

INVENTING THE “RIGHT TO VOTE” IN
Crawford v. Marion County Election Board,
128 S. Ct. 1610 (2008)

Although it has become almost axiomatic that the franchise is a “fundamental right”¹ possessed by all Americans, it remains very much open to question whether the Constitution was ever intended to bestow the broad-based right envisioned by the Supreme Court. Those wary of judicial imposition of normative convictions under the guise of pronouncing the law² indeed have ample reason to question the Court’s relatively recent discovery of this right in the Equal Protection Clause of the Fourteenth Amendment. Although the Court’s latest examination of the scope of the right to vote in *Crawford v. Marion County Election Board*³ represents a sensible exercise of judicial restraint in response to states’ efforts to combat and deter voter fraud, its reasoning exposes the potential for arbitrariness and activism inherent in the Court’s current voting rights jurisprudence.

The *Crawford* Court addressed a facial constitutional challenge to an Indiana statute known as “SEA 483,”⁴ which requires individuals voting in person to present a government-issued photo identification at the polling place.⁵ The law does not apply to absentee votes cast by mail or to voters living in

1. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“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.”).

2. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasizing that it is the duty of the judiciary to exercise “neither FORCE nor WILL but merely judgment”); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing that originalism is the interpretive method most apt to ensure judges avoid the dangerous fallacy of “mistak[ing] their own predilections for the law”).

3. 128 S. Ct. 1610 (2008).

4. 2005 Ind. Legis. Serv. 1241 (West).

5. See *Crawford*, 128 S. Ct. at 1613 (plurality opinion).

state-licensed facilities, such as nursing homes.⁶ In addition, those lacking the required identification are entitled to cast a provisional ballot, which is counted if the voter produces such identification at the circuit court clerk's office within ten days.⁷ The statute also contains exemptions for indigent persons as well as for those who hold a religious objection to being photographed.⁸ Voters obtaining the photo identification for the first time are responsible for any costs incurred in gathering the necessary preliminary documentation (usually a birth certificate or a U.S. passport);⁹ the photo identification itself, however, is available free of charge at branches of the state's Bureau of Motor Vehicles.¹⁰

Two lawsuits challenging SEA 483's constitutionality were soon filed by the local Democratic Party, elected officials, and several nonprofit organizations representing various groups of voters. The plaintiffs in the consolidated case argued that the law constituted an impermissible burden on their right to vote under the Equal Protection Clause of the Fourteenth Amendment.¹¹ In response, Indiana contended that any incidental burden the statute imposed on the franchise was outweighed by the state's interests in preventing and detecting voter fraud as well as the related need to preserve public confidence in the integrity of the election system.¹²

The United States District Court for the Southern District of Indiana held the statute constitutional, noting that the means employed by Indiana in advancing its valid interest in eliminating voter fraud placed only a relatively mild burden on voting rights.¹³ The Seventh Circuit affirmed the district court's

6. *Id.*

7. *Id.* at 1614.

8. *Id.* at 1613. Voters who properly claim either of these objections are entitled to cast a provisional ballot which is counted upon their execution of a statutorily prescribed affidavit within ten days. *Id.*

9. *Id.* at 1621 n.17 (noting that the fees for obtaining a copy of one's birth certificate in Indiana range from approximately three to twelve dollars).

10. *See id.* at 1614.

11. *Id.*

12. *See id.* at 1617.

13. *See Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 825–26 (S.D. Ind. 2006) (reasoning that “[t]he incontrovertible fact that many public and private entities already require individuals to present photo identification substantially bolsters the State’s contention that ‘[a]mong all the possible ways to identify individuals, government-issued photo identification has come to embody the best

decision in an opinion authored by Judge Posner. Although acknowledging that some voters may “disenfranchise themselves”¹⁴ by declining to endure the mildly cumbersome process of acquiring a photo ID, the court concluded that the overall burden the statute imposed on the right to vote was not severe and not even significantly greater than the countless other costs intrinsic to the voting process.¹⁵ The court also emphasized the crucial distinction between the incidental fees involved in obtaining a photo identification under the Indiana statutory scheme and a poll tax proscribed by the Supreme Court.¹⁶ The dissenting member of the three-judge panel strongly criticized SEA 483 as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic”¹⁷ and asserted that the court was obligated to strike down the law under a “strict scrutiny light” standard.¹⁸

The Supreme Court granted certiorari and affirmed.¹⁹ Writing for the plurality, Justice Stevens undertook what was effectively a two-step analysis of SEA 483’s constitutionality. First, the plurality determined that because the burden created by the regulation was not “severe,” it would eschew strict scrutiny in favor of the balancing approach formulated in *Anderson v. Celebrezze*.²⁰ Largely agreeing with Judge Posner’s analysis, the

balance of cost, prevalence, and integrity.” (internal citation omitted). The district court noted that the plaintiffs had failed to identify “a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements.” *Id.* at 783. The court cited an expert witness report stating that as of 2005, approximately 43,000 Indiana residents lacked the necessary identification. *See id.* at 807.

