

11-2009

## Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote

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### Recommended Citation

Joel A. Heller, Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote, 62 *Vanderbilt Law Review* 1871 (2019)

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# NOTES

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## I. INTRODUCTION

In his first inaugural address, President Franklin Roosevelt assured the American people that “the only thing we have to fear is fear itself.”<sup>1</sup> President Roosevelt’s famous statement begs the question, however, of why we should fear fear itself. What, or whom, does fear harm? When faced with the presence of fear, society must consider what steps it is willing to take and what it is willing to give up in order to address that fear. These considerations become particularly acute when the government uses the existence of fear as a rationale for legislation. The propriety of fear-based lawmaking is questionable, since fear is often unreasonable, malleable, and vague.<sup>2</sup>

This debate has recently arisen in the context of state laws that require individuals to present photo identification in order to vote. While proponents generally say that identification requirements are necessary to prevent in-person voter fraud, they have also argued that such laws are necessary to address voter fear.<sup>3</sup> Without photo identification laws, proponents contend, voters will fear that fraud is occurring at the polls. Indeed, states have made this argument even in the absence of any evidence of actual in-person voter fraud.<sup>4</sup> In *Crawford v. Marion County Election Board*, the Supreme Court accepted the State of Indiana’s argument that addressing fear of fraud is a state interest with “independent significance” apart from the interest in halting actual fraud.<sup>5</sup> In dicta in *Purcell v. Gonzalez*, the

1. Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 11 (Samuel I. Rosenman ed., 1938).

2. See generally CASS SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 1–5, 35–61 (2005) (arguing that fear-based lawmaking is faulty because fear is inherently faulty).

3. E.g., *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008); Weinschenk v. Missouri, 203 S.W.3d 201, 205, 218 (Mo. 2006).

4. See *Crawford*, 128 S. Ct. at 1619–20 (recounting the state’s contentions that its law served the interest of safeguarding public confidence but noting that the “record contains no evidence of any such [in-person] fraud actually occurring in Indiana at any time”).

5. *Id.* at 1620.

Court likewise expressed approval of laws designed to calm “[v]oters who fear their legitimate votes will be outweighed by fraudulent ones.”<sup>6</sup>

The Court has yet to evaluate a voting law that uses fear as a rationale under heightened scrutiny, as the law in *Crawford* survived a deferential level of review.<sup>7</sup> As such, courts have not yet had occasion to determine if a state’s interest in addressing fear of fraud is compelling. Indeed, courts presently lack an analytical framework for making such a determination. Yet a challenge that successfully triggers more exacting scrutiny is foreseeable; indeed, *Crawford* provides several hints of the shape such a challenge could take.<sup>8</sup> Unless states have significantly greater success than in previous cases in gathering evidence of in-person voter fraud, they will not be able to rely upon an interest in addressing actual fraud to survive heightened scrutiny. As such, the nature of the state’s interest in addressing fear of fraud will likely constitute the major focus of the case.

Fear in the photo ID context is particularly problematic, since such laws completely deny the right to vote to one group of legitimate voters—individuals without a photo ID, who are typically indigent, elderly, or members of minority populations<sup>9</sup>—in order to calm the fears of another group of voters. Measures that ensure confidence in the electoral system are important, but their salutary effect must be balanced against the burdens they create. Freedom from fear is not a fundamental right, but the right to vote is.<sup>10</sup> A framework for evaluating fear-based election laws is thus necessary not simply to prepare courts for a foreseeable controversy but also, and more importantly, to safeguard the fundamental right to vote. While this problem is implicated any time the state uses fear to tighten its voter requirements, the risk of disenfranchisement is more acute when the requirement is a photo ID, since such IDs are often particularly difficult to obtain.<sup>11</sup> In addition, states have so far made the fear argument most prominently in the photo ID context.

Decisions such as *Crawford* seem to be based on judicial assumptions that fear is a sufficiently serious harm to serve as a legitimate target of legislation. To justify their acceptance of voter fear

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6. 549 U.S. 1, 4 (2006) (per curiam).

7. 128 S. Ct. at 1616, 1623.

