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How the United States Supreme Court Diminished Constitutional Protections of the Right to Vote and What Congress Can Do About It

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Introduction

The right to vote in the United States has always been steeped in discrimination. For most of United States history, it was a right that African Americans, Asian Americans, American Indians, and women were denied. The United States Supreme Court in the 1960s and 1970s developed legal doctrine that required state-created restrictions on the right to vote to be reviewed by courts with strict scrutiny under the equal protection clause of the Fourteenth Amendment of the Constitution. In 2008, the Supreme Court inexplicably reduced the level of judicial scrutiny used to review new state voting restrictions in *Crawford v. Marion County Election Bd.*[1]

This article traces the history of Supreme Court review of state restrictions on the right to vote and highlights the significant diminution of judicial review of such restrictions that *Crawford* represents. After *Crawford*, many States enacted laws requiring registered voters to present identification documentation at the polling place, creating new impediments for some Americans to vote. In some states, federal courts have determined that these voter identification laws were purposely enacted to make it more difficult for African Americans to vote in violation of their constitutional rights under the Fourteenth and Fifteenth Amendments. Congress has the authority under these Amendments to enact legislation that seeks to prevent and remedy state restrictions on voting that violate the Constitution.

Provisions in the Constitution involving the right to vote

The initial U.S. Constitution that was ratified in 1788 did not explicitly identify who had the right to vote. The initial Constitution provided that members of the House of Representatives in the Congress of the United States would be chosen by the people of the states and the qualifications for electing them would be the same as for electing representatives of the most numerous branch of each state legislature.[2] The Seventeenth Amendment ratified in 1913 adopted the same criterion for electing members of the Senate of the United States.[3] The initial Constitution also provided that each state's

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legislature would determine a method for appointing their electors of the President of the United States of America.[4] As a result of these provisions in the U.S. Constitution, the states determine the qualifications for voting in federal and state elections.[5]

History of discrimination in voting in the United States

After the initial Constitution was ratified, only white male property owners could vote in eleven of the original thirteen States.[6] Women were not granted the right to vote in federal and state elections until the Nineteenth Amendment was ratified in 1920.[7] American Indians born in the United States were not granted U.S. citizenship until the enactment of the Indian Citizenship Act of 1924, but many States continued to not allow them to register to vote.[8] Many citizens were also prohibited from voting based on national origin. For example, California's second Constitution, ratified in 1879, provided that "no native of China" shall ever be allowed to vote in California.[9]

The right of African Americans to vote has a uniquely sordid history. As slaves, they had no right to vote.[10] After the Civil War, slavery was abolished by the Thirteenth Amendment[11], the newly freed slaves were granted citizenship by the Fourteenth Amendment[12] and the right to vote by the Fifteenth Amendment.[13] However, in the late nineteenth century and early twentieth century many southern States adopted constitutional provisions, statutes and voter registration practices that denied African Americans the right to vote.[14] As a result of these laws and practices, voter registration among African Americans in many southern States was very low.[15] For example, in Mississippi where African American adults outnumbered white adults in 1890, less than 9,000 of 147,000 adult African Americans were registered.[16] By 1965, only 6.7 percent of eligible African Americans in Mississippi were registered to vote.[17] As a result of this type of low voter registration of African Americans, the Congress enacted the Voting Rights Act of 1965.[18]

Constitutional limitations on state authority to set qualifications to vote

When state residents believe that states have unfairly restricted qualifications for voting, the residents can challenge the restrictions under the Fourteenth and Fifteenth Amendments of the U.S. Constitution. In *Guinn v. United States,*[19] the U.S. Supreme Court held that an amendment to the Oklahoma constitution that required a person seeking to register to vote to pass a literacy test unless the person was eligible to vote on January 1, 1866 or was a descendant of a person who was eligible to vote on that date violated the Fifteenth Amendment because it discriminated on the basis of race.[20] In *Nixon v. Herndon*,[21] the U.S. Supreme Court held that a Texas statute that barred African Americans from voting in the Democratic Party primary violated their equal protection rights under the Fourteenth Amendment.[22]

