, in these cases, the Court rarely bothers to discuss the right to vote as a *fundamental right*, never even using these words. Instead, the Court's focus is typically on the state's "reasonable" (i.e., less than compelling) interests. However, in other cases, the Court uses the language of fundamental

really undertake a thorough strict scrutiny analysis and that the case should not be understood as expanding the equal protection inquiry for a voting rights claim); *see also* Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert* Bush v. Gore *into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357, 375–76 (2002):

On balance, given the Court's discussion of the 'fundamental' nature of the right and its references to *Harper* and *Reynolds*, the opinion on *Bush* seems more oriented toward a strict scrutiny approach, at least where non-presidential elections are involved. This conclusion about strict scrutiny is by no means clear-cut, however, as is indicated by other voting rights cases decided by the Supreme Court.

*Id.* at 375.

124 *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964).

125 *See supra* note 123 and accompanying text.

126 *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363–64 (1997); Burdick v. Takushi, 504 U.S. 428, 430 (1992).

127 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615–16 (2008).

rights jurisprudence and applies strict scrutiny review.[128] This dichotomy holds true for most of the major areas of election law, including cases involving who can vote, who can be a candidate, and how much one's vote is worth.

Cases using a non-fundamental rights approach occur virtually in tandem with the Court's fundamental rights election law decisions. For example, in 1986, on the very same day, the Court in *Tashjian* analyzed whether the state had demonstrated a compelling interest for imposing a "closed" primary system,[129] while the Court in *Munro* required only a "reasonable" justification for a law limiting who could appear on the general election ballot.[130] The Court stated in *Tashjian* that "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of *fundamental rights*, such as the right to vote."[131] However, in *Munro*, the Court noted that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is *reasonable* and does not significantly impinge on constitutionally protected rights."[132] The Court in *Tashjian* identified the right to vote as a "fundamental right,"[133] while the words "fundamental right" appear in *Munro* only in the dissent.[134] In short, the Court has left an election law doctrine that is confused and muddled, providing little guidance to the lower courts on which approach is appropriate.

## II. POTENTIAL REASONS FOR THE COURT'S INCONSISTENCY IN ELECTION LAW CASES

Perhaps there is a principled reason for the Court's dual line of election law cases. Indeed, one might surmise that the analysis in the previous Part is not alarming because there is likely a pattern to when the Court uses a fundamental-rights-plus-strict-scrutiny approach versus a lower standard. This Part posits several theories to make sense of the

128 *See, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986); *Reynolds*, 377 U.S. 533.

129 *Tashjian*, 479 U.S. at 217.

130 Munro v. Socialist Workers Party, 479 U.S. 189, 195–96 (1986). *Tashjian* analyzed Connecticut's closed primary system that allowed only registered members of a party to vote in that party's primary, using a First Amendment right to association framework to invalidate the law. *Tashjian*, 479 U.S. at 210–13. *Munro* upheld Washington's statute that limited placement of candidates on the general election ballot to those who had received more than one percent of the vote in the primary. *Munro*, 479 U.S. at 190–93. Thus, both cases dealt with voters' ability to cast a ballot for a particular candidate or party, and the Court did not attempt to distinguish them; neither majority opinion mentioned the other.

131 *Tashjian*, 479 U.S. at 217 (emphasis added).

132 *Munro*, 479 U.S. at 195–96 (emphasis added).

133 *Tashjian*, 479 U.S. at 217.

134 *Munro*, 479 U.S. at 200 (Marshall, J., dissenting).

Court's differing treatment of election law cases but concludes that none fully explain the Court's decisions. This Part therefore provides the foundation for Part IV, which suggests a way for the Court to rethink its approach to election law cases.

### *A. Individual Rights Versus Ballot Access*

One potential way to distinguish cases that employ a fundamental rights approach from cases that use a lower level of scrutiny is to discern whose rights the law under review allegedly infringes. There may be a key distinction between laws that regulate an individual's right to vote and laws that determine a candidate's eligibility to appear on the ballot.[135] Many of the Supreme Court cases discussed in the previous Part mirror this understanding. For example, *Harper v. Virginia Board of Elections* dealt with a poll tax that directly restricted a citizen's right to vote, and the Court identified the right at stake as a "fundamental right" and struck down the law under strict scrutiny review.[136] *Kramer v. Union Free School District No. 15*, another fundamental-rights-plus-strict-scrutiny case, analyzed a law that limited which individuals could vote in a school district's elections.[137] In *Burson v. Freeman*, the Court upheld a law restricting advertising around a polling place because the law burdened the ability of individual voters to exercise their fundamental right to vote.[138]

In the same way, many of the cases where the Court used a lower level of scrutiny involved access to the ballot. In *Storer v. Brown*, a ballot access case, the Court stated that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.[139] The Court's "balancing of the interests" test came about in *Anderson v. Celebrezze*, which dealt with an independent party candidate's attempt to be placed on the ballot.[140] The same is true for *Munro v. Socialist Workers Party*, which used a lower level of scrutiny to analyze a restriction on who could appear on the general election ballot.[141]

However, while it may be convenient to believe that the Court's election law jurisprudence is predicated on whether the law burdens individual voters or candidates, the Court itself has explicitly rejected this view. In *Bullock v. Carter*, a ballot access case, the Court stated that "the

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135 Indeed, this Article expressly advocates invoking that distinction. *See infra* Part IV.A.1.

136 *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666, 670 (1966).

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

138 *See* Burson v. Freeman, 504 U.S. 191, 211 (1992).

139 Storer v. Brown, 415 U.S. 724, 30 (1974).

140 *See* Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983).

141 *See* Munro v. Socialist Workers Party, 479 U.S. 189, 196–97 (1986).

rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[142] The Court's cases also reflect this lack of a clear separation. The Court has employed a fundamental-rights-plus-strict-scrutiny analysis for some ballot access cases[143] and has used a lower level of scrutiny for cases that involve only otherwise-eligible citizens' right to cast a vote.[144] In fact, the Court promulgated the severe burden test and used a lower level of scrutiny in *Burdick v. Takushi*, a case involving Hawaii's ban on an individual voter writing in a candidate of the voter's choice on the ballot. The Court used a lower level of scrutiny in *Burdick* because it estimated that the law imposed only a minimal burden on the individual right to vote.[145] The same was true in *Crawford*, where the Court analyzed a law that directly burdened voters—requiring them to show a photo identification to vote—and employed merely some form of a balancing test.[146] If the Court actually reviewed laws about individual voters under strict scrutiny and laws regulating candidates or political parties under a lower level of scrutiny, then the Court should have used strict scrutiny in both *Burdick* and *Crawford*, which were cases about restrictions on individual voters.

### *B. Content-based Versus Content-neutral Laws*

Another possible explanation for the differing approaches is the content of the law under review. Perhaps laws that regulate voting rights based on the particular content of the voters' or political parties' expression or that invidiously discriminate require strict scrutiny review, while content-neutral laws warrant analysis under a lower standard.[147] Almost twenty years ago, Professor Tribe took a similar view:

> Constitutional review of election and campaign regulation amounts, in large part, to accommodating the fear of a temporary majority entrenching itself with the necessity of making the election a readable barometer of the electorate's preferences. It is not surprising, therefore,

142 Bullock v. Carter, 405 U.S. 134, 143 (1972).

143 *See, e.g.*, Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184–85 (1979); Williams v. Rhodes, 393 U.S. 23, 31 (1968).

144 *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433–34 (1992); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973).

145 *Burdick*, 504 U.S. at 434.

146 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623–24 (2008).

147 *See, e.g.*, *Burdick*, 504 U.S. at 438 (stating that "there is nothing content based about a flat ban on all forms of write-in ballots"); Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (stating that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status").

> that the vigor of judicial review of election laws has been roughly proportioned to their potential for immunizing the current leadership from successful attack.[148]

However, this reasoning has two general flaws. First, if this is really the Court's approach in election law cases—sorting the laws that infringe upon voters' rights based on the particular content of the law or the manner in which it entrenches the majority from the laws that simply regulate the voting process for the entire electorate—then the Court's competing approaches to election law cases are a cryptic and inapt means of achieving this goal. If there is a meaningful difference between election laws that are content-based and those that are content-neutral, and if the level of scrutiny in these cases is dependent on that difference, then we would expect the Court to make this distinction far more explicitly.

Second, many of the Court's cases contradict this understanding. While it is true that *many* laws that the Court has reviewed under strict scrutiny involved content-based regulations that tended to entrench majority parties,[149] there are significant cases that do not follow this pattern. For example, although the law restricting advertising near the polls in *Burson v. Freeman* impacted all voters equally and had nothing to do with entrenching the majority, the Court used a fundamental rights approach.[150] More tellingly, several of the court's non-fundamental rights election law cases *did* involve content-based laws that might have tended to entrench the majority. In *Storer v. Brown*, the Court used a lower level of scrutiny to analyze a ballot access law that required disaffiliation with a prior party for one year before the primary to be placed on the ballot as an independent.[151] This type of law was content-based because it affected only candidates who decided to become independents too soon before the primary. Furthermore, the law tended to help majority parties remain in the majority, because their candidates would face less opposition, as the law made it harder for factions to break off from entrenched parties. Nevertheless, the Court used a lower level of scrutiny because the law did not impose a "severe burden" on voting rights. The same analysis rings true when dissecting *Burdick*, which used a lower level of scrutiny to uphold Hawaii's write-in ban—even though that system helped to entrench the leadership by foreclosing last-minute write-in

148 TRIBE, *supra* note 16, at 1097; *see also* League of Women Voters v. Diamond, 965 F. Supp. 96, 101 (D. Me. 1997).

149 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.").

150 *See* Burson v. Freeman, 504 U.S. 191, 199–200 (1992).

151 Storer v. Brown, 415 U.S. 724, 728–33 (1974).

campaigns from outsiders.[152] Thus, while some cases follow the content-based-versus-content-neutral—or "entrenchment"—pattern, this distinction neither provides a satisfying explanation for the Court's actions nor accurately describes what the Court has done in all of its election law cases.

It is also incorrect to say that the Court uses strict scrutiny only to evaluate a law that discriminates against a suspect class and a lower level of scrutiny for all other cases. A law that invidiously discriminates is, by definition, a content-based law, and the Court has generally used strict scrutiny for these types of claims.[153] However, the Court has used strict scrutiny for a slew of other election laws that have nothing to do with invidious discrimination, such as laws limiting voter eligibility to property owners or laws creating different signature requirements for ballot access.[154] The Court's decision in *Burdick*, which purportedly delineated when to use strict scrutiny, referred simply to "burdens"–not "burdens that invidiously discriminate"—to define the scope of the severe burden test.[155] Furthermore, the Voting Rights Act provides a statutory mechanism for voters who are minorities to vindicate their rights, suggesting that this factor may not always be prevalent in a pure constitutional challenge to an election regulation.[156] Thus, attempting to reconcile the Court's election law cases by determining which laws are content-based as opposed to content-neutral or which laws invidiously discriminate against certain people leads to no principled explanation of the Court's election law jurisprudence. Simply put, this mode of analysis would be impossible to define, measure, or predict. It also fails to accurately reflect what the Court has done in all election law cases.