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

15. *See id.* at 951 (noting that “[t]he benefits of voting to the individual voter are elusive . . . and even very slight costs in time or bother or out-of-pocket expense deter many people from voting”).

16. *See id.* at 952. Specifically, the court reasoned that, in contrast to a traditional poll tax—in which the state’s interests stood in diametric opposition to the individual’s right to vote—in this case, “the right to vote is on both sides of the ledger” given the dilutive effect voter fraud has on legitimately cast ballots. *Id.* (citing *Purcell v. Gonzales*, 549 U.S. 1, 7 (2006)). Although conceding there was some uncertainty as to the severity of voter fraud in Indiana, the court noted there was at least “indirect evidence” of such activities and pointed out the chronic underenforcement of laws criminalizing voter fraud. *See id.* at 953.

17. *Id.* at 954 (Evans, J., dissenting).

18. *Id.*

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

20. 460 U.S. 780 (1983). Justice Stevens cautioned, however, that even the mildest state-imposed burdens on the right to vote “must be justified by relevant and

plurality reasoned that the “inconvenience” entailed in acquiring a photo identification—for example, gathering the necessary documentation and traveling to a local BMV branch—did not constitute “a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”²¹ In addition, the ability of voters lacking the needed identification to cast provisional ballots also “mitigated” the burden.²² The plurality hence concluded that SEA 483 is a “reasonable, non-discriminatory restriction[]”²³ subject to the more lenient demands of the *Anderson* balancing test rather than the rigors of strict scrutiny.²⁴ Although expressing agreement with the petitioners’ contention that the law places a particularly acute onus on certain groups (for example, the poor and elderly), the plurality reasoned “it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”²⁵ Accordingly, the plurality refused to undertake a separate constitutional analysis focused solely on these subsets of voters. The plurality did add, however, that its examination of SEA 483’s burdens centered not on the electorate as a whole but rather only on voters who lacked the identification required by the statute.²⁶

The plurality then proceeded to evaluate the gravity of the competing interests at stake through the lens of the *Anderson* test. As interpreted by the *Crawford* plurality, *Anderson* demanded that courts considering constitutional challenges to non-invidious²⁷ regulations placing non-severe restrictions on the franchise “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifi-

legitimate interests sufficiently weighty to justify the limitation.” *Crawford*, 128 S. Ct. at 1616 (plurality opinion) (internal quotation marks omitted).

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

22. *Id.* The plurality further noted that the additional required step of making a follow-up trip to the circuit court clerk’s office is not constitutionally problematic unless it is shown to be “wholly unjustified.” *Id.*

23. *Id.* at 1616 (citation omitted).

24. *See id.* at 1623.

25. *Id.* at 1622.

26. *See id.* at 1620.

27. The plurality explained that a law is not invidious so long as it relates to voters’ qualifications and imposes “evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *Id.* at 1616. (quoting *Anderson*, 460 U.S. at 788 n.9).

cations for the burden imposed by its rule.”²⁸ Deeming Indiana’s concern with deterring and detecting voter fraud to be a valid state interest,²⁹ the plurality concluded that the state’s statutory scheme constituted a permissible means of ameliorating the problem of fraud.³⁰ While acknowledging that the record lacked any evidence of actual in-person voter fraud in Indiana, the plurality suggested that “flagrant examples” of such activity in other parts of the country as well as fraud relating to absentee voting in a recent Indiana Democratic primary provided sufficient bases for the state’s concerns.³¹ The plurality also accepted Indiana’s argument that safeguarding voter confidence is a legitimate state interest advanced by the identification requirement.³² The plurality determined that the gravity of the state’s regulatory interest outweighed the comparatively mild burden on affected individuals.³³ Finally, the plurality emphasized that the state provided the photo IDs free of charge; but for this feature, SEA 483 would amount to an impermissible poll tax.³⁴

Justice Scalia concurred in the judgment, joined by Justice Thomas and Justice Alito, but expressed two points of disagreement with the plurality’s reasoning.³⁵ First, although he agreed that the burden SEA 483 imposed on voting rights was not “severe,” Justice Scalia argued that the appropriate test was supplied not by *Anderson*, but rather by the Court’s decision in *Burdick v. Takushi*.³⁶ According to Justice Scalia, *Burdick* sought to distill the “amorphous” principle articulated in *Anderson* into a concrete and workable standard, namely, that non-

28. *Id.* (quoting *Anderson*, 460 U.S. at 789).