In famous footnote four to *United States v. Carolene Products Co.*[23] the U.S. Supreme Court presaged the different levels of judicial scrutiny of state action that would eventually develop in equal protection jurisprudence.[24] The *Carolene Products* Court suggested in footnote four that legislation that restricts the right to vote should receive "more exacting judicial scrutiny" under equal protection because it involves legislation that restricts the "political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[25] In *Harper v. Virginia State Board of Elections*,[26] which held that a provision of the Virginia Constitution that made payment of a poll tax a precondition to voting violated equal protection under the Fourteenth Amendment,[27] the U.S. Supreme Court noted that governmental restrictions on the right to vote should be "closely scrutinized and carefully confined."[28]

The type of judicial scrutiny that courts should apply to State restrictions on the right to vote under equal protection was firmly established in *Kramer v. Union Free School District.*[29] In *Kramer*, a New York state statute limited voting in school district elections to residents who own or lease taxable real property in the district or who have children enrolled in the district's schools.[30] Mr. Kramer, a childless bachelor who lived in his parents' home and neither owned nor leased taxable real property, challenged the denial of his application to vote in a local school board election on equal protection grounds.[31] The U.S. Supreme Court held that in considering Mr. Kramer's equal protection claim "the Court must determine whether the exclusions are necessary to promote a compelling state interest."[32] The Court stated that the New York state statute that prevented Mr. Kramer from voting in school board elections must be given "close and exacting examination" because the right to vote:

> is preservative of other basic civil and political rights; constitutes the foundation of our representative society; and determines who may participate in political affairs or in the selection of public officials and any unlawful discrimination in voting undermines the legitimacy of representative government.[33]

For these reasons, the Court in *Kramer* found that State restrictions on the right to vote are not entitled to the presumption of constitutionality that is generally afforded State statutes.[34] The Court concluded that the New York statute in question was not sufficiently tailored to limit the right to vote to those "primarily interested" in school affairs and, therefore, it violated equal protection to deny Mr. Kramer the right to vote in local school board elections.[35]

In *Dunn v. Blumstein*,[36] the U.S. Supreme Court invalidated on equal protection grounds a provision of the Tennessee Constitution that limited voting to residents who had lived in Tennessee for twelve months and in their county of residence for three months.[37] In reviewing the constitutionality of Tennessee's

durational residence requirements, the *Dunn* Court recognized that the strict scrutiny test announced in *Kramer* applied to equal protection challenges to State laws that restrict the right to vote.[38] The *Dunn* Court also emphasized that a State law that restricts the right to vote is presumed to be unconstitutional unless the State meets a "heavy burden of justification" demonstrating that the law is necessary to promote a compelling governmental interest.[39]

It was settled after *Kramer* and *Dunn* that courts should apply strict scrutiny review to equal protection challenges to State laws that restrict the right to vote.[40] Constitutional scholars also acknowledge that "laws infringing on the right to vote must meet strict scrutiny."[41]

Voter identification laws

In the twentieth century, several states requested that voters present some form of identification at the polling place but provisions existed for voters in these states to be able to cast a ballot even if they did not have the requested ID.[42] By 2000, fourteen states requested that voters present an identification document at the polling place.[43]

Crawford v. Marion County Election Board

In 2005, Indiana enacted a statute (hereafter referred to as "SEA 483") requiring its citizens who appear in person to vote to present a government-issued photo identification.[44] Under SEA 483, if a prospective voter fails to present such identification, (s)he may file a provisional ballot that will be counted only if (s)he presents the required government-issued photo identification to the circuit court clerk's office within 10 days.[45]

The Indiana Democratic Party and several other plaintiffs sued Todd Rokita, the Indiana Secretary of State, the Marion County Election Board and several other government defendants in federal district court in Indiana challenging the constitutionality of SEA 483.[46] The district court judge found that an estimated 43,000 Indiana residents, or 0.9 percent of Indiana's voting aging population, lacked a state-issued photo identification.[47] In considering plaintiffs' equal protection challenge to SEA 483, the district judge decided that strict scrutiny did not apply because the plaintiffs failed to prove that any voters would be adversely impacted by SEA 483 and instead cited the following test for reviewing the plaintiff's equal protection challenge to SEA 483:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[48]