### *C. Direct Versus Indirect Burdens Pursuant to the State's Power to Regulate the Times, Places, and Manner of an Election*

Perhaps there is a difference between laws that directly burden an individual's right to vote and laws that indirectly burden that right by regulating some other part of the election process.[157] After all, states have a constitutional obligation to dictate the "times, places, and man-

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152 *Burdick*, 504 U.S. at 434, 436–37.

153 *See, e.g.*, Evans v. Cornman, 398 U.S. 419, 422 (1970). The law in *Evans* did not deal with a suspect class, but the Court still noted that the law invidiously discriminated against a certain class of voters. *Id.* at 426; *see also* Carrington v. Rash, 380 U.S. 89, 96 (1965).

154 *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 175–77 (1979); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969).

155 *Burdick*, 504 U.S. at 434.

156 *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

157 *See, e.g.*, Brief of Professor Erwin Chemerinsky as Amicus Curiae in Support of Neither Party [Applicable Legal Standard] at 3–9, Ind. Democratic Party v. Rokita, Nos. 07-21, 07-25, (U.S. Apr. 28, 2008), *available at* http://brennancenter.org/dynamic/subpages/download_file_50861.pdf (explicitly adopting this solution); *see also infra* Part IV.A.1.

ner" of holding elections;[158] perhaps laws enacted pursuant to that duty warrant a lower level of scrutiny. For example, the Court has used a lower level of scrutiny in ballot access cases, such as *Storer v. Brown*, demonstrating that a lower standard can be appropriate for a law that defines how to run an election and only indirectly burdens individual voters.[159] By contrast, *Kramer v. Union Free School District No. 15* involved a state statute that directly limited who could vote in a particular election, making it a direct burden on voting rights that was separate from regulating the times, places, and manner of holding an election.[160] The Court applied strict scrutiny review.[161]

However, this rationale does not explain many cases under the Court's election law jurisprudence. For example, in *Rosario v. Rockefeller*, the Court used a lower level of scrutiny to analyze a law that had little to do with regulating the times, places, or manner of holding an election.[162] Instead, the law restricted certain voters from participating in a primary unless they had enrolled in the party of their choice over a year in advance.[163] This law therefore directly burdened individuals' right to vote in the election unless they met particular criteria, did not directly affect candidates or political parties, and did not regulate the structure of the election itself.[164] Similarly, the Court used strict scrutiny to analyze California's scheme of regulating the internal operation of political parties, which did not directly burden voters,[165] and it used strict scrutiny to strike down a law that dealt with the "manner" of an election—the signature requirements for appearing on the ballot.[166]

Even more telling is that lower courts do not follow this distinction in their election law cases. For example, consider a state statute that prohibited candidates not affiliated with a political party from placing the word "Independent" next to the candidate's name on the ballot. The Fifth Circuit held that this kind of law, in Louisiana, imposed only a "minor, indirect, and remote" burden on the candidate's supporters, and

158 *See* U.S. CONST. art. I, § 4.

159 *See* Storer v. Brown, 415 U.S. 724, 729–30 (1974); *see also* Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986).

160 *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969).

161 *Id.* at 629–30.

162 *See* Rosario v. Rockefeller, 410 U.S. 752, 761–62 (1973).

163 *Id.* at 754. Construing this case as analyzing a law regarding the "manner" of an election would make it difficult to distinguish any law that infringes on the right to vote from a law that merely regulates the "manner" of holding an election.

164 I do not mean to suggest that the state did not have a compelling reason for imposing the law or that the law was not narrowly tailored to achieve the state's goal. The example merely shows that the Court does not review all laws that directly burden voters' rights under strict scrutiny.

165 *See* Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222 (1989).

166 *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 175–77, 183–88 (1979).

used a lower level of scrutiny.[167] However, the Sixth Circuit held that the same type of law in Ohio impaired the ability to cast a meaningful vote or to associate meaningfully, and invalidated the law under strict scrutiny.[168] Similarly, at least two courts have used strict scrutiny to analyze a challenge to the layout of a ballot, which seemingly relates to the state's power to regulate the manner of an election.[169]

Thus, whether a state enacts a law pursuant to its constitutional obligation or whether a law directly or indirectly burdens a voter's ability to cast a ballot does not necessarily impact the choice of the level of scrutiny. Although this rationale might explain some of the cases in the election law area, it does not provide a comprehensive explanation or an accurate predictive tool for the Court's overall jurisprudence.

The foregoing discussion suggests that currently there may be no principled reason for the Court's vacillation between strict scrutiny and a lower level of review in election law cases. Of course, the same law could impose different burdens in one state versus another, leading to inconsistent approaches for the exact same law and a dichotomy in how courts analyze a so-called fundamental right. Perhaps the Court is not seeking to achieve consistency when handling difficult cases involving an upcoming election. Perhaps the political motivations of the Justices are involved in each decision, leading to a dual line of cases depending on the specific facts of each case.[170] Perhaps the Justices believe that election law cases simply fall on a continuum that, for whatever reason, forecloses consistency between decisions.[171] Or perhaps there is simply

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167 *See* Dart v. Brown, 717 F.2d 1491, 1499–1504 (5th Cir. 1983).

168 *See* Rosen v. Brown, 970 F.2d 169, 175–76 (6th Cir. 1992).

169 *See* Graves v. McElderry, 946 F. Supp. 1569, 1578–79 (W.D. Okla. 1996); Devine v. Rhode Island, 827 F. Supp. 852, 861–62 (D.R.I. 1993).

170 *See generally* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 77–132 (1999) (arguing that having Supreme Court Justices decide cases based in part upon political motivations is both unavoidable and normatively desirable); *see also* Robert Barnes, *Partisan Fissures over Voter ID: Justices to Hear Challenge to Law*, WASH. POST, Dec. 25, 2007, at A1 (quoting Professor Hasen as arguing that in the voter identification context, judges' decisions demonstrate a "philosophical divide on the question of whether protecting the integrity of the voting process from fraud is of equal or greater value than making sure as many eligible voters as possible take part in the process").

171 *See, e.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1628 (2008) (Souter, J., dissenting) ("Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis."). As Justice O'Connor noted in *Clingman v. Beaver*:

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 merely a pretext for exclusionary or anticompetitive restrictions.

no adequate principle to sort out the Court's dual line of election law cases, because the Court alters its level of scrutiny for each case to ensure states can effectively regulate an election. The problem, however, is that predicting when the Court will use one approach or the other is exceedingly difficult. Additionally, as discussed below, the Court's election law jurisprudence leaves litigants and lower courts guessing as to the appropriate level of scrutiny and derogates the right to vote as less than fundamental in some circumstances.

## III. IMPLICATIONS OF THE SUPREME COURT'S FRACTURED APPROACH TO ELECTION LAW CASES

The Supreme Court's co-existing dual line of cases—one always applying strict scrutiny because the right to vote is fundamental, the other balancing the burdens the election law imposes with the state's legitimate interests—results in many negative consequences.

The most practical implication is the widespread confusion among the lower courts. A California district court recognized this inconsistency: "The Supreme Court . . . has not clearly articulated the level of scrutiny which courts are to give to alleged infringements of the fundamental right to vote. . . . Thus, at some times *Reynolds* seems to be adopting a strict scrutiny standard while at other [times] the standard seems to be more lenient."[172] The Eleventh Circuit remarked that although "[t]he right to vote is fundamental, . . . states are entitled to burden that right to ensure that elections are fair, honest and efficient."[173] Of course, the court did not explain why a fundamental right, which would normally require strict scrutiny review, should instead be reviewed under a lower standard in determining whether the state is impermissibly burdening that right. Similarly, the First Circuit recognized that "[t]he standard of review for a law that burdens ballot access and voting rights is not static; rather, the Supreme Court has suggested something of a sliding scale approach and has noted that there is no 'bright line' to separate unconstitutional state election laws from constitutional ones."[174] But the Court has not actually provided a clear explanation of that sliding scale; if the Court had articulated what factors define where a given case falls on a purported scale, then there would be less cause for concern, but because the Court has not done so, the results are arbitrary or easily manipulated.

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544 U.S. 581, 603 (2005) (O'Connor, J., concurring).

[172] Common Cause S. Christian Leadership Conference of Greater L.A. v. Jones, 213 F. Supp. 2d 1106, 1108–09 (C.D. Cal. 2001).

[173] Wexler v. Anderson, 452 F.3d 1226, 1232 (11th Cir. 2006).

[174] McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004); *see also* Werme v. Merrill, 84 F.3d 479, 483 (1st Cir. 1996) ("The Supreme Court has eschewed a hard-and-fast rule, and instead has adopted a flexible framework for testing the validity of election regulations.").

Indeed, lower courts have varied in how they have approached election law claims. For example, appellate courts have differed in what level of scrutiny to use for challenges to new voting machines in the wake of the 2000 election.[175] In *Stewart v. Blackwell*, the Sixth Circuit held that Ohio's punch card ballots and optical scan systems were unconstitutional under strict scrutiny review.[176] The holding reflected the majority's determination that the machines placed a heavy burden on the electorate's ability to cast a vote.[177] In contrast, the dissent relied on *Burdick*: "This challenge to the nuts-and-bolts of election administration, regardless of its merit, cannot be equated with either discriminatory voter-qualification requirements or generally applicable state laws that deny 'equality of voting power,' . . . which are the principal types of state actions that the Supreme Court has subjected to strict scrutiny."[178] The Ninth Circuit held the opposite on virtually the same issue.[179] In *Weber v. Shelley*, the court analyzed a voter's challenge to California's plan to replace paper ballots with an electronic voter system under a lower level of scrutiny.[180] The court reviewed the law using *Burdick* because the "use of paperless, touchscreen voting systems [does not] severely restrict[ ] the right to vote."[181]

Voter identification cases provide another example of the confusion regarding the appropriate level of scrutiny for election law disputes.[182] In *Common Cause/Georgia v. Billups*, the Northern District of Georgia determined that a law requiring voters to show photo identification at the polls—at least for that upcoming election—imposed a severe burden on voters who did not have proper identification, therefore warranting strict scrutiny review.[183] However, the district court in *Gonzalez v. Arizona* disagreed, stating that a requirement that voters show identification when registering to vote and arriving at a polling site would affect "less than

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175 *See* Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U. L. REV. 1174, 1192–95 (2007).

176 Stewart v. Blackwell, 444 F.3d 843, 861–62 (6th Cir. 2006), *vacated as moot en banc by* 473 F.3d 692, 694 (6th Cir. 2007) (becoming moot when Ohio abandoned its desire to use the challenged machines).

177 *Id.*

178 *Id.* at 883 (Gilman, J., dissenting) (citations omitted).

179 Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003).

180 *Id.*

181 *Id.* Professor Daniel Tokaji discerns a reconciling principle between cases such as *Weber*, *Stewart*, and *Wexler*. *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1077–78 (2007) (suggesting that the differences in the cases stem from different empirical evidence involving particular voting machines).