29. *Id.* at 1617.

30. *See id.* at 1618. The plurality pointed to the Help America Vote Act of 2002 and a Commission on Federal Election Reform report, both of which prescribe the use of photo identification as a means of combating fraud and preserving the integrity of elections. *Id.*

31. *See id.* at 1619. The plurality also noted that Indiana’s “unusually inflated” voter rolls provided an additional “neutral and nondiscriminatory reason” supporting the enactment of SEA 483. *Id.* at 1620.

32. *Id.* at 1620.

33. *See id.* at 1623.

34. *Id.* at 1620–21.

35. *Id.* at 1624 (Scalia, J., concurring in the judgment).

36. 504 U.S. 428 (1992).

severe,³⁷ nondiscriminatory restrictions on the right to vote should generally be upheld so long as the burden is outweighed by the state's "important regulatory interests."³⁸ Second, Justice Scalia criticized the plurality's focus on the burdens placed only on those voters particularly affected by the law rather than evaluating SEA 483's overall impact on "voters generally."³⁹ According to Justice Scalia, the plurality's more individualized approach marked an unmistakable divergence from precedent and portended judicial micromanagement of voting procedures, in clear contravention of the States' Article I, Section 4 prerogatives.⁴⁰ Under the *Burdick* framework, Justice Scalia contended, courts are obligated to defer to states' judgments on the regulation of elections unless the law at issue "imposes a severe and unjustified overall burden upon the right to vote or is intended to disadvantage a particular class."⁴¹

Justice Souter dissented, joined by Justice Ginsburg.⁴² Although maintaining that *Burdick's* "sliding scale balancing analysis"⁴³ provided the controlling standard, Justice Souter indicated the need for "a rigorous assessment"⁴⁴ of Indiana's proffered rationales in light of what he viewed to be the "seri-

37. According to Justice Scalia, "[b]urdens are severe if they go beyond the merely inconvenient." *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment) (citing *Storer v. Brown*, 415 U.S. 724, 728–29 (1974)).

38. *Id.* (internal quotation marks omitted). *Burdick* formulates the rule as follows: "[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

39. *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring in the judgment).

40. *See id.* at 1626. Justice Scalia emphasized "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class." *Id.*

41. *Id.* at 1626–27. Some confusion persists, however, over exactly how demanding the *Burdick* test is in practice. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 330 (2007) (arguing that the Court "has not done much to resolve this ambiguity. . . . [but] suffice it to say that the Supreme Court typically applies something like rational basis review in nonsevere burden cases, but that the rationality standard may not be quite so lax as the one applied to ordinary economic and social legislation; also, to the extent that the burden is fairly characterized as 'significant,' if not quite 'severe,' some intermediate form of scrutiny may be in order").

42. *Crawford*, 128 S. Ct. at 1627 (Souter, J., dissenting).

43. *Id.* at 1628 (Souter, J., dissenting).

44. *Id.* at 1635.

ous" (albeit not "severe")⁴⁵ nature of the burdens imposed by SEA 483. Implicitly disagreeing with Justice Scalia's contention that *Burdick* prescribes a singular focus on the law's overall impact on all voters, Justice Souter argued that it is indeed constitutionally relevant if a statute's incidental effect is to impose particularly cumbersome burdens on certain classes of individuals even though the average voter would regard the law's requirements as mere inconveniences.⁴⁶ Emphasizing the costs entailed in traveling to relatively scarce BMV locations and in obtaining the necessary preliminary documentation, Justice Souter asserted that "in the *Burdick* analysis it matters that both the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile."⁴⁷ Justice Souter concluded that the state's purported interests could not withstand the "rigorous assessment" necessary in light of SEA 483's heavy burdens.⁴⁸ Specifically, Justice Souter underscored the complete absence of any evidence of in-person voter fraud in Indiana,⁴⁹ and concluded by remarking that SEA 483 comes "uncomfortably close" to the poll tax invalidated by the Court some four decades earlier.⁵⁰

Justice Breyer filed a separate dissent expressing his view that the law "imposes a disproportionate burden upon those eligible voters who lack . . . [a] statutorily valid form of photo ID."⁵¹ The proper test, argued Justice Breyer, is not the *Burdick* formulation, but rather "whether the statute burdens any one such [voting related] interest in a manner out of proportion to

45. *Id.* at 1632.

46. *See id.* at 1629 ("The need to travel to a BMV branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience. Poor, old, and disabled voters who do not drive a car, however, may find the trip prohibitive . . ."). Justice Souter did, however, suggest that the number of voters affected is a germane factor when administering the *Burdick* test. *See id.* at 1632–33.

47. *Id.* at 1631.

48. *Id.* at 1635.