The district court cited the following U.S. Supreme Court cases as the source of this test: *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), quoting from *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).[49] Applying this test, the district court concluded that Indiana's important interest in preventing voter fraud justified the restrictions on voting imposed by SEA 483.[50] Thus, the District court concluded that SEA 483's requirement that voters present a government-issued photo identification at the polling place is a permissible regulation of elections by the State of Indiana[51] and rejected the plaintiffs' equal protection challenge to the statute.[52]

The plaintiffs appealed the district judge's decision to the Seventh Circuit Court of Appeals and the majority there also rejected reviewing SEA 483 with strict scrutiny, relying on the Supreme Court's decisions in *Anderson* and *Burdick*.[53] The Seventh Circuit majority affirmed the district court's decision finding SEA 483 to be a constitutional exercise of Indiana's authority under Article I, section 4 of the U.S. Constitution to impose reasonable regulations on the electoral process in Indiana.[54] One member of the Seventh Circuit panel dissented identifying the obvious purpose of SEA 483 to be to discourage turnout among Democratic voters.[55] The dissenting judge urged that "strict scrutiny light" under *Burdick* be applied to SEA 483 resulting in its invalidation as an undue burden on the fundamental right to vote of a segment of Indiana's eligible voters.[56]

The Seventh Circuit's decision that SEA 483 is constitutional was appealed to the U. S. Supreme Court and the Supreme Court affirmed without a majority opinion.[57] Justice Stevens, writing the lead opinion for three justices, also applied *Anderson* and *Burdick* and concluded that the evidence presented to the district court was not sufficient to support a facial attack on SEA 483 in its entirety, necessitating an affirmance.[58] Justice Stevens found that Indiana voters who possess government-issued photo identification are not unconstitutionally burdened by the requirement of presenting it before voting.[59] Justice Stevens recognized that some persons in Indiana who are eligible to vote but who do not possess a current photo identification may be unconstitutionally burdened by SEA 483 but concluded that the evidence in the record made it impossible to assess the burden on them.[60] Accordingly, Justice Stevens found that the plaintiffs' facial attack on SEA 483 failed because the statute's effect on the vast majority of Indiana voters is justified by the State's interest in protecting the integrity and reliability of the electoral process.[61]

Justice Scalia, who also wrote for three justices, applied the *Anderson* and *Burdick* precedents and affirmed the district court's holding that SEA 483 is constitutional.[62] However, Justice Scalia took issue with Justice Stevens' suggestion that SEA 483 may be unconstitutional as applied to some eligible

voters in Indiana.[63] Justice Scalia found that a generally applicable voter law, like SEA 483, should be constitutionally reviewed based on its burden on most voters and not on how it might burden discreet sub-classes of the eligible voter population and the burden that SEA 483 imposes on most Indiana voters is reasonable, satisfying equal protection.[64]

Justice Souter, writing for two justices, dissented.[65] Justice Souter asserted that Justice Stevens in the lead opinion underestimated the serious burdens that SEA 483 places on those eligible Indiana voters who do not possess a government-issued photo identification.[66] Further, Justice Souter found that Indiana's principal interest in preventing voter fraud is discounted by the fact that Indiana admitted that it cannot document a single instance of voter fraud in the State's history.[67] Justice Souter concluded, applying the standards created in *Anderson* and *Burdick*, that SEA 483 is unconstitutional because the State's interests fail to justify the burdens on the right to vote that it imposes, especially on the old and the poor who may have difficulty obtaining the required voter identification documentation.[68] Justice Breyer dissented separately and also concluded that SEA 483 is unconstitutional because it imposes a burden on eligible voters who lack a government-issued identification that is disproportionate to the State's interests in the statute.[69]

Critique of the Supreme Court's decision in *Crawford*

The principal critique of the Supreme Court's decision in *Crawford* is that it ignored legal precedent in *Kramer* and *Dunn* that applied to State laws that restrict the right to vote, like SEA 483, and instead applied precedent in *Anderson* and *Burdick* that is tangential to that right. *Crawford* involved an equal protection challenge to SEA 483. Prior to the enactment of SEA 483, a registered voter seeking to vote in person in Indiana had to simply sign a poll book and if the signature matched the signature in the voting registration records, the voter could cast a ballot.[70] After enactment of SEA 483, Indiana voters seeking to vote in person were also required to present a government–issued photo identification in order to vote.[71] Thus, SEA 483 created a new restriction on the right of registered voters in Indiana to cast a ballot.