182 *See generally* Overton, *supra* note 31 (providing an in-depth analysis of photo identification requirements).

183 Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1345 (N.D. Ga. 2006).

3% of the voting population" and therefore was not a "severe" burden.[184] In *ACLU v. Santillanes*, the court determined that a new city ordinance requiring voters to show identification at the polls imposed a severe burden,[185] while the Seventh Circuit's decision in *Crawford* determined that a photo identification requirement did not impose a severe burden and that strict scrutiny was inapplicable to this issue.[186] Judge Wood, dissenting from the denial of rehearing en banc at the Seventh Circuit, noted that "the panel's opinion in this case addresses an exceptionally important unresolved question of law: what level of scrutiny should courts use when evaluating mandatory voter identification laws?"[187] The litigants in *Crawford* spent considerable time debating the proper level of scrutiny, and several law professors wrote amicus briefs to the Supreme Court solely on this topic.[188]

However, instead of answering this question, the Supreme Court in *Crawford* injected even more confusion into this issue.[189] Generally speaking, *Crawford* determined that voter identification cases require a balancing analysis of the various interests at stake.[190] But the lead opinion in *Crawford* also left open the door for voters to bring as-applied challenges, suggesting that the burden of a photo identification law might be severe enough to warrant a higher level of scrutiny—or at least significant enough to make a law unconstitutional even under a lower level of scrutiny.[191] Although a balancing test might make theoretical sense, its application becomes difficult when there are few standards for how to apply it.[192] Unfortunately, the Court did not provide any additional guidance, beyond balancing the actual burdens the voters claimed and the interests the state set forth for that particular law. Given the lead opinion's fact-specific analysis of Indiana's photo identification law, it will be difficult for lower courts to glean any guiding principles from *Crawford*, even for voter identification cases. Further, the Court once again failed to recognize that part of its election law jurisprudence includes the concept that the right to vote is a fundamental right, never even using this phrase in either the lead or concurring opinions.

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184 Gonzalez v. Arizona, No. CV 06-1268-PHX-ROS, 2006 U.S. Dist. LEXIS 76638, at *27–28 (D. Ariz. Oct. 11, 2006), *aff'd*, 2007 U.S. App. LEXIS 9125 (9th Cir. Apr. 20, 2007).

185 ACLU of N.M. v. Santillanes, 506 F. Supp. 2d 598, 633 (D.N.M. 2007).

186 Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

187 *Id.* at 437 (Wood, J., dissenting from the denial of rehearing en banc).

188 *See supra* note 157.

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

190 *Id.* at 1616 (stating that the burden imposed by a state must "be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation'").

191 *Id.* at 1621–22.

192 A recent district court case demonstrated the difficulties inherent in discerning the proper approach stemming from *Crawford*. *See* Paralyzed Veterans of Am. v. McPherson, No. C 06-4670, 2008 U.S. Dist. LEXIS 69542, at *46–49 (N.D. Cal. Sept. 8, 2008).

With a lack of guidance, lower courts have attempted to create their own distinctions for when to use one level of scrutiny or the other. In *Donatelli v. Mitchell*, the Third Circuit opined that laws that permanently deny access to the franchise deserve strict scrutiny review, while laws that only temporarily infringe on the right to vote require rational basis.[193] In *Mixon v. Ohio*, the Sixth Circuit articulated its understanding of Supreme Court law by stating that state election regulations that "grant[ ] the right to vote to some residents while denying the vote to others" are subject to strict scrutiny, while rational basis is appropriate for legislation that "does not infringe on the right to vote."[194]

This divergence in approaches demonstrates that one positive result of adopting a consistent rule for election law disputes is that the Court can streamline litigation in the lower courts. As the next Part demonstrates, the Court will save judicial resources by declaring that an *individual's* right to vote is always a fundamental right that requires a specific mode of strict scrutiny review, but that laws that do not directly affect voters are not about a fundamental right. Thus, lower courts can more easily dispose of election law cases without spending considerable time merely trying to figure out which level of scrutiny is most appropriate for that situation. In this way, the court can focus on the merits of the dispute instead of the framework with which to evaluate it. As discussed above, the Court basically punted on this issue in *Crawford*. But the solution should not be limited to voter identification cases: the Court should clear this up for all election law disputes involving individual voters, so lower courts can focus on the substance of these cases.[195] This is particularly important for last-minute voter challenges, which a court must decide quickly before an election takes place.[196]

Another negative implication of the Court's dual approach to election law cases is that the Court has sent the message that the right to vote should not be cherished as a basic Constitutional protection or a right that

193 Donatelli v. Mitchell, 2 F.3d 508, 514 (3d Cir. 1993).

194 Mixon v. Ohio, 193 F.3d 389, 402 (6th Cir. 1999).

195 *Cf.* Brett W. King, *Deconstructing* Gordon *and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 163–64 (1999) (noting that lower courts have remained confused about the correct level of scrutiny for cases involving a state's constitutionally-mandated supermajority requirement for approving certain ballot initiatives in light of *Gordon v. Lance*, 403 U.S. 1 (1971)).

196 *See, e.g.*, Summit County Democratic Cent. & Executive Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004) (deciding a voter's last-minute challenge to an Ohio law allowing partisan challengers at the polling places). Indeed, in *Summit County*, one judge believed the court should use a lower standard because the law did not impose a severe burden, *id.*, one judge concurred for a procedural reason, *id.* (Ryan, J., concurring), and the dissenting judge would have used strict scrutiny, *id.* at 552 (Cole, J., dissenting). A clear declaration that the individual right to vote is fundamental and requires strict scrutiny review would have eliminated this confusion, because the law directly impacted voters' experiences at the polls by allowing challengers to question their eligibility.

is "implicit in the concept of ordered liberty."[197] If it is true that the Court will not "pick out particular human activities, characterize them as 'fundamental,' and give them added protection" but instead will simply "recognize[ ], as it must, an established constitutional right, and give[ ] to that right no less protection than the Constitution itself demands,"[198] then the Court's inconsistent treatment of whether the right to vote is a fundamental right is particularly curious. Every time the Court uses a standard less than strict scrutiny to review an election law that directly burdens individuals, it sends the signal that an individual's right to vote is not a fundamental right.[199]

The Court's approach also raises other, more practical questions. Might some voters choose not to challenge a particular state law because they believe the Court will use a lower level of scrutiny to make a bold statement upholding the law? Are state lawmakers overzealous in regulating elections based on the Court's differing treatment of the right to vote? Does the Court's approach to an individual's right to vote as sometimes less than fundamental send the wrong signal to society and contribute to voter apathy and low turnout rates?[200] Obviously, these effects are merely speculative, as they are difficult to define or measure. But the Court's fractured methodology raises these questions, which demonstrates that the Court's differing treatment of the right to vote has far-reaching implications. In short, the Court's different approaches have produced unintended consequences, creating serious ramifications for the operation of our representative democracy by undermining the importance of the right to vote.

Thus, having a consistent approach will help to elevate the stature of the right to vote. By always treating the right to vote as a fundamental

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197 *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937) (using this phrase in the substantive due process context).

198 Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring) (internal quotation marks omitted).

199 Professor Foley, in an online debate, expressed the importance of the message the Court sends when evaluating a claim for equal voting rights:

> [W]hatever the full panoply of individual rights that is necessary for any democratic process to be fair, equal voting rights for all adult citizens surely would be included. Equal voting rights are a prerequisite to democratic fairness not only for their instrumental value, which is most readily apparent when likeminded citizens pool their equal voting rights to prevail under majority rule; but also, equal voting rights are an essential ingredient to democratic fairness for the additional symbolic—but no less important—reason that they signify the equality of citizenship upon which democratic fairness depends.

Bradley A. Smith & Edward B. Foley, *Voter ID: What's at Stake?*, 156 U. PA. L. REV. PENNUMBRA 241, 249 (2007), *available at* http://www.pennumbra.com/debates/pdfs/voterid.pdf.

200 *See* Jeffrey A. Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1019 (1995) (citing voter apathy as an important factor in low voter turnout).

right when a law directly burdens voters, the Court will signal that a state may infringe on the right only pursuant to its obligation to regulate elections.[201] Society puts particular importance on those rights that are "implicit in the concept of ordered liberty."[202] By vacillating between levels of scrutiny in the voting rights context, the Court has sent a signal that the right to vote is not as important as other fundamental rights. Perhaps this is because the state has a special role in regulating elections or because some parties or candidates have more to gain by attempting to disenfranchise the other sides' supporters through election regulation.[203] Regardless, the way the Court analyzes the right to vote has particular significance on the way society values the right.[204] Why should the right to vote be less important than, say, the right to interstate travel, which receives consistent treatment as a fundamental right?[205] Declaring that the individual right to vote is always fundamental will go a long way toward elevating the importance of the right in the social fabric of our culture.

## IV. A NEW APPROACH TO ELECTION LAW DISPUTES

It is possible for the Court to provide consistency in its election law cases and still remain faithful to its precedents. The solution is twofold: first, the Court should redefine what it means to have a *fundamental* right to vote, recognizing that the right involved, when considered *fundamental*, is really an individual right. That is, the Court should employ the language of fundamental rights only when the law under review has the predominate effect of directly burdening individual voters. Second, for

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201 *See* Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 32 (2003) (stating that "[p]olitical and civil rights and liberties—free speech, privacy, voting, and so on—are properly regarded as fundamental rights because of their importance to personhood and for society").

202 *Palko*, 302 U.S. at 325.

203 *See* Samuel Issacharoff et al., LAW OF DEMOCRACY 64 (rev. 2d ed. Supp. 2005) (recognizing "the always present risk that election regulations enacted by self-interested legislatures can be a vehicle for incumbent or partisan protection"); *see also* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1248 (2005) (suggesting that local election administrators may apply rules that benefit their preferred candidate or hurt the candidates they oppose).

204 *See* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 513–14 (2003) (arguing that "substantive outcomes in our courts can also be seen as cultural forms, functioning in a relation of mutual influence with other cultural forms in American society" and that "our courts have themselves contributed to the process" of cultural change).

205 *See* Saenz v. Roe, 526 U.S. 489, 498 (1999); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974); Shapiro v. Thompson, 394 U.S. 618, 628, 629–30 (1969); *see also* Christopher S. Maynard, *Nine Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 330 (2000) (stating that "the Court has justified a heightened level of scrutiny by declaring the right to travel an implied fundamental right").

those laws that impact an individual fundamental right or impose a severe burden on voters (albeit indirectly), the Court should apply strict scrutiny, but it should recalibrate the strict scrutiny test for election law cases to recognize the unique stake that states have in regulating elections.

### *A. Redefining the "Fundamental" Right to Vote*

#### 1. Laws that Impact an Individual Right

The Court has first gone astray in failing to define precisely what aspect of the right to vote is involved in its election law cases. Indeed, while there is no reconciling principle in the cases, there *should* be. That is, the Court should make a normative judgment about what parts of the voting process belong to the individual as a fundamental right and what aspects are instead tangential to an individual's act of voting. In some ways, the Court's current approach demonstrates a desire to create a "one size fits all" rule via the severe burden test. But voting is an extremely complex act with many interrelated parts, not all of which are necessarily part of the fundamental right.