49. *See id.* at 1637. Justice Souter also took a skeptical view of the State's rationale that voter fraud is extremely difficult to detect. *See id.* at 1638. He added that, even if Indiana had shown voter fraud to be a substantial problem, it would not necessarily justify the "particular burdens [SEA 483] imposes on poor people and religious objectors," namely, the need to travel to the county seat of government within ten days of the election every time they wish to vote. *Id.* at 1640.

50. *Id.* at 1643.

51. *Id.* (Breyer, J., dissenting).

the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)."⁵² Answering this question in the affirmative as to SEA 483, Justice Breyer noted that other states have implemented photo ID laws less restrictive and less burdensome than Indiana's, and that there is no apparent reason why it is necessary for Indiana to maintain more stringent requirements.⁵³

While the *Crawford* Court's judgment upholding SEA 483 as a constitutional exercise of Indiana's regulatory powers is correct, the plurality's reasoning leaves open the potential for future improper judicial encroachments on the States' authority to devise their own election law regimes. Balancing tests such as that employed by the plurality in *Crawford* and its precursors always contain at least some element of arbitrariness caused by the subjectivity inherent in assigning respective weights to competing (and often somewhat abstract) interests. This effect, however, is exacerbated exponentially when the "right" occupying one side of ledger—here, a general "right to vote" that can be invoked even against neutral, nondiscriminatory regulations—is one entirely of the Court's invention with little grounding in the Constitution's text and original intent. In such instances, there is no independent constraint on the Court's power to define the extent and magnitude of its own creation.⁵⁴ Much of voting rights doctrine in general and *Crawford* in particular, exemplifies precisely this situation.

Although the exact meaning and scope of the Fourteenth Amendment is a vexing question not capable of easy resolution, it is highly doubtful that, whatever else it was meant to accomplish, the Equal Protection Clause conferred a broad-ranging fundamental "right to vote."⁵⁵ As an initial matter, the text of

52. *Id.* (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

53. *See id.* at 1644–45.

54. It is worth noting that even the current Court's most prominent originalists, Justice Scalia and Justice Thomas, have seemingly accepted the authority of the *Burdick* framework, which by its terms contemplates a general "right to vote" that can conceivably nullify even generally applicable, nondiscriminatory regulations. *See id.* at 1626–27 (Scalia, J., concurring in the judgment) (arguing that courts should generally uphold such a neutral law "unless it imposes a severe and unjustified overall burden upon the right to vote" (emphasis added)).

55. Importantly, the Court never has held that the Fourteenth Amendment endows American citizens with an independent and freestanding right to vote that can be invoked, for example, to compel the government to render unelected pub-

Section 2 of the Fourteenth Amendment, which expressly contemplates reducing the representation in Congress of states that deny adult males the franchise, seems to foreclose the possibility that a general right to vote is embedded in Section 1's Equal Protection Clause.⁵⁶ Representative James Bingham, a principal author of the amendment, himself declared that, as Section 2 attests, "[t]he amendment does not give . . . the power to Congress of regulating suffrage in the several States."⁵⁷ Bingham implied that, to the extent Section 2 is an enforcement mechanism for remedying wrongful deprivations of the franchise, it was directed to the relatively narrow objective of protecting the rights of black Americans.⁵⁸ Many historians have concurred in this view. After conducting an exhaustive examination of the Fourteenth Amendment's adoption, Professor Raoul Berger concluded that "the framers' incontrovertible exclusion of suffrage

lic positions subject to direct election by voters. Rather, as a product of the Equal Protection Clause strand of the Court's "fundamental rights" jurisprudence, the essence of the right to vote is that, once the government chooses to extend the franchise to citizens, it must do so on an equal basis. *See, e.g.,* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973). In that case, the Court indicated that "the right to vote, *per se*, is not a constitutionally protected right." Instead, "the protected right . . . [is one] to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *Id.*

56. *See* U.S. CONST. amend. XIV, § 2. ("[W]hen the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.")

57. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Clearly implicit in Bingham's argument is that Section 1 does not create any rights with respect to suffrage because if it did, these rights would be subject to congressional regulation under Section 5, which vests in Congress the power to enforce the Amendment's requirements.