Kramer and *Dunn* both involved constitutional challenges to State laws that prevented otherwise eligible voters from casting ballots. In *Kramer* and *Dunn*, the Supreme Court was emphatic that when State-law created restrictions on the right to vote are challenged on equal protection grounds the Courts should apply strict scrutiny and only uphold such restrictions if they are necessary to promote a compelling state interest.

Anderson and *Burdick*, on the other hand, did not involve restrictions on the ability of any person to vote. *Anderson* was a constitutional challenge to an Ohio statute that required independent candidates for President to file

their candidacy documents in March in order to appear on the general election ballot the following November.[72] *Burdick* was a constitutional challenge to Hawaii's prohibition on write-in voting.[73] The provisions of the Ohio and Hawaii State laws that were challenged in *Anderson* and *Burdick* respectively did not prevent any eligible voter in these States from casting a ballot.

Prof. Erwin Chemerinsky, a constitutional law scholar, filed an *Amicus Curiae* brief in the Supreme Court in *Crawford* urging the Court to clarify the doctrinal confusion that has arisen in lower courts, including in the lower courts in *Crawford*, in cases involving constitutional challenges to State laws that directly deny citizens their right to vote.[74] Professor Chemerinsky drew a distinction between two types of election law cases that had been decided by the Supreme Court. In the first line of cases (including *Kramer* and *Dunn*), the Supreme Court applied "close scrutiny" to State laws that directly deny the right to vote and required the laws to be "necessary to promote a compelling state interest."[75] The other line of cases (including *Anderson* and *Burdick*) involved State statutes that indirectly or derivatively impose a burden on the right to vote and the Supreme Court has held that constitutional challenges to these laws will be decided based a balancing of the burden on the voters' rights resulting from the laws and the State's interests that are promoted by them.[76] Professor Chemerinsky urged the Supreme Court to apply the *Kramer-Dunn* precedents in deciding *Crawford* and determine whether SEA 483 is narrowly tailored to serve a compelling State interest.[77] Unfortunately, the Supreme Court did not adopt Professor Chemerinsky's suggestion and eight of the nine justices adopted the *Anderson-Burdick* balancing test to guide their opinions in *Crawford*.[78] No Supreme Court justice distinguished or even referred to the *Kramer-Dunn* precedents in their opinions in *Crawford*.

The *Kramer-Dunn* precedents should have been applied to the plaintiffs' equal protection challenge in *Crawford* because SEA 483 imposed a new restriction on voting that prevented some otherwise eligible Indiana voters from casting a ballot. The profound interests that Americans have in voting that were so aptly described in *Kramer* were frustrated for those registered Indiana voters who could not cast a ballot because of SEA 483.

Had the Supreme Court properly applied the *Kramer-Dunn* precedents, the governmental defendants in *Crawford* would have had the burden to establish that SEA 483 was necessary to satisfy a compelling State interest in combatting voter fraud.[79] It is difficult to comprehend how the defendants in *Crawford* could have met this burden when Indiana failed to present any evidence that in person voter fraud had ever occurred in State history.[80]

By not applying the *Kramer-Dunn* precedents to decide *Crawford*, the Supreme Court diminished significantly the constitutional protection of

the right of Americans to vote. The *Anderson-Burdick* line of cases simply require a balancing of the interests of voters against the interests of the State in the electoral process. The *Kramer-Dunn* line of cases, on the other hand, requires States that pass laws that restrict the right to vote to justify such laws as necessary to promote a compelling government interest. The right of Americans to vote deserves the strongest protections that the Constitution affords[81] and the U.S. Supreme Court should have applied the *Kramer-Dunn* precedents in *Crawford.*