A good starting place in defining the right to vote is to discern what interests and stakeholders are involved in most election law disputes. Then, by making a value judgment about the importance of those rights *vis à vis* the other interests of the various stakeholders, we can determine which aspects of the right to vote are so important as to be deemed fundamental because they are intrinsic to the foundations of our democracy and to the goal of self-governance.[206]

State election laws generally regulate three kinds of actors: individual voters, political parties, and candidates. Similarly, election law cases typically pit at least one of these groups against the state. The basic premise of this section is that when the Court speaks of the *fundamental* right to vote, it should consider that right as it directly relates to individual voters.[207] Laws that directly burden individual voters' rights impli-

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206 *See* Van Detta, *supra* note 27, at 219 n.21.

207 Some scholars have posited that the Court's election law jurisprudence demonstrates that it really analyzes voting laws with a structural purpose and is mostly concerned with aggregate effects. *See, e.g.*, Elmendorf, *supra* note 35, at 322 (noting that the Court "seeks . . . to insure that the electoral system achieves or manifests certain properties in the aggregate (such as adequate openness to change, political accountability, and participation by a full cross-section of the citizenry)"); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 523 (2004); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 670–74 (1998); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001) ("The Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional

cate a fundamental right because these laws make distinctions about who can vote or how voters actually cast their ballots, and thus go to the foundations of political participation and democracy. At its core, voting is an individual act. We go to the polls and cast our ballot for a particular candidate, and we expect that our vote will count toward electing someone to office. Voting is perhaps the most important politically expressive activity that we undertake, because by voting, we indicate our desire to have a particular person in a position of power. Our democracy is founded upon the notion that every vote counts. For many people, voting is extremely personal. While we need others' votes to elect someone to office, generally speaking, every person casts a ballot as an individual, and a single vote can tilt the outcome of an election. Further, voting represents the most pure act of self-governance. By voting, each person makes a personal choice about who best can represent his or her interests in the government. Rights that are inherent in protecting individual autonomy and self-governance are properly construed as fundamental.[208] Thus, it makes sense to think of the *fundamental* right to vote as an individual right.

This understanding comports with the Court's approach to other fundamental rights. The right to marry is an individual right, not a collective right.[209] The same holds true for the right to procreate,[210] the

arrangements within which politics is conducted.") (citations omitted); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 44 (2004) (arguing that the purpose of judicial supervision is to "address structural problems and enforce structural values concerning the democratic order as a whole"). This viewpoint, however, creates the very problem I identify in this Article, namely, that the Court necessarily derogates the importance of an individual's right to vote through this approach. Professor Guy-Uriel Charles argues,

> [E]lection law cases cannot be divided into neat categories along the individual rights and structuralism divide. Election law cases raise both issues of individual and structural rights. Therefore, the label attached to election law claims is immaterial. The fundamental questions are what are the values that judicial review ought to vindicate and how best to vindicate those values. These are questions that transcend the rights-structure divide.

Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005). I take a similar view on the structuralism/individual rights debate. Without wading too deeply into that discussion, however, my argument is simply that when the Court defines the right to vote as a *fundamental* right, it should do so in an individual rights context. It follows that structuralism is still important for laws that directly touch other interests, such as those that regulate political parties or candidates. Regardless, by precisely identifying the meaning of the phrase "fundamental right to vote," the Court can untangle this confusion.

208 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); Palko v. Connecticut, 302 U.S. 319, 326 (1937); TRIBE, *supra* note 16, at 770; Winkler, *supra* note 11, at 236.

209 *Zablocki*, 434 U.S. at 383–85; *Loving*, 388 U.S. at 12.

210 *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

right to interstate travel,[211] and the right to sexual privacy.[212] When the Court speaks of these rights as fundamental, it construes the right with respect to an individual who seeks to assert that right in the face of a law that restricts that individual's actions. This is no different in the election law context.

In contrast to laws that directly burden individual voters, laws that regulate candidates or political parties are about electoral mechanics and the structure of elections. These types of laws impact individual voters only tangentially because they restrict someone other than the voter—such as a candidate or a political party. Further, the Constitution itself explicitly gives states the power to regulate the elections of senators and representatives with respect to the "times, places, and manner"—i.e., the mechanics of holding an election.[213] To be sure, voters' rights are intertwined with the rights of other groups subject to laws about the structure of an election, but these laws often do not directly burden voters.[214] It therefore makes little sense to refer to a voter's right in this context as an individual fundamental right. The upshot is that laws that directly impact voters deserve strict scrutiny review because they regulate a fundamental right, but the Court can continue to use the severe burden test for laws that regulate political parties or candidates.[215]

Voters' interests in election law disputes typically lie in their ability to participate in our democracy, express their individual preferences, make a political statement, or ensure that their votes are counted

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211 United States v. Guest, 383 U.S. 745, 759 (1966).

212 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).

213 U.S. CONST. art. I, § 4.

214 For example, a law that creates certain rules for political parties in the context of a state's primary election does not directly affect how an individual voter interacts with the electoral process, even if the law indirectly impacts voters through its regulation of political parties. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1187 (2008).

215 This approach is significantly different from how Professor Elmendorf describes the Court's current methodology. *See* Elmendorf, *supra* note 35, at 322, 336–37. Professor Elmendorf suggests that laws regulating "electoral mechanics" generally carry a strong presumption of constitutionality. *Id.* at 336. He notes, however, that an inspection of the formal features of the law, informed by simple "proxies for impact," can reverse this presumption and trigger strict scrutiny, with an eye toward preserving desirable structural features of election law. *Id.* at 336, 344. Therefore, under the Court's current methodology, a law purportedly regulating electoral mechanics—such as a ban on write-in voting—would likely enjoy relaxed scrutiny even if it directly impacts voters' experiences at the polls. Thus, according to Professor Elmendorf's explanation, the Court does not take into account the types of burdens that individual voters encounter, and it does not distinguish between the political actors (i.e., voter, candidate, or political party) that an election law primarily targets. I believe that this omission in the Court's current approach creates confusion over what it means to have a *fundamental* right to vote.

equally.[216] These concepts can be thought of as the "foundation" of the right to vote. As discussed above, laws that directly restrict or limit how voters interact with the political process regulate an individual fundamental right. There are three categories of laws that fall into this group: regulations that create a disparity regarding the value of one's vote, laws that define who is eligible to vote, and laws that burden how voters are treated at the polls.

A regulation that values one person's vote over another's patently affects individual rights because that law makes distinctions between particular voters. We all want our votes to count—and to count in the same way as every other vote. The "one person-one vote" principle helps to ensure the legitimacy of our democracy by reassuring voters that the election results are an accurate portrayal of the majority's will and that their leaders win elections to their offices fairly. Laws that draw distinctions between voters regarding the value of their votes thereby affect their individual rights and call into question the accuracy of the election results and the efficacy of self-governance.[217] The Supreme Court's "one person-one vote" cases—*Gray v. Sanders*,[218] *Reynolds v. Sims*,[219] *Moore v. Ogilvie*,[220] and even *Bush v. Gore*[221]—involved differential treatment of voters by state apportionment mechanisms.[222] If all other rights derive from the right to vote, then it makes sense that ensuring

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216 For example, the plaintiffs in *Crawford* sought to ensure that they could participate in the election even if they did not present a photo identification. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1614 (2008). The plaintiffs in *Reynolds v. Sims*, a one person-one vote case, were concerned with the dilution of the value of their votes. *See* Reynolds v. Sims, 377 U.S. 533, 540 (1964).

217 For example, many people questioned President Bush's legitimacy after the 2000 election because many voters believed that their votes were not counted. *See* Frank Emmert et al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 3–4 (2007).

> Legitimacy requires that governments conduct elections in a way that is objectively fair and widely perceived as fair. Therefore, a central motivation for non-partisan and uniform system of election administration is that every citizen, every voter, be treated equally and have an equal opportunity to participate. The United States frequently appears to fall short of these goals. The highest profile example of this failure is the Florida vote in the 2000 presidential election. Michigan Representative John Conyers stated, "[o]ur broken electoral system was an accomplice to a magic trick that would make David Copperfield proud: millions of Americans went to vote on November 7, 2000, only to have their voice in our democracy disappear."

*Id.* (alteration in original) (internal footnotes and quotation marks omitted).

218 Gray v. Sanders, 372 U.S. 368, 379 (1963).

219 Reynolds v. Sims, 377 U.S. 533, 554–56 (1964).

220 Moore v. Ogilvie, 394 U.S. 814, 815–16, 819 (1969).

221 Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam).

222 *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2489 (2003).

equality in the value of one's vote must be paramount.[223] It follows that equal representation is one aspect of the individual fundamental right to vote, especially because it affects voters directly with respect to their interaction with the political process and ensures the legitimacy of their elected leaders.[224]

This theory demonstrates why the Court should have been explicit and used strict scrutiny in *Bush v. Gore*.[225] The majority stated that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."[226] The Court then purported to determine whether the Florida recount procedure was "consistent with [the] obligation to avoid arbitrary and disparate treatment of the members of its electorate."[227] Perhaps one of the most interesting aspects of *Bush v. Gore* was that at least seven Justices agreed that Florida's recount scheme violated the fundamental right to vote under the Equal Protection Clause.[228] But the case is frustrating for scholars trying to discern a governing principle, because the Court con-

223 *See* Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

224 *See, e.g.*, Hill v. Stone, 421 U.S. 289, 292–93, 300 (1975) (striking down an election procedure for bond initiatives whereby an initiative would pass only if approved by both a majority of all persons owning taxable property rendered for taxation (renderers) and by a majority of the entire electorate). The law therefore distinguished between renderers and non-renderers when counting votes. *Id.* at 292–93. In holding that the state failed to demonstrate a compelling state interest sustaining this classification, the Court properly treated the right involved as an individual fundamental right. *Id.* at 300.

225 *Bush*, 531 U.S. 98 (per curiam).

226 *Id.* at 104.

227 *Id.* at 105.

228 *See id.* at 111 ("Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. The only disagreement is as to the remedy." (citations omitted)); *see also id.* at 126 (Stevens, J., dissenting) ("Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns."); *id.* at 134 (Souter, J., dissenting) ("I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary."). *Cf. id.* at 143 (Ginsburg, J., dissenting) ("I agree with Justice Stevens that petitioners have not presented a substantial equal protection claim."). Justice Breyer seemed to agree with the majority that the recount procedure may have lacked fundamental fairness in its treatment of voters' intent:

> [S]ince the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem.

*Id.* at 145–46 (Breyer, J., dissenting). Thus, most of the Justices agreed that the recount procedure *might* have infringed on the fundamental right to vote, and at least seven of the Justices

spicuously omitted any references to strict scrutiny review.[229] The Court would have been on firmer ground—at least in its recognition of a constitutional violation—had it not only called the right at issue fundamental but also employed a fundamental rights approach. In short, the Court's cases and methodology demonstrate that the fundamental right to vote, which is an individual right, should include the right to have one's vote counted equally and in the same manner as every other vote so as to promote "equal dignity" for each voter.[230] The Court should consistently use strict scrutiny review for these cases.