58. *See id.* at 2543 ("By [Section 2], if . . . [any] State discriminates against her colored population as to the elective franchise (except in cases of crime,) she loses to that extent her representative power in Congress."). Indeed, it seems that most of the debate concerning the interplay between the Fourteenth Amendment and voting rights centered on the enfranchisement of black Americans; the notion that the amendment would reach all forms of state regulation of voting (including those with no discriminatory intent) appears not to have been considered. *See* CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 28-30 (1997) (noting that the Arkansas ratifiers were apparently aware that the Fourteenth Amendment could be construed to mandate black suffrage but that many Michiganders and West Virginians did not take such an expansive view of the amendment).

from the Fourteenth Amendment . . . leaves no room for judicial 'flexibility.'"⁵⁹ Other scholars chronicling the circumstances of the Fourteenth Amendment's adoption have similarly noted flatly that "[t]he statement most frequently made in debates on the Fourteenth Amendment is that it did not, in and of itself, confer upon blacks or anyone else the right to vote."⁶⁰

Despite the *Anderson* Court's effort to construe the Equal Protection Clause otherwise, even those framers who maintained that the Fourteenth Amendment's demand for equality extends to suffrage do not appear to have contemplated that it would embrace even neutral and nondiscriminatory regulations.⁶¹ For example, the prominent abolitionist and Fourteenth Amendment proponent Senator Thaddeus Stevens indicated that the amendment would not bar states' property qualifications on the franchise so long as such laws were applied to all citizens.⁶²

59. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 154 (2d ed. 1997). Professor Berger argued that "[a]part from a few radical dissentients, there was a wide consensus that control over suffrage had from the beginning been left with the States, as was categorically stated by [framers Thaddeus] Stevens, [William] Fessenden, [Roscoe] Conkling, [John] Bingham, and many others." *Id.* at 472 (footnotes omitted).

60. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 125 (1988). Nelson noted that, although some proponents of the amendment argued that it did compel the equal administration of those voting rights which a state chose to extend, others espoused the view that "the amendment concerned only civil rights and not political rights and hence had nothing at all to do with voting." *Id.* at 132. Even such a strong proponent of the amendment as Michigan Senator Jacob Howard asserted that "the theory of this whole amendment is, to leave the power of regulating the suffrage with . . . the States, and not to assume to regulate it by any clause of the Constitution." BERGER, *supra* note 59, at 85 (alteration in original) (internal quotation marks omitted). Howard also argued on the Senate floor that the notion that the Fourteenth Amendment grants a right to vote is "a construction [that] cannot be maintained. No such thing was contemplated on the part of the committee which reported the amendment; and if I recollect rightly, nothing to that effect was said in debate in the Senate when it was on its passage." CONG. GLOBE 40th Cong., 3d Sess. 1003 (1869). Furthermore, Section 2 is a "plain, indubitable recognition and admission . . . of the right and power of each State to regulate the qualifications of voters." *Id.*

61. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (asserting that even when the law at issue is generally applicable and not motivated by an intent to discriminate, the Court will "not only determine the legitimacy and strength of each of [the state's] interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights").

62. See NELSON, *supra* note 60, at 142 (noting that Stevens believed that "if the property qualification applie[d] impartially to all," its incidental effects were irrelevant from the standpoint of the Fourteenth Amendment (alteration in original) (internal quotation marks omitted)).

In addition, while legal scholar William van Alstyne has challenged the *Reynolds* dissenters' argument that the legislative history of the Fourteenth Amendment foreclosed the majority's reliance on the "one person, one vote" principle,⁶³ even he acknowledged that "the case can safely be made that there was an original understanding that [Section] 1 of the proposed Fourteenth Amendment would not itself immediately invalidate state suffrage laws severely restricting the right to vote."⁶⁴

Indeed, the Supreme Court itself adhered to precisely this understanding of the Fourteenth Amendment for nearly a century before abruptly reversing course during the Warren Court era. In one of the first cases concerning the subject, the Court refused the plaintiff's urging to formulate a general right to vote out of the newly ratified Fourteenth Amendment.⁶⁵ Although the *Minor v. Happersett* plaintiff's argument that the Fourteenth Amendment prohibited restrictions on the franchise based upon sex was rooted in the Privileges or Immunities Clause⁶⁶ (thereby rendering some of the Court's reasoning inapposite to the Equal Protection Clause issue), much of the Court's logic is generally applicable to any Fourteenth Amendment argument concerning the right to vote. Specifically, the Court examined the circumstances of the amendment's adop-

63. See William W. van Alstyne, *The Fourteenth Amendment. The 'Right' to Vote and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 85 (arguing that "there was no express understanding one way or the other, respecting the prospective relevance of the Equal Protection Clause to instances of state legislative malapportionment").

64. *Id.* at 72. Professor van Alstyne reasoned tenuously that, because Congress "did not adopt . . . [a] specific and narrowly defined amendment that, by its clear language, could never be applied to suffrage," *id.* at 73, the Court's fashioning of expansive voting rights is justified. While the amendment's broad wording is certainly relevant, it makes more sense to view it not as a license to engage in judicial policymaking but rather as a starting point to discern more precisely what was intended by the open-ended language, by examining exactly what the amendment's framers and ratifiers believed it did and did not do. Indeed, to the extent ambiguities surrounding its adoption and differences of opinion among its ratifiers preclude a comprehensive and definitive understanding of the amendment's precise intent, it would surely be a dubious principle of constitutional construction to require that the framers explicitly enumerate everything an amendment is *not* meant to accomplish lest the Court claim the power to declare heretofore unknown rights. This is especially true when there is a noticeable paucity of evidence that the framers or ratifiers intended to confer a general right to vote, despite being conscious of the possibility of doing so.