Constitutional challenges to state photo ID laws after *Crawford*

Constitutional challenges to State photo identification laws did not abate but rather increased after *Crawford* was decided by the Supreme Court. Since a majority of the justices in *Crawford* recognized that some eligible Indiana voters might have their constitutional right to vote violated by the operation of SEA 483,[82] constitutional challenges to state voter identification laws have been brought after *Crawford* by individuals and members of discreet groups who are burdened by such laws.[83]

After *Crawford* was decided by the Supreme Court, implementation of voter identification laws have been found to violate the constitutional rights of: African Americans in North Carolina;[84] voters in Wisconsin who are entitled to free IDs which will enable them to vote;[85] and eligible American Indian voters who lack statutorily-required voter identification in North Dakota.[86] The Fifth Circuit, sitting in en banc, held that a Texas photo identification law had a discriminatory effect on minorities' voting rights in violation of Section 2 of the federal Voting Rights Act.[87] A state court judge in Pennsylvania also held that the Commonwealth of Pennsylvania's photo ID law violated the state constitution in that it burdens the fundamental right to vote.[88] These cases indicate that several state voter identification laws that were enacted after *Crawford* have been implemented in ways that violate the constitutional rights of individuals or members of groups who simply seek to vote in state and federal elections.

Professor Richard L. Hasen, an election law expert, has surveyed the efficacy of litigation that has challenged state voter identification laws in the wake of *Crawford.*[89] Professor Hasen recognizes that this litigation is important because it seeks to enfranchise voters who face special burdens obtaining acceptable voter identification credentials.[90] However, he asserts that the litigation challenging voter identification laws imposes substantial burdens and costs on voters, voter advocacy groups, courts, government entities and their agencies.[91] He also asserts that voter identification laws contribute to voter confusion and discouragement and that administrative errors in their implementation further disenfranchise voters.[92] He contends

that what is often lost in the intense focus on addressing the myriad problems created by voter identification laws is that the "evidence that such laws prevent impersonation fraud or instill voter confidence is essentially non-existent."[93] Professor Hasen concludes that states should be required by courts to provide actual evidence that they have good reasons for burdening voters with these identification requirements and that the means used are closely connected to these reasons.[94] Of course, strict scrutiny review by the courts of voter identification laws would require states to provide the type of justification for these laws that Professor Hasen seeks.

Congress's authority to address state voter identification laws

Although a majority of the Supreme Court justices in *Crawford* declined to find Indiana's voter identification law to be facially unconstitutional, subsequent lower federal court decisions have found state-created voter identification laws to be unconstitutional as applied to members of discreet groups, including racial minorities. The United States Congress has the authority under the Fourteenth and Fifteenth Amendments to enact legislation to prevent and remedy violations of the substantive provisions of these Amendments.[95] Congressional action in response to another discriminatory electoral practice, literacy tests, illustrates the type of legislation that Congress could enact to prevent or remedy the unconstitutional violations that state voter identification laws have spawned.

In the late nineteenth and early twentieth centuries, many states enacted literacy tests that required prospective voters to establish their proficiency in reading and/or writing English as a requirement for voting. The Supreme Court held in 1959 that literacy tests are constitutional, absent proof of racial discrimination in their application.[96] However, Congress later determined that literacy tests were used, especially in southern states, to prevent African Americans from voting and as a result their use in these states was suspended for five years by the Voting Rights Act of 1965.[97] South Carolina, one of the states whose literacy test was suspended, challenged Congress's authority to suspend its literacy test.[98] The Supreme Court held that the suspension of South Carolina's literacy test was a proper exercise of Congress's authority under Section 2 of the Fifteenth Amendment because Congress had determined that South Carolina's literacy test had been instituted and administered to prevent African Americans from voting.[99] In the Voting Rights Act of 1965, Congress also provided that certain persons of Puerto Rican descent could not be denied the right to vote due to an inability to read or write English[100] and the Supreme Court upheld Congress's authority to enact this provision under section 5 of the Fourteenth Amendment in *Katzenback v. Morgan*.[101] In 1970, Congress amended the Voting Rights Act of 1965 to suspend literacy tests in all federal, state and local elections for a period of five years.[102] Oregon and

several other states challenged Congress' authority to suspend the use of all literacy tests but the Supreme Court unanimously agreed that Congress had the authority under the Fourteenth and Fifteenth Amendments to suspend them in all jurisdictions because they had been used to discriminate against voters on the basis of race.[103]