8. *Id.* at 1621 n.19, 1622–23.

9. Brief for Petitioners at 12–13, *Crawford*, 128 S. Ct. 1610 (No. 07-21).

10. *E.g.*, *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (holding the right to vote fundamental); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (same).

11. *See infra* notes 37–41 and accompanying text.

as a rationale for lawmaking, and for the sake of consistency and manageability, courts must articulate the legal principles behind such decisions and establish a generally applicable standard for the evaluation of such laws. This Note proposes an outline for such a standard and presents several questions that a court should ask when evaluating laws that deny or abridge the right to vote based on fear. Providing definite answers to these questions is beyond the scope of this Note, as they will often involve quantitative or other factual information specific to a particular jurisdiction. Nonetheless, pressing courts to ask these questions is preferable to acquiescing in their current unguided analysis.

Rather than address an open question and attempt to provide an answer, this Note instead takes an inquiry at risk of being answered poorly and unsettles it by asking more questions. Constitutional theory based on intuition or assumption is troubling, particularly when those assumptions deal with something as irrational and malleable as fear and when the fundamental right to vote is at stake. As such, this Note suggests that the courts step back and engage in a more probing analysis before intuition calcifies into doctrine. While “[l]iberty finds no refuge in a jurisprudence of doubt,”<sup>12</sup> it fares little better under answers premised upon faulty conclusions and unproven assertions.

Part II of this Note first provides background on the process of evaluating election laws generally, then discusses how courts have considered the use of fear in the voting context, particularly in cases involving photo ID laws. Part III discusses the inherent risks of fear-based lawmaking that affects the right to vote and critiques the courts’ failure to define the nature of the state interest at stake adequately or to craft a consistent and manageable standard for analyzing such laws. Finally, Part IV presents a series of questions that courts should ask, including whether the fear is real, reasonable, and correlated with a defined and generally recognized harm. While not an exhaustive list, these three questions are proposed since they are particularly probative of the nature and strength of the state interest in addressing fear of fraud. Once a court identifies the interest at stake, it can more effectively judge the necessity of the challenged law to serve that interest when balanced against the burden it places on the right to vote.

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12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

## II. VOTING LAWS AND VOTER FEARS

Courts have long recognized that voting is unique and that laws affecting the right to vote should receive heightened scrutiny. Voting “is regarded as a fundamental political right, because preservative of all rights.”<sup>13</sup> Recent decisions affirm this sentiment, holding that “it is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure’ ”<sup>14</sup> and describing the right to vote as “one of the most fundamental rights of our citizens.”<sup>15</sup> Determining under what circumstances and for what reasons states can pass laws that restrict this important right, and how courts should evaluate such laws, is a central inquiry for American democracy.

A. *Evaluating Voting Laws*

In a series of cases in the 1960s and 1970s, the Supreme Court consistently held that voting was a fundamental right safeguarded by the Equal Protection Clause.<sup>16</sup> Once the state has granted the right to vote, it cannot arbitrarily abridge or deny that right to a certain group of otherwise legitimate voters. Generally, any law restricting fundamental rights is subject to strict scrutiny.<sup>17</sup> However, the Constitution charges states with setting the “Times, Places and Manner of holding Elections for Senators and Representatives,”<sup>18</sup> an authority that necessarily leads to some restrictions on the right to vote. States can, for instance, establish residency requirements,<sup>19</sup> registration deadlines,<sup>20</sup> or limitations on write-in voting.<sup>21</sup> Such

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13. *Yick Wo*, 118 U.S. at 370.

14. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections*, 440 U.S. at 184).

15. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1240 (2009).

16. *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“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.”); *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.”).

17. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Reynolds*, 377 U.S. at 562.

18. U.S. CONST. art. I, § 4, cl. 1. The Court has held that states have an analogous power to control the election process for state offices. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

19. *Dunn*, 405 U.S. at 343.

20. *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 122–23 (D. Conn. 2005).

21. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).

measures are necessary to ensure that “some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>22</sup>

Recognizing this necessity, the Court developed a more flexible framework for evaluating election laws that affect the right to vote. First articulated in *Anderson v. Celebrezze*<sup>23</sup> and reaffirmed nine years later in *Burdick v. Takushi*,<sup>24</sup> this framework remains in place today. Like much judicial analysis, evaluation of election laws consists of a balancing test. Under *Burdick*, “the rigorousness of [the court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens” the right to vote.<sup>25</sup> As such, not all laws that affect the right to vote are subject to strict scrutiny, but rather face a sliding scale of scrutiny. The severity of the burden determines the level of scrutiny the court will apply to the “precise interests put forward by the State” and “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>26</sup>

If the burden is severe, heightened scrutiny applies and the state must show that its law is narrowly drawn to support a compelling state interest.<sup>27</sup> By contrast, if the burden is minimal and nondiscriminatory, the state need only show that the law is a reasonable way of accomplishing a “legitimate” interest.<sup>28</sup> At this lower level of review, akin to traditional rational basis, the court will typically defer to the judgments of the legislature.<sup>29</sup> While rejecting the inflexible application of strict scrutiny, the Court nonetheless

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22. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

23. 460 U.S. 780, 789 (1983).

24. 504 U.S. at 434.

25. *Id.*

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

27. *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). While the Court uses the language of strict scrutiny, some subsequent decisions have described the heightened scrutiny under *Burdick* as “strict scrutiny light.” *E.g.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff’d*, 128 S. Ct. 1610, 1613 (2008).

28. *Burdick*, 504 U.S. at 434, 440.

29. The Court has never clarified whether the level of review it applies to election laws with non-severe burdens is actually rational basis or just relatively deferential. Compare *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (applying rational basis), with *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (holding that a law without a severe burden could fail under *Burdick* even if the “regulation is rational”). See also Brief for Christopher Elmendorf & Daniel P. Tokaji as Amici Curiae Supporting Petitioners at 2–3, 7 n.6, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (No. 07-21) (noting the uncertainty and suggesting a “reasonably necessary to important state interests” standard).

reiterated that “ ‘precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.’ ”<sup>30</sup>

### *B. Voter ID Laws and Voter Fears*

#### 1. Voter ID Background

Following the 2000 presidential election and the accompanying confusion in Florida, the mechanics of the electoral system faced increased scrutiny from the public, the press, and politicians.<sup>31</sup> In response, Congress passed the Help America Vote Act (“HAVA”),<sup>32</sup> and various official commissions met and issued reports and recommendations on improving the system. Although voter fraud was not one of the major issues in the Florida election, many of the responses included proposal or enactment of new identification requirements for voting, including the requirement that voters bring a photo ID to the polls. HAVA only required first-time voters who had registered by mail to produce an ID when voting in person and did not mandate a photo ID.<sup>33</sup>

One of the more controversial recommendations came from the Report of the Commission on Federal Election Reform (commonly known as the Carter-Baker Report, after its two chairmen), which proposed that states require all voters to present a state-issued photo ID every time they vote.<sup>34</sup> While most states maintain the HAVA minimum for ID requirements, Indiana, Georgia, Missouri, and Florida passed laws requiring photo ID of nearly all in-person voters.<sup>35</sup> In addition, Michigan, Louisiana, and South Dakota ask for photo ID,

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30. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

31. *E.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 689–90 (2006) (discussing the “unprecedented” focus on election administration in the aftermath of the 2000 presidential election).

32. 42 U.S.C. §§ 15301–15545 (Supp. 2005).

33. *Id.* § 15483(b)(1)-(2)(A).

34. COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 21 (2005), available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf).