65. See *Minor v. Happersett*, 88 U.S. 162 (1874).

66. See *id.* at 165.

tion, noting that not only had states enacted various restrictions (relating to, for example, property ownership) since the time of the Founding,⁶⁷ but that virtually no one regarded the Fourteenth Amendment as securing a broad right to the franchise, as evidenced by the numerous limitations on suffrage remaining after its ratification and the perceived need to enact the Fifteenth Amendment.⁶⁸ The Court also explained that the wording of Section 2 of the Fourteenth Amendment rendered highly dubious the notion that the broad language of Section 1 secured a general right to vote.⁶⁹ The penalty Section 2 exacts for depriving adult male citizens of the franchise⁷⁰ seems by its terms to contemplate that the States can in fact impose such restrictions so long as they are willing to accept the penalty. Indeed, as recently as the 1970s, the Court relied on the explicit language of Section 2 in upholding the constitutionality of states' revocation of felons' voting rights.⁷¹

Similarly, the Court in *Colegrove v. Green*⁷² rejected the plaintiffs' claims that Illinois's congressional apportionment scheme amounted to a constitutional injury to the "right to vote." Relying on the plain text of Article I, Section 4, Justice Frankfurter

67. *See id.* at 172–73.

68. *See id.* at 175 (arguing that if the Fourteenth Amendment really had been intended to extend to the right to vote, there would have been no need to adopt the Fifteenth Amendment); *see also* United States v. Reese, 92 U.S. 214, 217–18 (1875) (explaining that before the Fifteenth Amendment was ratified, "[i]t was as much within the power of a state to exclude citizens of the United States from voting on account of race &c., as it was on account of age, property or education").

69. *See Minor*, 88 U.S. at 174.

70. *See* U.S. CONST. amend. XIV, § 2.

71. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974). *But see* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 289 (2004) (arguing that the Court has generally viewed Section 2 as having "no independent effect" in light of the more broadly worded Fifteenth Amendment). Regardless, *Ramirez* seems to represent an anomaly in the Court's current voting rights jurisprudence and to some extent stands in deep tension with other decisions. If Section 2 is still a viable provision (as *Ramirez* indicates it is), all restrictions on the franchise except those explicitly forbidden by other provisions of the Constitution are presumably permissible (although potentially subject to penalty). If Section 2 is nugatory, however, then it appears likely that laws prohibiting felon voting must withstand strict scrutiny to remain constitutionally valid.

72. 328 U.S. 549 (1946); *see also* Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (Black, J.) ("The Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

opined that ensuring fair representation is “[a]n aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution.”⁷³ The Court likewise adhered to the original understanding in unanimously upholding Georgia’s generally applicable poll tax against an Equal Protection Clause challenge.⁷⁴

In 1966, however, the Court abruptly changed course and declared in *Harper v. Virginia Board of Elections* that voting is a “fundamental political right” protected by the Equal Protection Clause.⁷⁵ While beginning its opinion with an attempt to clothe its sweeping assertion with the respectability of *stare decisis* by citing the nineteenth-century case *Yick Wo v. Hopkins*,⁷⁶ the

73. *Colegrove*, 328 U.S. at 554 (opinion of Frankfurter, J.). Although *Colegrove* was a case involving vote dilution rather than vote deprivation, the Court’s later apportionment doctrine was itself grounded in the Equal Protection Clause and bears many conceptual parallels to the Court’s general ‘right to vote’ jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (“Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations”); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that malapportionment claims are justiciable under the Equal Protection Clause).

74. See *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937). The basis of the plaintiff’s challenge was not even that the poll tax wrongfully encumbered any fundamental “right to vote” but rather that the statute’s exemptions (namely, for the blind, those over the age of 60, and women not registering to vote) violated the Equal Protection Clause. The Court rejected this argument, reasoning that the clause “does not require absolute equality” and that the exceptions were reasonable. See *id.* at 281–82.