Another fundamental rights subset involves laws that determine who may cast a ballot. Much like the issues in the one person-one vote cases, laws regulating who may vote directly burden individual rights. These laws make explicit distinctions regarding the eligibility of certain people to cast a ballot. For example, in *Evans v. Cornman*, the Court struck down a Maryland law that restricted those living at the federal National Institutes of Health from voting.[231] The law implicated a fundamental right because it burdened voters directly, explicitly denying the right to vote to a certain class of people.[232] The same was true in *Kramer v. Union Free School District No. 15*, where the Court struck down a New York law that limited the right to vote in school district elections solely to property owners and parents, thereby granting the franchise to certain individuals but not others.[233]

This discussion demonstrates that the Court's approach in both *Lassiter* and *Rosario* was flawed. In *Lassiter v. Northampton County Board of Elections*, the Court upheld a literacy requirement to vote, noting that the law did not discriminate on the basis of race, creed, color, or sex.[234] What the law did do, however, was grant the right to vote to some citizens but not to others.[235] Therefore, the Court should have analyzed the law under strict scrutiny review because the law burdened an individual's right to vote. Similarly, in *Rosario v. Rockefeller*, the Court upheld a New York law that made a distinction regarding who could vote in a primary based on when that person had registered with the political

explicitly seemed to agree with the majority's decision on this issue. The real debate regarded the proper remedy.

229 *See* Elmendorf, *supra* note 35, at 331 n.66; Hasen, *supra* note 32, at 389; *see also supra* note 123 and accompanying text.

230 *Bush*, 531 U.S. at 104.

231 Evans v. Cornman, 398 U.S. 419, 420, 422 (1970).

232 *Id.* at 422.

233 Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

234 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51, 53 (1959). Congress's passage of the Voting Rights Act of 1965 and the Court's decision in *Katzenbach v. Morgan* effectively overruled *Lassiter*. *See* Katzenbach v. Morgan, 384 U.S. 641, 649 (1966); *supra* note 46.

235 *See Lassiter*, 360 U.S. at 52.

party.[236] The language the Court used demonstrated that it was not concerned with any fundamental right of individual voters.[237] Instead, the Court focused on the ability of the state to regulate elections.[238] But it is difficult to distinguish between the rights at stake in *Evans* and *Kramer* and the right at stake in *Rosario*: all three cases made distinctions between voters and gave the franchise only to voters who met the state's criteria.[239] The outcome in *Rosario* may have been correct—that is, the law may have been constitutional even under strict scrutiny review.[240] However, the approach was incorrect because the Court failed to recognize that the law directly impacted individual voters and therefore was really about the fundamental right to vote.

This analysis highlights where the Court went astray in its recent voter identification decision.[241] Indiana's photo identification law directly targets voters, not candidates or political parties. Voters must show photo identification to vote, and legitimate voters are effectively denied the franchise if they do not comply with the law.[242] This is a direct restriction on the eligibility of certain individuals. Further, the lead opinion explicitly recognized that Indiana's voter identification requirement directly burdens a quantifiable segment of individual voters.[243] In particular, the requirement to show identification to vote burdens elderly people born out-of-state and those with economic limitations.[244] The problem with the Court's analysis is that it looked at the relative magnitude of the burden on different classes of people, instead of determining which actors in the political spectrum the photo identification law directly affects. Because the law directly burdens individual

236 Rosario v. Rockefeller, 410 U.S. 752, 762 (1973).

237 For example, instead of carefully scrutinizing the burdens that the "lengthy" time between the enrollment deadline and the next primary election imposed on voters, the Court focused primarily on the state's goals that the law achieved. *See id.* at 760.

238 *Rosario*, 410 U.S. at 761 ("[P]reservation of the integrity of the electoral process is a legitimate and valid state goal.").

239 *Id.* at 762; Evans v. Cornman, 398 U.S. 419, 420, 422 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

240 *See infra* notes 318–26 and accompanying text.

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

242 *See id.* at 1627 (Souter, J., dissenting).

243 *Id.* at 1621 (plurality opinion) ("Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons."); *cf.* Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Ballots*, J.L. & POL. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287735 (estimating that Indiana did not count approximately 400 provisional ballots in its 2008 presidential primary because the voters failed to present a photo identification).

244 *Crawford*, 128 S. Ct. at 1621 (plurality opinion).

voters, the Court should have used strict scrutiny review to protect the fundamental right to vote.[245]

The third category of election laws that involve the fundamental right to vote are those that speak to a voter's experience at the polls or restrict how a voter expresses his or her preferences. These cases involve a fundamental right because they directly impact how a voter actually participates in our democracy. *Burson v. Freeman* falls into this category.[246] *Burson*, a case about an advertising ban around a polling site, involved an individual's fundamental right to vote with respect to his or her experience at the polls, as the law ensured that voters would not be inundated with political advertisements while waiting to exercise the franchise.[247] The case concerned the actual, direct burdens a voter might face while going to cast a ballot.[248] Similarly, the Court should have used a fundamental rights approach in *Burdick v. Takushi*, where the Court upheld a ban on write-in voting.[249] This case was not a ballot access case, because the law in question did not regulate who could appear on the ballot.[250] Instead, the case was about how a voter could express his or her preferences.[251] If a voter did not opt for any of the choices on the ballot, the write-in ban constrained the voter not to vote at all instead of allowing the voter to express an alternative political choice. Because a restriction on how a voter casts a ballot impacts that individual voter, the Court should have construed the law as infringing upon an individual fundamental right to participate in our democracy, which would require strict scrutiny review.

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245 Of course, a state might be able to demonstrate that its voter identification law is narrowly tailored to achieve the compelling state interest of combating fraud. It is doubtful, however, that Indiana's law would have passed muster, given that it is the "most restrictive" voter identification law in the country. *See id.* at 1644–45 (Breyer, J., dissenting).

246 Burson v. Freeman, 504 U.S. 191, 200–01, 211 (1992).

247 *Id.* at 195.

248 *Id.* at 205–06.

249 Burdick v. Takushi, 504 U.S. 428, 434–35, 441 (1992).

250 Professor Tokaji disagrees, arguing that *Burdick* was akin to a ballot access case because it limited voters' choices as opposed to preventing voters from voting or having their votes counted. *See* Daniel P. Tokaji, *Judicial Review of Election Administration*, 156 U. PA. L. REV. PENNUMBRA 379, 383 (2008), *available at* http://www.pennumbra.com/responses/02-2008/Tokaji.pdf. But this explanation fails to take into account which political actor suffers the most direct burden under a law. *Burdick* directly restricted what voters could do, not what candidates or political parties could do. In contrast to the ballot access cases, the law *directly* limited voters' choices, because they could not even express "no preference" without abstaining from voting altogether. Therefore *Burdick* entailed the same type of burden as laws that limit who may exercise the franchise.

251 *See Burdick*, 504 U.S. at 434–35.

2. Laws that Only Tangentially Impact Individual Voters' Rights

The Court has used the severe burden test for virtually all election law cases, but that test is appropriate, if at all, only for cases involving laws that indirectly impact voters' rights. Indeed, the cases that created the severe burden test—*Anderson v. Celebrezze*[252] and *Norman v. Reed*[253]—involved ballot access laws, which only burdened voters indirectly by limiting the choice of candidates. But the Court has used the severe burden test for all types of election laws—even those that directly impact voters such as the write-in ban in *Burdick* or the voter identification law in *Crawford*.[254] The Court should stay true to the original purposes of the severe burden test by limiting it to those laws that directly burden political parties or candidates. This approach still will protect voters, because if a law imposes a severe burden on voters, the Court will be required to review it under strict scrutiny. But it also allows states to regulate elections and ensure fairness. In short, the Court should separate laws that directly burden voters from laws that indirectly impact voters, and should always use strict scrutiny for the former and the severe burden test for the latter.

Ballot access cases, which restrict candidates' rights, provide a cogent example of when the state should have a greater ability to promulgate election laws, particularly because these laws regulate voters only indirectly. Thus, the Court was incorrect in *Bullock v. Carter* (a ballot access case) when it stated that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[255] Laws that restrict who may be a candidate only indirectly impact voters' rights, because the law is directed at candidates, not individual voters. Voters still can express their political preferences even if a particular candidate is not on the ballot, assuming that there is no write-in ban (which would have to survive strict scrutiny review because that type of law directly burdens individual voters). Candidates have no fundamental right to be on the ballot—participation in our democracy stems from every citizen having the ability to cast a vote, not run for office.[256] It follows that laws that make distinctions regarding who can be a candidate do not touch upon a fundamental right because they only impact

252 Anderson v. Celebrezze, 460 U.S. 780 (1983).

253 Norman v. Reed, 502 U.S. 279 (1992).

254 *Burdick*, 504 U.S. at 434–35; *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624–25 (2008) (Scalia, J., concurring in the judgment).

255 Bullock v. Carter, 405 U.S. 134, 143 (1972).

256 *See* Clements v. Fashing, 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).

voters peripherally. Therefore, the Court should consistently use the severe burden test for all ballot access cases and employ strict scrutiny review to these laws only if the law in question imposes a severe burden on voters.

The Court should also use the severe burden test for cases that regulate political parties' primary systems. For example, in *Clingman v. Beaver*, the Court upheld Oklahoma's "semiclosed" primary system and omitted any reference to a fundamental right, instead stating that "not every electoral law that burdens associational rights is subject to strict scrutiny."[257] As noted above, an election law that directly burdens individual voters impacts the (individual) fundamental right to vote and deserves strict scrutiny review. The Oklahoma law, by contrast, merely regulated political parties and thus only indirectly impacted voters. That is, the severe burden test was appropriate in this setting because the law did not directly impact an individual fundamental right to vote but instead concerned how a political party could choose its candidates.[258] The key question should be who the law actually restricts—if the law is directed at individuals, it implicates voters' rights directly and the Court should always use strict scrutiny. If the law restricts a different stakeholder, such as a candidate or political party, then the Court should invoke the severe burden test because no individual fundamental rights are involved. Making a principled distinction between cases involving the fundamental right of individual voters and the non-fundamental right of candidates or political parties will go a long way toward eradicating the confusion in this area.

The final inquiry under this analysis is, how should we distinguish between laws that regulate individuals and laws that regulate another stakeholder such as candidates or political parties? If the fundamental right to vote is dependent on directly burdening voters, then there must be a principle to separate laws that might fall into either category. This should be a fairly simple inquiry. A court merely should discern what group the law impacts most directly: does the law directly restrict voters in a particular way, or does the law instead affect voters based upon how it regulates another actor in the political spectrum? *Burdick* provides a good example of this proposition.[259] Although the law was perhaps analogous to a ballot access case in that it limited the choices available,[260] the law directly limited what voters could do to express their political preferences. The law altered the behavior of voters themselves, not po-

257 Clingman v. Beaver, 544 U.S. 581, 592 (2005).

258 *Id.*; *see also* Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008) (allowing candidates to self-identify with a party on the primary ballot without that party's approval).