35. State Requirements for Voter ID, <http://www.ncsl.org/programs/legismgt/elect/taskf/voteridreq.htm> (last visited Oct. 1, 2009). Each of these states allows voters without a photo ID to cast a provisional ballot, though Georgia will not count these ballots unless the voter returns within a set period of time and presents a photo ID and Indiana requires the voter to return with a photo ID or to sign an affidavit stating that he cannot obtain such an ID either for religious reasons or because he is indigent. The Ohio State University Moritz College of Law, Election Law Maps Voter ID Requirements, <http://moritzlaw.osu.edu/electionlaw/maps/maps.php?ID=69> (last visited Oct. 1, 2009).

but allow voters without one to cast a regular ballot after signing an affidavit attesting to their identity.<sup>36</sup>

## 2. Constitutional Challenges and the Rise of Fear

Constitutional challenges to such laws met with varying degrees of success in the lower courts. Plaintiffs argued that photo ID laws violate equal protection by placing a significant burden on the fundamental right to vote for certain populations, such as minorities, the indigent, and the elderly, that are less likely to have a state-issued photo ID.<sup>37</sup> These challenges contended that the requirements were a significant burden due to the cost and administrative difficulty of obtaining such an ID. Courts held that charging a fee for the ID constituted an impermissible poll tax.<sup>38</sup> Even states that offered a free ID required applicants to present other forms of identifying documentation such as a passport or a birth certificate, which themselves cost money to obtain.<sup>39</sup> In addition, securing a copy of a birth certificate often proved difficult for elderly or homeless voters who no longer lived in the state of their birth.<sup>40</sup> As such, the voters who lacked a photo ID tended also to lack the means to obtain one.<sup>41</sup>

Courts struck down photo ID requirements as violative of equal protection in Missouri<sup>42</sup> and the city of Albuquerque,<sup>43</sup> and initially enjoined enforcement of the Georgia law.<sup>44</sup> Such requirements were

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36. Voter Identification, [http://www.pewcenteronthestates.org/uploadedFiles/HAVA\\_Map2.pdf](http://www.pewcenteronthestates.org/uploadedFiles/HAVA_Map2.pdf) (last visited Oct. 1, 2009).

37. *E.g.*, Brief for Petitioners, *supra* note 9, at 12–13. Indeed, Indiana acknowledged that “seniors and the disabled who live in care facilities would likely have particular difficulty traveling to obtain photo identification.” League of Women Voters of Ind., Inc. v. Rokita, No. 49A02-0901-CV-40, 2009 Ind. App. LEXIS 1628, at \*30 (Ind. Ct. App. Sept. 17, 2009).

38. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1366–70 (N.D. Ga. 2005).

39. *E.g.*, Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621 n.17 (2008). Although counties in Indiana charged as little as \$3–\$12 for a copy of a birth certificate, *id.*, the Supreme Court famously held a \$1.50 poll tax unconstitutional in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 664 n.1, 670 (1966).

40. Crawford v. Marion County Election Bd., 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 128 S. Ct. 1610 (2008).

41. Indeed, obtaining a photo ID in Indiana is now even more difficult. A new identity theft law requires all first-time applicants to present a minimum of four identifying documents in order to obtain such an ID. Editorial, *BMV Headaches Ahead*, FORT WAYNE J. GAZETTE, July 15, 2009.

42. Weinschenk v. Missouri, 203 S.W.3d 201, 221–22 (Mo. 2006).

43. ACLU v. Santillanes, 506 F. Supp. 2d 598, 607 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

44. Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006).

upheld in Indiana,<sup>45</sup> Michigan,<sup>46</sup> Albuquerque (on appeal),<sup>47</sup> and, ultimately, Georgia.<sup>48</sup>

The Supreme Court first addressed the issue in the form of an appeal from an interlocutory injunction order in *Purcell v. Gonzalez*.<sup>49</sup> The challenged Arizona law required proof of citizenship when registering and either a photo ID or two non-photo forms of identification when voting in person.<sup>50</sup> While the Court reversed the injunction upon a finding that the Ninth Circuit's failure to defer to the discretion of the district court was erroneous, the Court commented briefly on the merits of the case.<sup>51</sup> The per curiam opinion noted that Arizona "indisputably" had a compelling interest in preserving the integrity of its election process against threats like voter fraud.<sup>52</sup> The Court reasoned that fraud "drives honest citizens out of the democratic process and breeds distrust of our government."<sup>53</sup> The Court then went one step further, stating that "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."<sup>54</sup>

In a single paragraph concurrence, Justice Stevens stressed the need to develop an adequate factual record when important constitutional issues are at stake. The Court must resolve such issues "on the basis of historical facts rather than speculation."<sup>55</sup> In particular, he noted the lack of factual evidence of either the "prevalence and character of the fraudulent practices that allegedly justify" the ID requirement or the "scope of disenfranchisement" that it would produce.<sup>56</sup>

Lower courts and commentators interpreted the *Purcell* dicta as implying that a state's interest in addressing fear of fraud may validly serve as a rationale for legislation. The Michigan Supreme Court quoted the "feel disenfranchised" language in an advisory

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45. *Crawford*, 472 F.3d at 954 (majority opinion).

46. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 447-48 (Mich. 2007).

47. *ACLU v. Santillanes*, 546 F.3d 1313, 1325 (10th Cir. 2008).

48. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009).

49. 549 U.S. 1 (2006) (per curiam).

50. ARIZ. REV. STAT. ANN. § 16-579 (2008); *Purcell*, 549 U.S. at 2.

51. *Purcell*, 549 U.S. at 4-5.

52. *Id.* at 4.

53. *Id.*

54. *Id.*

55. *Id.* at 6 (Stevens, J., concurring).

56. *Id.*

opinion deeming a state photo ID law constitutional.<sup>57</sup> A federal district court in Florida refused to enjoin a law that required certain voters to present a driver's license or Social Security card at the polls in part because the law was intended to "enhance[] public confidence."<sup>58</sup> Likewise, the Albuquerque City Council listed the need for "the public to have confidence in the election process" as its first finding in a resolution proposing a vote on a photo ID law.<sup>59</sup> Academic commentary split between praise and condemnation, but both sides agreed that *Purcell* could allow states to use fear of fraud as support for enhanced voter requirements.<sup>60</sup>

At least one court expressly rejected this rationale. The Missouri Supreme Court struck down Missouri's photo ID law despite the state's assertions that it had a "compelling interest in combating perceptions of voter fraud" and that such a law was necessary to "reassure voters who 'perceive' that fraud exists."<sup>61</sup> Applying heightened scrutiny, the court held that the state's interest in reassuring frightened voters was insufficient to support the law in the absence of evidence of actual in-person voter fraud.<sup>62</sup>

### 3. *Crawford v. Marion County Election Board*

In the wake of these lower court challenges, the Supreme Court ruled on the constitutionality of Indiana's photo ID law in *Crawford v. Marion County Election Board*.<sup>63</sup> Applying the *Burdick* framework, the Court found that the plaintiffs had failed to demonstrate that the law's burden on the right to vote was severe.<sup>64</sup> Indeed, the Court held that the record lacked sufficient evidence for the Court even to

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57. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 454 (Mich. 2007) (quoting *Purcell*, 549 U.S. at 4).

58. Fla. State Conference of the NAACP v. Browning, 569 F. Supp. 2d 1237, 1252 (N.D. Fla. 2008).

59. ACLU v. Santillanes, 506 F. Supp. 2d 598, 614 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

60. *E.g.*, Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1740 (2008) (expressing concern that, post-*Purcell*, parties had "taken the Court at its word that combating perceptions of fraud . . . can justify voter identification laws"); Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voter Fraud*, 83 N.Y.U. L. REV. 847, 874 (2008) (arguing that *Purcell* showed the Court "leaning toward recognizing the prevention of the appearance of fraud as a compelling state interest" and praising that development).

61. *Weinschenk v. Missouri*, 203 S.W.3d 201, 218–19 & n.29, 205 (Mo. 2006).

62. *Id.* at 205, 215. For additional discussion of *Weinschenk*, see *infra* Part III.A.2.

63. 128 S. Ct. 1610, 1613 (2008).