75. 383 U.S. 663, 667 (1966) (internal quotation marks omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). The Court had implicitly hinted at the existence of such a “right to vote” in the years immediately preceding *Harper*. See *Carrington v. Rash*, 380 U.S. 89, 96–97 (1965) (striking down provision of state constitution which permitted member of armed forces to vote only in the county where he resided at the time he entered the service). *Harper*, however, marked the first time the Court elaborated on the new “right to vote” with any specificity. Indeed, as recently as 1959, the Court declined to embrace the notion of a “fundamental right” to vote embedded in the Fourteenth Amendment. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (upholding generally applicable literacy test and noting that the “right to vote” referred to in *Yick Wo* and Section 2 of the Fourteenth Amendment “refers to the right to vote as established by the laws and constitution of the State” (internal quotation marks omitted) (quoting *McPherson v. Blacker*, 146 U.S. 1, 39 (1892))).

76. The Court in *Yick Wo* invalidated a facially neutral ordinance regulating laundry businesses on the ground that it was being applied in a discriminatory manner. 118 U.S. 356. Despite the sweeping language of the phrase cited in *Harper*, the *Yick Wo* Court did not suggest that the Equal Protection Clause contains a multifaceted and wide ranging right to vote encompassing neutrally applied laws. Indeed, the arguably more sensible interpretation of *Yick Wo* is that the Court was merely enforcing the obvious original intent of the Fourteenth Amendment, to wit, precluding

Court soon abandoned this pretense and all but acknowledged that its newly devised right lacked any significant basis in original intent. In response to decades' worth of case law directly undermining its decision, the Court remarked simply that

the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.⁷⁷

The unstated implication, of course, is that the new "notions" dictating the substance of the Equal Protection Clause will be chosen by the Court and animated by whatever normative theory of the elusive concept of "equality" that any given majority of Justices happens to espouse and wishes to superimpose onto the Constitution as purportedly reflecting what the national consensus is (or ought to be).⁷⁸

While *Crawford* and similar decisions⁷⁹ do indicate an effort to contain *Harper's* expansive holding through restrained applications of the more deferential *Anderson-Burdick* test, other cases aptly illustrate *Harper's* promise that the Court's newly devised right and corresponding balancing tests can be manipulated to supplant states' duly enacted voting regulations with the Court's favored notions of "fairness" and "equality." In particular, many courts have used the subjectivity inherent in resolving the threshold question of whether a burden is "severe" to analyze (and usually invalidate)

states from engaging in deliberate racial discrimination through selective enforcement of the law. See *Harper*, 383 U.S. at 682 n.3 (Harlan, J., dissenting) (arguing that *Yick Wo* "finds justification in the fact that, insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status").

77. *Harper*, 383 U.S. at 669 (citation omitted).

78. As Judge Bork noted, the *Harper* majority's formulation of equal protection clearly "means that the content of the equal protection clause changes with the notions of five or more Justices." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 91 (1990).

79. See, e.g., *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998) (upholding under *Anderson-Burdick* lifetime term limits on state legislators); *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1340 (S.D. Fla. 2008) (holding that a Florida law requiring new voters to register at least 29 days before an election did not impose a severe burden and was supported by the state's interest in "honest, fair and orderly election[s]").

neutral, generally applicable laws under a strict scrutiny standard.⁸⁰ Even *Crawford*, while signaling at least a partial return to judicial modesty, appeared to leave open the possibility that similar cases may be decided differently if certain details of the statute and its effects differ.⁸¹

The malleability of these tests, however, is directly attributable to the nature of the right to vote itself. As *Harper* itself essentially acknowledged, the contours of the right are defined by the philosophical proclivities of those applying it. The right to vote is a judicial creation possessing as much force as the Court chooses to accord it in any given case.

Some have argued that even if the Court has engaged in an aggrandizement of its powers unauthorized by the text or original intent, the subject matter of these decisions render them fundamentally different from other instances of judicial activism. In the voting rights sphere, so the argument goes, the Court's decisions have operated to facilitate rather than ob-

80. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (applying strict scrutiny to invalidate a statute requiring voters in a party's primary to be registered members of that party); *Ayers-Shaffner v. DiStefano*, 37 F.3d 726, 729–30 (1st Cir. 1994) (holding that an election board ruling limiting participation in a re-vote to those voters who had cast ballots in the original election placed an impermissibly "severe" burden on the right to vote); *Common Cause of Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (invalidating under *Burdick* a law that required in-person voters and some absentee voters to present photo identification); *Partnoy v. Shelley*, 277 F. Supp. 2d 1064, 1075 (S.D. Cal. 2003) (nullifying under strict scrutiny a law providing that votes cast for a candidate in a recall election will be counted only if the voter also voted on the recall question itself). Although decided before *Burdick*, other cases have also asserted the prerogative of effectively micromanaging the appropriate length of residency requirements. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (striking down a Tennessee law requiring that voters must reside in the state for one year and in the county for three months before registering to vote there); see also *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (declaring unconstitutional a law which limited participation in local school board elections to those who either owned or leased property in the district or who had children enrolled in the district's schools).