As with state literacy tests, Congress can enact laws that seek to prevent or remedy the unconstitutional applications of state voter identification laws. This power extends to suspending their use in federal and state elections because they have been applied in a racially discriminatory manner. Congress could prohibit states from requiring voters to present identification documentation as a qualification for casting a ballot. Such a prohibition would prevent states from enacting voter identification laws, which suppress voter turnout,[104] without evidence that in-person voter fraud is a widespread problem in American elections. Congress should act to make it easier for Americans to vote, not more difficult.

Conclusion

The right to vote in America is a precious right. Americans have fought and died to expand and protect it. The U.S. Supreme Court's decision in *Crawford* constitutes a substantial diminution of the constitutional protection of the right of Americans to vote. Congress should enact legislation that prohibits state-created restrictions on voting, such as voter identification laws. Only then will the right of Americans to vote be protected commensurate to its importance in our democratic and republican form of government.

NOTES

1. 553 U.S. 181 (2008).
2. U.S. Const. art. I, §§ 1, 2.
3. U.S. Const. amend. XVII
4. U.S. Const. art. II, § 1.
5. Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247, 2257–58 (2013).
6. Ari Berman, Give Us The Ballot 11 (2015).
7. U.S. Const. amend. XIX.
8. Voting Rights Project of the American Civil Liberties Union, Voting Rights in Indian Country 5 (2009), *available at* https://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf.
9. Cal. Const. art. II, § 1 (1879).
10. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association In Maui, Hawaii 3 (May 6, 1987), *available at* http://thurgoodmarshall.com/the-bicentennial-speech/.
11. U.S. Const. amend. XIII.
12. U.S. Const. amend. XIV.
13. U.S. Const. amend. XV.

14. MICHAEL WALDMAN, THE FIGHT TO VOTE 82–86 (2016).
15. *Id.* at 86, 88.
16. *Id.* at 84, 88.
17. *Id.* at 88.
18. 52 U.S.C. § 10301 *et. seq.*
19. 238 U.S. 347 (1915).
20. *Id.* at 362–65.
21. 273 U.S. 536 (1927).
22. *Id.* at 539–41.
23. 304 U.S. 144 (1938).
24. *Id.* at 152–53 n.4.
25. *Id.*
26. 383 U.S. 663 (1966).
27. *Id.* at 664–66.
28. *Id.* at 670.
29. 395 U.S. 621 (1969).
30. *Id.* at 622.
31. *Id.* at 622–25.
32. *Id.* at 626–27.
33. *Id.* at 626 (internal citations omitted).
34. *Id.* at 627–28.
35. *Id.* at 622, 633.
36. 405 U.S. 330 (1972).
37. *Id.* at 331–35, 360.
38. *Id.* at 337, 342 (internal citations omitted).
39. *Id.* at 342–43 (internal citations omitted).
40. *See* Cipriano v. City of Houma, 395 U.S. 701, 704, 706 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204, 205, 208–09 (1970); Hill v. Stone, 421 U.S. 289, 295, 297, 300–301 (1975).
41. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 909 (5th ed. 2015).
42. *Voter ID History*, National Conference of State Legislatures (May 31, 2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx.
43. *Id.*
44. Indiana Senate Enrolled Act No. 483, Pub. L. No. 109-2005.
45. *Id.*
46. Indiana Democratic Party v. Rokita, 458 F. Supp.2d 775, 782–84 (S.D. Ind. 2006).
47. *Id.* at 807.
48. *Id.* at 820–22.
49. *Id.*
50. *Id.* at 826.
51. *Id.* at 830.
52. *Id.* at 845.
53. Crawford v. Marion County Election Bd., 472 F. 3d 949, 952 (7th Cir. 2007).