259 Burdick v. Takushi, 504 U.S. 428, 434–35 (1992).

260 *See* Tokaji, *supra* note 250, at 383.

litical parties or candidates, and therefore involved an individual fundamental right. In contrast, a law that limits who can appear on the ballot directly restricts the candidate, even if the supporters of that candidate indirectly suffer a burden in not being allowed to vote for that person. If a court remembers this foundational principle, it can discern whether the law directly regulates an individual right to vote or indirectly impacts voters, thereby dictating which test to use.

Perhaps this scheme will encourage states to enact more regulations that indirectly burden voters, knowing that they can enjoy a less stringent level of scrutiny than if the law places direct restrictions on individuals. That would be a positive unintended consequence. Laws that should cause concern are those that directly stop individuals from casting a ballot; a state is unlikely to be able to achieve the same level of regulation of individuals through a law that only indirectly touches voters.[261] Further, the severe burden test militates against laws that burden voters too much, even if that burden is indirect, because it requires a court to employ strict scrutiny if the law imposes a severe burden on voters' rights.

### *B. Rethinking Strict Scrutiny for "Fundamental Rights" Election Law Cases*

A reformation of the Court's election law jurisprudence is not complete merely by redefining what it means to have a fundamental right to vote. The Court should also reform its approach to strict scrutiny review for election law cases where strict scrutiny applies (i.e., for fundamental rights laws that directly burden voters or for laws that indirectly impact voters but impose a severe burden). That is, because voting is such an important aspect of our democracy, and because states have a unique interest in regulating elections, the Court should carefully define the strict scrutiny test in the election law context.

"Strict scrutiny is not 'strict in theory but fatal in fact.'"[262] This is nowhere more true than for voting rights.[263] If the Court had always reviewed election law challenges under strict scrutiny but provided states with "a limited degree of leeway"[264] to regulate elections in a manner that is appropriate to election law claims, many of its decisions would have come out the same way. This is because preventing election fraud is a compelling governmental interest, and many election regulations are

261 For example, it is difficult to think of how a state could require a voter to show identification at the polls by enacting a law that actually regulates candidates or political parties.

262 Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted).

263 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 863 (2006) (concluding through a statistical analysis that laws regulating a fundamental right are still upheld about a quarter of the time under strict scrutiny review).

264 *See* Bush v. Vera, 517 U.S. 952, 977 (1996) (O'Connor, J., plurality opinion).

narrowly tailored to meet that goal. A renewed focus on the narrowly tailored prong will provide a way for states to continue regulating elections because it suggests a guide to the types of laws that are constitutionally permissible.

The Supreme Court has declared that "not every electoral law that burdens associational rights is subject to strict scrutiny."[265] However, the Court made that statement in the context of its concern that always using strict scrutiny will result in the Court striking down every election law and handcuffing states' ability to regulate an election.[266] But always treating the right to vote as fundamental when a law directly impacts individual voters' rights will not necessarily mean that a state can never justify its election regulation under strict scrutiny review. This is particularly true given that a law can be narrowly tailored and still adversely impact a small number of voters so long as there is not a better way to regulate the election in a manner that infringes fewer voters' rights.[267] Therefore, "the States [still will] have the power to impose voter qualifications, and to regulate access to the franchise in other ways."[268] Indeed, states enact many of their election laws to combat voter fraud or to run a fair election, which are compelling state interests.[269] So long as the state's law is narrowly tailored to effectuate one of those goals—that is, so long as there is not a demonstrably "better" way to achieve the same goals given that states still should have some leeway in regulating an election—the Court need not strike down the law under this understanding of strict scrutiny review. This Part demonstrates that principle.

Before diving into the analysis, however, one final point is warranted: one might question why the Court's approach even matters if its ultimate decisions in many, if not most, of its cases are correct. The answer should be obvious: if the Court is inconsistent, then litigants and lower courts will have no principle to guide them in future cases. A simpler and clearer approach will streamline election law litigation. Further, as discussed above, the Court's current fractured methodology sends troubling signals about the importance of the right to vote.[270] Thus, there is both a practical reason and a normative goal in seeking consistency: redefining the meaning of the right to vote and the level of

265 Clingman v. Beaver, 544 U.S. 581, 592 (2005).

266 *Id.* at 593 ("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.").

267 *See infra* Part IV.B.1.b.

268 Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

269 *See* Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (per curiam); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989).

270 *See supra* notes 197–99 and accompanying text.

scrutiny it enjoys will provide clarity to lower courts and will enlighten future jurisprudence about this key principle in our democracy.

1. Compelling Interest and Narrow Tailoring: A Context-specific Approach

The Supreme Court first used the precise term "strict scrutiny" to describe a particular test in 1942 in *Skinner v. Oklahoma*.[271] Professor Adam Winkler summarized the two-prong test for strict scrutiny as follows:

> Courts first determine if the underlying governmental ends, or objectives, are "compelling." According to [Professor] Linde, "the Court uses compelling in the vernacular to describe [the] societal importance" of the government's reasons for enacting the challenged law. Because the government is impinging upon someone's core constitutional rights, only the most pressing circumstances can justify the government action. If the governmental ends are compelling, the courts then ask if the law is a narrowly tailored means of furthering those governmental interests. Narrow tailoring requires that the law capture within its reach no more activity (or less) than is necessary to advance those compelling ends. An alternative phrasing is that the law must be the "least restrictive alternative" available to pursue those ends. This inquiry into "fit" between the ends and the means enables courts to test the sincerity of the government's claimed objective.[272]

Thus, the question in an election law case is first, whether the state has demonstrated a compelling interest for enacting the election regulation, and second, whether the regulation is narrowly tailored to effectuate that goal.

a. Compelling interest

The Court has stated that preventing voter fraud is a compelling governmental interest.[273] "A State indisputably has a compelling interest in preserving the integrity of its election process."[274] Indeed, the Court has noted that "[c]onfidence in the integrity of our electoral processes is

271 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Winkler, *supra* note 263, at 799.

272 Winkler, *supra* note 263, at 800–01.

273 *See* Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (per curiam).

274 *Eu*, 489 U.S. at 231.

essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."[275] Therefore, all a state needs to do for this prong in a challenge to an election regulation is to show that the state enacted the law pursuant to the goal of "preserving the integrity of its election process."[276] Elections are the most important aspect of a democratic society; the Constitution gives states the right to dictate the "times, places, and manner"[277] of holding an election probably because states are in the best position to ensure fairness at the local level.

The Court's election law cases demonstrate that states can usually meet this burden. *Dunn v. Blumstein*[278] is particularly apt for this point. There, Tennessee had enacted a durational residence requirement for voting, meaning that newly arrived citizens did not have the right to the franchise.[279] As noted above, this law impacted an (individual) fundamental right to vote because it directly distinguished between which voters were eligible to exercise the franchise and which voters were not.[280] The state asserted that this law helped to achieve the compelling governmental interest of protecting against voter fraud.[281] In striking down the law, the Court did not dispute that preventing fraud is a compelling state interest.[282] Instead, the Court invalidated the regulation because it did not actually serve that purpose.[283] "Preventing fraud, the asserted evil that justifies state lawmaking, means keeping nonresidents from voting. But, by definition, a durational residence law bars *newly arrived* residents from the franchise along with nonresidents."[284] Thus, although the state had asserted a compelling governmental interest, the law was not tailored narrowly enough to meet that goal.

The Court's holding in *Illinois State Board of Elections v. Socialist Workers Party* similarly showed that the state had demonstrated a compelling governmental interest under strict scrutiny.[285] The Court noted that a state has a compelling interest in regulating the number of candidates on the ballot to ensure that voters can make rational choices be-

275 *Purcell*, 549 U.S. at 7.

276 *Eu*, 489 U.S. at 231.

277 U.S. CONST. art. I, § 4.

278 Dunn v. Blumstein, 405 U.S. 330 (1972).

279 *Id.* at 334.

280 *See supra* note 45 and accompanying text.

281 *Dunn*, 405 U.S. at 345.

282 *Id.*

283 *Id.*

284 *Id.*

285 Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184–87 (1979).

tween serious candidates.[286] However, the Court struck down the regulation limiting ballot access because "[t]he signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives."[287] Similarly, the Court has ruled that a state has a compelling interest in deterring frivolous candidacies to assure that "the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections."[288] Yet the Court struck down Texas's requirement that candidates pay a filing fee to appear on the ballot because the state could not show even a "rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy."[289] Once again, therefore, it was the narrowly tailored prong that doomed the election law in question, even though the state had asserted a compelling interest for its law.[290]

A state will lose an election law case on this prong only if the state fails to show that its regulation is pursuant to combating voter fraud, limiting the number of frivolous candidacies, effectively selecting a winner, or some other compelling interest.[291] This should be so; states have no interest in burdening voters if it is not for a sufficiently important reason. Thus, in *Williams v. Rhodes*, the Court struck down an Ohio scheme that posed significant burdens on minor political parties from appearing on the ballot because the state did not have a compelling interest in favoring the Republican and Democratic parties over minor parties.[292] As another example, in *Hill v. Stone*, the Court struck down an election procedure for bond initiatives whereby, to pass, the initiative required a vote of "yes" from both a majority of all persons owning taxable property rendered for taxation and a majority of the entire electorate.[293] The Court held that the state did not have a compelling interest in promoting the voluntary rendering of property for taxation.[294] These cases make clear that when analyzing whether the state has met the first

286 *Id.* at 185–86.

287 *Id.* at 186.

288 Bullock v. Carter, 405 U.S. 134, 145 (1972).

289 *Id.* at 146.

290 Of course, given that many of the cases in this discussion involved ballot access laws, under the formulation of what is a fundamental right to vote as discussed in the previous section, the state would need to meet strict scrutiny only if the laws imposed a severe burden on voters, as the laws did not directly burden individual voters. *See supra* notes 252–56 and accompanying text.

291 *See, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (per curiam); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989); *Ill. State Bd.*, 440 U.S. at 185–86; *Bullock*, 405 U.S. at 145.

292 Williams v. Rhodes, 393 U.S. 23, 32 (1968).

293 Hill v. Stone, 421 U.S. 289, 291–92 (1975).

294 *Id.* at 300–01.

prong of the strict scrutiny test, the Court will hold that states may validly enact laws that are pursuant to combating voter fraud or regulating an election but may not burden voters for some other reason that is not pursuant to a compelling governmental interest. The preceding discussion also highlights that the narrowly tailored prong provides the key to most election law disputes under strict scrutiny.

b. Narrow tailoring

The Court has not provided a detailed discussion of what the narrowly tailored prong entails for an election law dispute. This is despite the fact that, as mentioned above, the narrowly tailored prong usually provides the "meat" of the controversy. Therefore, any discussion of whether the Court needed to create a second line of non-fundamental rights cases for election law must include an understanding of how the Court should analyze this prong.