81. For example, Justice Stevens noted that absentee voting (which did not require presenting a photo ID) was a possibility for elderly voters who had difficulty obtaining a birth certificate, but left unclear how important the absentee exemption was to ensuring SEA 483's constitutionality. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008) (plurality opinion). In addition, Justice Stevens also relied on the lack of record evidence of hardship encountered by particular voters. See *id.* The necessary implication is that SEA 483 could have been placed in constitutional jeopardy had the petitioners been able to garner more testaments by voters who allegedly were "severely" burdened by the financial or logistical hurdles to obtaining a birth certificate, traveling to the BMV, and so on.

struct the democratic process by ensuring an equalization of opportunities to participate across various strata of society.⁸² This argument is persuasive to a degree, but it nevertheless marks a troubling and potentially dangerous concession to the notion that the Court's duty is not to "say what the law is,"⁸³ but rather to protect the integrity of American democracy in accordance with fluid constitutional boundaries crafted almost entirely according to the Justices' personal conceptions of "fairness."⁸⁴ In addition, to the extent that "democracy" is a constitutionally protected value, there lingers the critical question of what exactly "democracy" even means. While the egalitarianism embraced by the Court is certainly one model of democracy, it is far from the only one and indeed was a paradigm manifestly disfavored by many of the Constitution's Framers.⁸⁵ As Justice Harlan noted in his *Harper* dissent, various states had long espoused alternative conceptions of democracy that incorporated such considerations as interest in the outcome of the elections (as gauged by property qualifications) and ability to participate meaningfully in the democratic process (as illus-

82. See Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 471-72 (2007) (rhetorically asking "[h]ow . . . can democracy be the grounds to deny the equal-voting right said to be vital to supporting democracy itself?"). One might note, however, that Americans' voluntary enactment of numerous constitutional and statutory provisions augmenting the franchise (including the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, and the Voting Rights Act of 1965) undermines not only the argument that the Fourteenth Amendment was intended to encompass a broad right to vote, but also the contention that expansion of voting rights requires the judiciary to act as the self-appointed arbiter of how best to realize democratic ideals.

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

84. The Court has made a similar argument in other contexts to support its assertion that it could invalidate laws which in its view were the product of a deficient democratic process. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (claiming for itself the power to conduct a "more searching judicial inquiry" when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

85. James Madison and Gouverneur Morris, for instance, were deeply suspicious of mass democracy and maintained that suffrage should be limited to independent landowners. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 225 (1996). Numerous states did precisely that even in the years leading up to the ratification of the Constitution. See *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* (Patrick T. Conley & John P. Kaminski eds., 1992). Under this view, laws that impose barriers to the ballot actually serve to *strengthen* the vitality of the democratic process by limiting participation to those especially invested in its outcomes.

trated by proficient literacy). Indeed “it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability.”⁸⁶

In sum, *Crawford* is in some respects a shift toward renewed deference by the judiciary to the States’ constitutional prerogative of regulating voter qualifications and elections, as evidenced by the plurality’s explicit recognition of the latitude enjoyed by states in crafting measures to combat voter fraud and ensure the integrity of the electoral system. Nevertheless, *Crawford* also embodies more troubling potentialities. Six of the nine Justices appeared to endorse the idea that the Court may weigh the onuses imposed on particular subsets of the voting population when conducting its benefit-burden calculus. More fundamentally, the Justices unanimously accepted the core post-1960s voting rights notion that the Equal Protection Clause encompasses a general right to vote, although the Justices disagree considerably as to the magnitude of the right relative to state interests. They do agree, however, that this “right to vote” can be invoked even against neutral, generally applicable laws that do not deny the franchise on any basis proscribed by the Constitution, such as race or gender. Such an approach not only subjects duly enacted laws to the vagaries of judicial caprice but also vests in the Court the expansive authority to police the political process in accordance with its own understanding of such fundamental concepts as the nature of constitutional democracy itself.

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86. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting). Justice Harlan further admonished the Court for injecting its preferred theory of political representation into the Fourteenth Amendment. *See id.* at 686 (“It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.” (citation omitted)). Even Professor Schacter acknowledged that “[t]he Constitution does not clearly specify what democracy means, nor does it clearly establish which clauses or amendments should be seen as required by the democracy that the Constitution helps to constitute.” Schacter, *supra* note 82, at 474. The subjectivity and uncertainty inherent in elucidating terms like “democracy” and “republicanism” similarly call into question Judge Bork’s argument that at least some of the Court’s voting rights doctrine can be reconceptualized under the Guarantee Clause of Article IV. *See BORK, supra* note 74, at 85–86. Judge Bork’s proposal, however, is beyond the scope of this Comment.