54. *Id.* at 954.
55. *Id.*
56. *Id.* at 954, 956–57. The Supreme Court majority in *Burdick* recognized that strict scrutiny would apply if a state election law imposed a severe burden on the First and Fourteenth Amendment—rights that are implicated in the right to vote. 504 U.S. 428, 434 (1992).
57. Crawford v. Marion County Election Bd., 553 U.S. 181 (2008).
58. *Id.* at 188–89, 202–04.
59. *Id.* at 197–98.
60. *Id.* at 199–202.
61. *Id.* at 204.
62. *Id.* at 209.
63. *Id.* at 207–08.
64. *Id.*
65. *Id.* at 209.
66. *Id.* at 218, 223.
67. *Id.* at 225–26.
68. *Id.* at 210–11, 237.
69. *Id.* at 237, 241.
70. Indiana Democratic Party v. Rosita, 485 F.Supp.2d 775, 788 (S.D. Ind. 2006).
71. *Id.* at 989.
72. Anderson v. Celebrezze, 460 U.S. 780, 782–83 (1983).
73. Burdick v. Takushi, 504 U.S. 428, 430 (1992).
74. Brief of Professor Erwin Chemerinsky as Amicus Curiae Supporting Neither Party at 1, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25).
75. *Id.* at 3–6.
76. *Id.* at 6–9.
77. *Id.* at 12–16.
78. *Crawford*, 553 U.S. at 189–191, 204–07, 209–11. Justice Breyer's dissenting opinion did not adopt the reasoning of either line of cases that Professor Chemerinsky described in his amicus curiae brief.
79. *See* Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972).
80. *Crawford*, 553 U.S. at 194.
81. Writing for the majority in *City of Boerne v. Flores*, Justice Kennedy described the compelling interest test as "the most demanding test known to constitutional law." 521 U.S. 507, 534 (1997).
82. *Id.* at 199–202.
83. Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. 100, 103–17 (2016).
84. NC State Conference of NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).
85. One Wisconsin Institute, Inc. v. Thomsen, 198 F. Supp. 3d 896, 949 (W.D. Wis. 2016).
86. Brakebill v. Jaeger, No. 16-CV-8, 2016 WL 7118548, *10 (N.D. Aug. 1, 2016).

87. Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (dismissing the plaintiff's equal protection claims because judicial relief for such a violation would be the same as a Voting Rights Act violation).
88. Applewhite v. Pennsylvania, No. 330 M.D. 2012, 2014 WL 184988, Appx. B, 9 (Pa. Jan. 17, 2014). Pennsylvania did not appeal the *Applewhite* decision.
89. *See* Hasen, *supra*, note 83.
90. *Id.* at 101.
91. *Id.* at 111.
92. *Id.*
93. *Id.* at 119.
94. *Id.* at 120.
95. Nevada Dep't. of Human Resources v. Hibbs, 538 U.S. 721, 727–35 (2003) (citing U.S. CONST. amend. XIV); City of Rome v. United States, 446 U.S. 156, 173–78 (1980) (citing U.S. CONST. amend. XV).
96. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51–54 (1959).
97. Voting Rights Act § 4(a) (1965), 52 U.S.C. § 10303(a).
98. South Carolina v. Katzenbach, 383 U.S. 301 (1966).
99. *Id.* at 308, 333–34.
100. *See* Voting Rights Act § 4(e) (1965), 52 U.S.C. § 10303(e).
101. 384 U.S. 641, 646 (1966).
102. Pub L. 91-285, 84 Stat. 314 (1970).
103. Oregon v. Mitchell, 400 U.S. 112, 118, 131–34 (1970).
104. The United States Government Accountability Office's analysis of voter data indicated that voter turnout decreased between the 2008 and 2012 general elections in Kansas and Tennessee because these states changed their respective voter identification requirements. *See* UNITED STATES GOVERNMENTAL ACCOUNTABILITY OFFICE, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 48 (2014), *available at* https://www.gao.gov/assets/670/665966.pdf. Both Kansas and Tennessee enacted laws between the 2008 and 2012 general elections that required their voters to present photo identification as a prerequisite for voting. *See* ERIC A. FISCHER ET AL., STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS 26, 29 tbl.A-1 (2016), *available at* https://fas.org/sgp/crs/misc/R42806.pdf.