In *Bush v. Vera*, a plurality of the Court recognized that states have some discretion to create electoral districts even under the narrowly tailored prong of strict scrutiny.[295] The Court "reaffirm[ed] that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering" its compelling interests of ensuring fair electoral districts and complying with Section Two of the Voting Rights Act.[296] The Court recognized that "[i]f the State has a 'strong basis in evidence' . . . for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race 'substantially addresses the § 2 violation,' . . . it satisfies strict scrutiny."[297] There is no reason why the Court cannot include this same mode of narrow tailoring analysis for all election law cases.

This approach to narrow tailoring makes sense given the context of an election law dispute where, even though the individual right to vote is a fundamental right, the state has a constitutional requirement to regulate the "times, places, and manner" of holding an election.[298] The Court has recognized that narrow tailoring can signify different things in different settings, meaning that the right involved is still fundamental, but that the requirements for narrow tailoring depend on the specifics of that right.[299]

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295 Bush v. Vera, 517 U.S. 952, 977 (1996) (O'Connor, J., plurality opinion).

296 *Id.* Interestingly, Justice O'Connor had originally rejected what she termed "watered-down strict scrutiny" before recognizing in *Bush v. Vera* the multifaceted contours of the narrowly tailored prong for certain types of cases. *See* Paul H. Dickerson, *The Future of Racial Redistricting in Voting*: Clark v. Calhoun County, Mississippi, 16 IN PUB. INTEREST 129, 154–56 (1997/1998).

297 *Bush v. Vera*, 517 U.S. at 977 (O'Connor, J., plurality opinion) (internal citations omitted).

298 *See* U.S. CONST. art. I, § 4.

299 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 340–41 (2003).

Just as narrow tailoring meant one thing for drawing electoral districts to achieve racial equality, in the university admissions and affirmative action context, the Court has stated,

> Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups . . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.[300]

There is no reason to limit a context-specific approach to narrow tailoring only to issues involving race or to instances where a state is attempting to comply with a statute. Instead, the Court can create a specific rule for what it means to narrowly tailor an election regulation. As Professor Peter Rubin argues, an approach to strict scrutiny should "explore[ ] dimensions along which appropriately 'strict' scrutiny of governmental actions should rationally be calibrated to address in each different context the particular concerns that warrant close examination in the first place."[301] In this regard, Professor Rubin recognized that the narrowly tailored prong serves at least three purposes:

> First, it ensures that the stated purpose was indeed the actual purpose behind the classification. A narrow tailoring inquiry can help to "smoke out" illegitimate purposes by demonstrating that the classification does not, in fact, serve the stated, legitimate purpose. Second, it checks stereotyped thinking. When a classification is based not on a factual distinction between one and another group, but on a stereotype, that classification will fail the narrow tailoring inquiry. Finally, even when the classification does correlate with some genuine distinction between the two groups, the narrow tailoring inquiry assures that the classification only will be used when there is some degree of necessity for its use if the governmental purpose is to be achieved. This aspect of the narrow tailoring inquiry is not really about "fit," but about comparing the marginal benefits and costs of the

300 *Id.* at 339 (internal citations omitted).

301 Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 10 (2000).

> use of a particular classification with those of some alternative if there is one.[302]

In construing the precise contours of the narrowly tailored prong for election law cases, the Court can borrow from the language in *Bush v. Vera*, which already applied a "limited degree of leeway" or "strong basis in evidence" approach for drawing electoral maps because of the unique nature of that issue.[303] *Bush v. Vera* dealt with a state's attempt to comply with a statute; cases about regulations that affect the fundamental right to vote involve a state's mandate to comply with the Constitution.[304] Professor Elmendorf identifies a slightly different approach in his description of *Dunn v. Blumstein*, arguing that under what he terms "best-practices strict scrutiny of individual-rights infringements," the Court "asks whether the challenged law approximates the 'best' or least burdensome version of its type that has proven workable in other jurisdictions. Only if it does is the law sustained."[305] Similarly, as the Court suggested in *Kusper v. Pontikes*, courts should look to the practices of other jurisdictions to determine if the state's scheme is the least restrictive means of achieving its goals.[306] Along those lines, although the state has the burden of showing that its law is narrowly tailored, voters often attempt to demonstrate that the state cannot meet this burden by presenting a viable alternative.[307] If the state persuades the Court that

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302 *Id.* at 14 (citations omitted). Professor Crump suggests another method of construing the narrowly tailored prong for all cases, which borrows from the Court's approach in the speech context. *See* David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in* Gratz *and* Grutter *of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 522 (2004). Professor Crump argues that the Court should adopt the formulation of narrow tailoring from *Broadrick v. Oklahoma*, 413 U.S. 601, 602 (1973), where the Court stated that, to be unconstitutional, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* (citing *Broadrick*, 413 U.S. at 615). Under this approach,

> [T]he imposition of a significant harmful impact upon protected speech to achieve the prohibition of a minor range of disfavored conduct is unconstitutional. It is unconstitutional for the same reason that using a Howitzer to kill a fly is excessive. On the other hand, if the impact of a statute falls largely upon conduct that the State is permitted to prohibit, and if the discouragement of protected speech is incidental (or, in the terms used by the Court, if it is not "substantial"), the statute is constitutional.

Crump, *supra*, at 522–23.

303 *Bush v. Vera*, 517 U.S. at 977 (O'Connor, J., plurality opinion).

304 *See id.*

305 Elmendorf, *supra* note 35, at 344. As Professor Elmendorf points out, *Kusper v. Pontikes*, 414 U.S. 51 (1973), exemplifies this approach, as the Court struck down the Illinois law in part because a similar and less restrictive New York law achieved the exact same purpose. Elmendorf, *supra*, at 353–54. R

306 *See Kusper*, 414 U.S. at 59.

307 *See* William H. Jordan, *Protecting Speech v. Protecting Children: An Examination of the Judicial Refusal to Allow Legislative Action in the Realm of Minors and Internet Pornography*, 57 S.C. L. REV. 489, 499 (2006) ("To satisfy the least restrictive means element of the

any less restrictive alternatives the voters propose would not be as effective as the challenged regulation, then the state may have satisfied its burden (assuming that the Court does not, on its own, perceive another less restrictive alternative).[308]

Justice Breyer highlighted this approach in the Supreme Court's recent voter identification case.[309] One reason Justice Breyer dissented in *Crawford* was that Indiana's photo identification law was the most restrictive law of its type in the country.[310] Justice Breyer compared the Indiana law to the laws in Florida and Georgia, and determined that those states had found a way to require the presentation of identification that was less burdensome than Indiana's law.[311] Florida and Georgia provide more alternatives for voters, such as a broader range of the types of identification a voter may show (Florida) or a larger number of documents that a voter can present to obtain suitable identification (Georgia).[312] Florida allows a voter without identification to cast a provisional ballot, and the state will count the vote if the signature on the provisional ballot matches the one on the voter's registration form.[313] Georgia allows any voter to vote absentee without having to show identification.[314] In contrast, the Indiana law allows fewer types of permissible identification, requires a person casting a provisional ballot to travel to the county clerk or county election board to show identification or sign an affidavit, and restricts who may vote by absentee ballot.[315] Justice Breyer found that Florida and Georgia have achieved the same goals as Indiana of preventing election fraud while using a less restrictive means.[316] Under a fundamental-rights-plus-strict-scrutiny analysis, Indiana's law would not be narrowly tailored because the voters could show alternative workable methods of achieving the same goals, as other states had successfully adopted these methods.

These two concepts—that states have limited leeway to regulate elections under a context-specific approach to narrow tailoring and that states often rebut a challenge under this prong by establishing that the voters' suggested alternatives would be less effective than the current

narrowly tailored standard, the government must prove that any less restrictive alternatives proposed by the plaintiff would not be as effective as the challenged statute." (quotation marks and citations omitted)).

308 *Id.* at 499.

309 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1644–45 (2008) (Breyer, J., dissenting).

310 *See id.*; *see also id.* at 1635 n. 26 (Souter, J., dissenting).

311 *Id.* at 1644–45 (Breyer, J., dissenting).

312 *Id.* at 1644.

313 *Id.*

314 *Id.* at 1644–45.

315 *Id.* at 1645.

316 *See id.*

scheme—demonstrate that the narrowly tailored prong need not be unduly restrictive of a state's ability to regulate an election. Additionally, this approach preserves the individual aspect of the right to vote as a fundamental right.

Combining the relevant aspects of the proposed tests, the narrow tailoring prong of strict scrutiny for election law cases should involve a two-part inquiry: first, does the law fall within the state's limited leeway to regulate elections? In other words, does the state have a strong basis in evidence that the law is the best regulation to effectuate the state's goals? This prong includes an examination of the "fit" between the state's goals and the methods it has employed. Second, are there any alternatives that would be more effective in regulating the election without burdening voters' rights (i.e., is there a proper weighing of the benefits versus the burdens of the law)? In this way, "narrowly tailored" can have specific meaning for election law cases. This two-part test appropriately balances the interests of the state with the fundamental nature of the right to vote. It ensures that states burden that right significantly only if there is a good enough reason. This approach would have been better than creating conflicting lines of cases where the right to vote is sometimes fundamental, sometimes not, because it maintains the importance of the right involved, provides consistency, and still allows states to regulate elections.

### 2. Analyzing the Court's Cases Using this New Understanding of Strict Scrutiny for Election Law Disputes

With these principles in mind, it follows that the Court did not need to create a new line of cases and derogate the individual right to vote as less than fundamental to reach its holding in many of its cases. In several decisions where the Court upheld election laws using a lower standard than strict scrutiny, the decisions would have likely been the same under a consistent fundamental rights approach that calibrates the narrowly tailored prong to the specific context of an election law dispute, requiring the state to show a "strong basis in evidence" that its law is the best and least restrictive means of complying with the Constitution.[317] Of course, just based on the language of the Court's decisions, whether the state had a strong basis in evidence that its law was the best way to achieve a compelling interest pursuant to its constitutional mandate is

317 Bush v. Vera, 517 U.S. 952, 977 (1996) (O'Connor, J., plurality opinion) (citation omitted); *see also* Nelson Ebaugh, Note, *Refining the Racial Gerrymandering Claim:* Bush v. Vera, 33 TULSA L.J. 613, 638 (1997) ("The standards for satisfying the narrow tailoring requirement are high but they are not impossible to achieve. The plurality is not looking for perfection in narrow tailoring; they are simply looking for a good faith effort and something close to this will likely satisfy strict scrutiny.").

mere speculation. Nevertheless, it is at least plausible that the state could have made this showing in many of these cases.

*Rosario v. Rockefeller* provides a cogent example of this principle.[318] In *Rosario*, the Court used a lower level of scrutiny to uphold a New York law regulating which voters could participate in a primary election.[319] This law directly burdened individual voters and therefore involved a fundamental right. As noted above, deterring fraudulent elections is always a compelling state interest.[320] Further, the Court stated that the statute in question—which required voters to register with a party within thirty days of the previous general election—assisted the state in achieving this goal by helping to ensure that voters were not participating with malicious intent.[321] A pre-registration deadline of thirty days before the previous general election—which had the effect requiring registration eight months prior to a presidential primary (in June) or eleven months prior to a nonpresidential primary (in September)—hardly seems to sweep too broadly based on a narrowly tailored prong that gives states "limited leeway" to regulate elections.[322] Allowing voters to switch parties right before a primary could attract voters from an opposing party to try to skew the results of another party's primary;[323] this apparently occurred in open primary states during the 2008 election.[324] For purposes of the New York law in *Rosario*, a waiting period of this length seemed to be a good "fit" to deter voters from switching parties solely to taint the results of the primary. While a pre-registration deadline of a longer time might not meet this test,[325] presumably New York could show a strong basis in evidence that thirty days before the previous general election achieved the state's goals while infringing the rights of the fewest voters. Further, there is no indication that the voters could have come up with a less drastic alternative given New York's legitimate concern about party-raiding.[326] Thus, under an

318 *See* Rosario v. Rockefeller, 410 U.S. 752, 762 (1973).

319 *See id.*

320 *See id.* at 761; *see, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (per curiam); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989); *see also supra* Part IV.B.1.a.

321 *Rosario*, 410 U.S. at 761 (noting that the statute helped the state to achieve its goal of preserving the integrity of the electoral process by deterring party raiding in a primary election).

322 *See id.* at 754, 760; *see also Bush v. Vera*, 517 U.S. at 977 (O'Connor, J., plurality opinion).

323 *See Rosario*, 410 U.S. at 761.

324 *See, e.g.*, Clay Robinson, Commentary, *Democratic Primary Also a GOP One*, HOUSTON CHRON., Feb. 24, 2008, at B1, *available at* http://www.chron.com/disp/story.mpl/hotstories/5566595.html.

325 *See* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (striking down a law prohibiting a voter from participating in a political party's primary if the voter had voted in the primary of any other party within the preceding twenty-three months).

326 *See Rosario*, 419 U.S. at 761–62.

approach to strict scrutiny that is specific to the context of an election law claim, the state likely would have prevailed, even though this case involved an individual fundamental right to vote: preventing party raiding is a compelling state interest, and the statute likely was narrowly tailored to achieve that goal.

*Burdick v. Takushi* teaches the same lesson.[327] The Court in *Burdick* articulated the severe burden test by noting that laws that do not severely burden the right to vote do not require strict scrutiny review.[328] But the Court still could have upheld Hawaii's ban on write-in voting under strict scrutiny. The Court should have used this standard given that the law directly restricted voters' choices at the polls. First, the state asserted several compelling interests for forbidding voters from writing in a candidate: the write-in ban helped to "avoid the possibility of unrestrained factionalism at the general election" and "guard against 'party raiding.'"[329] Second, the statute was narrowly tailored to further these goals, because it averted "sore loser" candidates who might try to run a write-in campaign and ensured that an independent who had failed to win sufficient votes to be placed on the general election ballot did not taint the result of the general election.[330] There was likely a strong basis in evidence for having a law that limited write-in candidates given Hawaii's lax requirements for appearing on the ballot.[331] That is, the "fit" between the state's goals and the law was strong given the other parts of the state's electoral code. Indeed, another state's write-in ban possibly would not survive strict scrutiny review if the state's ballot access requirements were stricter. However, the fact that virtually anyone could qualify for the ballot in Hawaii meant that the state had a sufficiently compelling reason to limit write-in candidacies given that there was no less restrictive alternative to deter sore losers from running write-in campaigns.[332]

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327 *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992).

328 *See id.* at 433–34.

329 *Id.* at 439 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 219 (1986)).

330 *See id.* at 439–40.

331 *See id.* at 436–37.

332 The majority chastised the dissent for employing strict scrutiny review to argue that the law should be struck down. *See id.* at 440 n.10. Indeed, it is not clear that the dissent's suggestion to use a "less drastic means" to deter "sore-loser candidacies" or to screen out ineligible candidates through postelection disqualification would have achieved the same goals of promoting fair elections as did Hawaii's write-in ban. Thus, even when the dissent used strict scrutiny, its argument was perhaps flawed because it could not point to a viable alternative. Or perhaps there was a better way of achieving these goals that would not be overinclusive, as the dissent suggested. *See id.* at 449 (Kennedy, J., dissenting). If so, then this case should have gone the other way and the Court should have struck down the law. However, given that the dissent could not articulate a specific method that would be narrower and yet still would achieve the state's exact same goals, the Court probably decided the case correctly, albeit through the wrong method.

Admittedly, this would be a close case, and perhaps the Court should have struck down the write-in ban because it unduly infringed on the fundamental right to vote by restricting voters from expressing a particular political preference. But a contrary ruling would cause little concern given that states have wider discretion to regulate access to the ballot, meaning that states can limit the number of viable candidates. This analysis underscores the conclusion that the Court should vigorously protect the individual right to vote because it is a fundamental right, but that states can still regulate elections either through the limited leeway approach to strict scrutiny or by restrictions on ballot access as opposed to burdening individual voters.

*Storer v. Brown*, among the first cases to make clear that the Court would not use strict scrutiny for all election law claims, involved a California scheme that limited access to the ballot for independent candidates if they had been affiliated with a political party within the previous year.[333] The Court upheld the law under a lower level of scrutiny.[334] This standard was not necessarily incorrect given that the law involved access to the ballot, which only impacted voters indirectly and thus did not regulate an individual's fundamental right to vote. But even if the law imposed a severe burden, the Court could have come out the same way under strict scrutiny. Preserving the integrity of the election process is a compelling state interest. Therefore, the statute would be constitutional if the state could demonstrate that it was narrowly tailored to achieve that goal. The Court implicitly answered that question in the affirmative:

> The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.[335]

This language suggests that the state demonstrated a strong basis in evidence that its law directly achieved its goals, and the Court did not mention any alternative methods. Therefore, the law, in theory and in

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333 Storer v. Brown, 415 U.S. 724, 726 (1974).

334 *See id.* at 736.

335 *Id.* at 735. Elaborating further, the Court noted that the law "works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party." *Id.*

practice, was narrowly tailored to ensure that last-minute independent candidates did not sully the results of the election, and there was nothing to indicate that the law reached more voters than necessary to achieve this goal. The Court would not have needed to resort to a lower level of scrutiny to uphold this law even if the law imposed a severe burden. It simply could have examined what it means to "narrowly tailor" a law in the election law context by adopting this two-part test.

A fairly simplistic hypothetical also illustrates that using strict scrutiny will not doom all election regulations that impact the individual fundamental right to vote or impose a severe burden on voters. Suppose that a state chooses to close a particular polling place, or even limit the number of machines at each polling site. These laws would impact the fundamental right to vote because they would directly burden individual voters, as opposed to political parties or candidates. Depending on the circumstances, the state would very likely have a compelling interest to enact the law to ensure fairness or preserve limited resources. Additionally, the state frequently can show a strong basis in evidence that its law is the best alternative to achieve its goals—for example, that the voting machines can better help to alleviate the long lines at a busier precinct. So long as the state does not close all polling places and does not, in effect, restrict the franchise for a particular class of voters, the state has met its burden under the narrowly tailored prong.[336] In fact, a court would likely uphold most "routine" election regulations under this approach so long as the state has no viable alternatives and can present an appropriate fit (i.e., a "strong basis in evidence" that the law will achieve a compelling state interest[337]), and so long as those regulations do not discriminate against a particular group of voters. Laws that do not meet this test are inherently too restrictive on voters' rights.

This analysis also presents another question: what if, under an understanding of the individual fundamental right to vote and a context-specific approach to strict scrutiny, the Court would have come out differently in some of its cases? In that instance, the Court's decisions were wrong when decided under a lower level of scrutiny and should have gone the other way. Perhaps part of the right to vote is that a voter can cast a ballot for any person he or she wants, including writing in "Donald Duck" if the voter so chooses.[338] One goal of this Part is to show that always treating the right to vote as fundamental when a law directly im-

336 *See* Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 338 n.329 (1987) ("[A] state could not permit a municipality to close its polling places and exclude its residents from participation in the otherwise statewide election of a governor.").

337 Bush v. Vera, 517 U.S. 952, 977 (1996) (O'Connor, J., plurality opinion).

338 *See* David Perney, Note, *The Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off*, 58 MO. L. REV. 945, 965–67 (1993)

pacts voters does not mean the upheaval of years of precedent. But is there anything wrong with requiring states to ensure that their laws are the best means of regulating an election? A state will usually be able to meet the first part of the strict scrutiny test because a state has a compelling interest in promoting fair elections that generate a clear winner. However, if the state's regulation burdens more voters than necessary, and if there is a better way for the state to achieve its goals of political stability and running a fair election that is not more burdensome on the state's resources, then why should the Court rubberstamp the law? The state has the burden of showing that its law is narrowly tailored to meet its compelling interest. If the state cannot make this showing, perhaps because the voters who challenge the law present a better way to achieve the same purpose, or because the state cannot show a strong basis in evidence for needing the law, then the Court should require the state to change its electoral scheme. Not only is that the whole point of the narrowly tailored prong, but it is also the essence of preserving fundamental rights.

By using strict scrutiny for all election law cases involving the individual fundamental right to vote (and for all cases involving a law that imposes a severe burden), and by paying particular attention to the narrowly tailored prong, the Court will achieve several goals. First, it will allow states to continue regulating elections to ensure fairness and integrity in the election process. Second, it will protect voters from the burden of state laws that overreach in trying to achieve the state's goals, particularly if there is a better way to regulate an election that infringes fewer voters' rights. Third, it will provide clear guidance to lower courts and litigants and will help to streamline election law cases. Finally, it will elevate the importance of the individual right to vote to be on par with other fundamental rights. We should expect nothing less of the highest court of the land for protecting one of the most important rights in our democracy.

## CONCLUSION

This Article began with the question, "Is the right to vote really fundamental?" Unfortunately, under the Court's current jurisprudence, the answer is not all that clear: sometimes the Court considers the right to vote to be fundamental, and sometimes it does not. This proposition might be shocking to many in our democracy. How can the right to vote not be a fundamental right? Why has the Court treated the right to vote in some circumstances as less than fundamental? For many complex rea-

(exploring how *Burdick* narrowed the scope of the right to vote and discussing the concept that a vote is a form of political expression that contributes to the marketplace of ideas).

sons, in some instances the Court has omitted language of fundamental rights when upholding particular election regulations. As this Article demonstrates, the Court can remedy this confusion through a multifaceted reform to election law jurisprudence. First, the Court should redefine what it means to have a *fundamental* right to vote, applying a fundamental-rights-plus-strict-scrutiny approach to laws that directly burden individuals. The Court should use the severe burden test only for other laws, which typically burden candidates or political parties and impact voters only indirectly. Second, the Court should carefully calibrate the strict scrutiny test for election law cases, and in particular should define the narrowly tailored prong so that it comports with the unique circumstances of an election law dispute. In this way, the right to vote will remain fundamental, but states can continue to regulate elections to avoid fraud and ensure fairness. While the answer to the title of this Article is "not always," the Court can rethink and reevaluate its approach so that the individual right to vote will always remain a fundamental right.