64. *Id.* at 1621–23.

measure the law's burden on the right to vote.<sup>65</sup> As such, the Court applied a low level of review, requiring only that the law be reasonable and serve a legitimate state interest.<sup>66</sup>

Indiana's proffered interests included deterring in-person voter fraud and safeguarding voter confidence.<sup>67</sup> The Court acknowledged that the record "contains no evidence of any such fraud actually occurring in Indiana at any time in its history"<sup>68</sup> and instead cited nineteenth-century Boss Tweed anecdotes and reports from other jurisdictions<sup>69</sup> as support for the rationality of a photo ID law to meet Indiana's interest in preventing fraud. Likewise, the Court accepted with minimal comment Indiana's claim that its interest in safeguarding voter confidence had "independent significance" sufficient to support the photo ID law.<sup>70</sup>

The assertion that a state has a legitimate interest in responding to the public's fear of fraud in the electoral process, even in the absence of evidence of any actual fraud, recalls the *Purcell* dicta that voters who fear fraud are in some way disenfranchised. Indeed, Indiana cited *Purcell* in its brief for the proposition that its law was justified as addressing the "perception of corrupt elections."<sup>71</sup> Nine amicus briefs similarly cited *Purcell* in support of Indiana's ID requirement.<sup>72</sup> While the Court made no mention of it in the opinion, Indiana's brief also cited a Rasmussen public opinion poll reporting the percentage of voters who "believed there was 'a lot' or 'some' fraud in elections."<sup>73</sup>

Under low-level scrutiny, this minimal support underlying Indiana's interests was sufficient. The Court required neither

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65. *Id.* For instance, the record did not list the number of registered Indiana voters who lacked ID. *Id.* at 1622. Further, none of the named plaintiffs could definitively show that they were unable to acquire a photo ID. *Id.* The Court held that such scant evidence could not support a facial challenge, seeking to invalidate the law "in all its applications." *Id.* at 1621.

66. *Id.* at 1616, 1623.

67. *Id.* at 1617.

68. *Id.* at 1619.

69. *Id.* at 1619 & nn.11–12. Justice Stevens recounted the perhaps apocryphal instructions to Boss Tweed's supporters to alternate between the polling place and the barber on Election Day in order to vote "with their whiskers on, . . . vote 'em again with the side lilacs and a mustache . . . vote 'em a third time with the mustache [and i]f that ain't enough . . . clean off the mustache and vote 'em plain face." *Id.* at 1619 n.11.

70. *Id.* at 1620.

71. Brief for State Respondents at 53, *Crawford*, 128 S. Ct. 1610 (Nos. 07-21, 07-25).

72. See Ansolabehere & Persily, *supra* note 60, at 1740 & n.8 (citing amicus briefs).

73. Brief for State Respondents, *supra* note 71, at 55.

empirical evidence nor much theoretical justification.<sup>74</sup> Justice Souter, in dissent, rebuked the majority for failing to make a “careful, ground-level appraisal . . . of the State’s reasons for imposing” a burden on the right to vote, arguing that, even under rational basis, Indiana cannot support its law simply with “abstract interests” in a smooth electoral system.<sup>75</sup> Rather, the state must proffer the “precise interests” that the law is meant to serve.<sup>76</sup>

*Crawford* does not foreclose the possibility that heightened scrutiny might apply in subsequent challenges to photo ID laws, however. The decision reflects the Roberts Court’s general unwillingness to entertain facial challenges to election laws,<sup>77</sup> but six of the Justices intimated that as-applied challenges might meet with greater success.<sup>78</sup> Indeed, the Court suggested at least two parties who might bring such a challenge: indigents and individuals who have a religious objection to being photographed.<sup>79</sup> When one such challenge manages to identify burdens on the right to vote significant enough to trigger heightened scrutiny, the courts will presumably demand more explanation from the state as to the nature of its interest in addressing fear of fraud.<sup>80</sup>

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74. Somewhat ironically, Justice Stevens, who had penned the paean to factual records in his *Purcell* concurrence, 549 U.S. 1, 6 (2006) (Stevens, J., concurring), wrote the majority opinion in *Crawford*, accepting Indiana’s rationales without much factual support.

75. *Crawford*, 128 S. Ct. at 1627–28 (Souter, J., dissenting).

76. *Id.* at 1635 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

77. See generally Nathaniel Persily & Jennifer Rosenberg, *Defacing Democracy? The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court’s Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1644–47, 1658–75 (2009) (describing the Roberts Court’s strong preference for as-applied challenges, particularly in the context of election law controversies).

78. Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy in the opinion that consideration of only the law’s “broad application to all Indiana voters” precluded a finding of a severe burden, *Crawford*, 128 S. Ct. at 1623, and the three dissenting justices would have invalidated the law under the present challenge, *id.* at 1627 (Souter, J., dissenting). Only Justices Scalia, Alito, and Thomas rejected the possibility of an as-applied challenge. *Id.* at 1625 (Scalia, J., concurring).

79. *Id.* at 1621 n.19, 1622–23 (majority opinion).

80. The League of Women Voters subsequently brought a successful state court challenge to the photo ID law the Court upheld in *Crawford*. *League of Women Voters of Ind., Inc. v. Rokita*, No. 49A02-0901-CV-40, 2009 Ind. App. LEXIS 1628, at \*1–5, \*44 (Ind. Ct. App. Sept. 17, 2009). The Indiana Court of Appeals invalidated the law as violative of the state constitution’s Equal Privileges and Immunities Clause on the grounds that the provisions exempting absentee voters and voters who resided in state licensed health care facilities that also served as polling sites constituted unreasonable differential treatment. *Id.* at \*22–25, \*34–35, \*44. The opinion did not discuss fear of fraud, suggesting that neither party raised the issue. The likely legislative response would seem to be an expansion of the ID requirement, which is probably not voting rights advocates’ ideal result.

## 4. Perceptions Elsewhere in Election Law

*a. Campaign Finance*

While the *Crawford* Court's reliance on fear as support for a law was novel in the voting context, public perception has been used as a rationale for campaign finance laws since the seminal case of *Buckley v. Valeo*.<sup>81</sup> In *Buckley*, the Court announced that the government's interests in preventing "corruption and the appearance of corruption" were sufficient to justify limits on campaign contributions<sup>82</sup> and that the latter interest was "of almost equal concern as the danger of actual quid pro quo arrangements."<sup>83</sup> The Court explained that the appearance of corruption is "inherent in a regime of large individual financial contributions."<sup>84</sup>

Since *Buckley*, public opinion polls measuring public perceptions of corruption have become a regular ingredient in litigation concerning campaign finance laws.<sup>85</sup> The Court recently reaffirmed the validity of reliance on appearances, holding that the practice was so well established by precedent that the state had only a minimal burden of justification for such reliance in any given case.<sup>86</sup>

The Court has never expressly stated the level of scrutiny it is applying in these cases, though no indication exists that the state's interest in combating the appearance of corruption is sufficiently compelling to satisfy strict scrutiny.<sup>87</sup> Similarly, the Court has never required campaign finance laws to be narrowly tailored to address actual or apparent corruption.<sup>88</sup> Critics of *Buckley* and its progeny have attacked such decisions for allowing the government to infringe First Amendment rights through a scattershot, " 'blunderbuss approach' " against "vague and unenumerated harms."<sup>89</sup> Other

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81. 424 U.S. 1, 25 (1976) (per curiam).

82. *Id.* (emphasis added).

83. *Id.* at 27.

84. *Id.*

85. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 133 (2004).

86. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000).

87. *See McConnell v. FEC*, 540 U.S. 93, 137 (2003) (describing the "less rigorous standard of review" applied to campaign finance laws).

88. *See Persily & Lammie, supra* note 85, at 142 (noting that "[t]he Court has emphasized that campaign reforms need not be 'scalpel-like' in their precision").

89. *Nixon*, 528 U.S. at 428, 424 (Thomas, J., dissenting) (quoting *Co. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 642 (1996) (Thomas, J., concurring in judgment and dissenting in part)); *see also* D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687,

commentators contend that campaign finance laws intended to address public suspicions of corruption and restore faith in the system will ultimately fail to do so since other factors that the laws do not address contribute to the overall lack of confidence.<sup>90</sup>

*b. Burdened by Perceptions*

Outside of the campaign finance context, courts have displayed little sympathy towards legal arguments predicated on voter fear. The state's interest in addressing voter fear of an election system in shambles is arguably implicit in HAVA, a law enacted in the aftermath of the 2000 election with the twin aims of making it "easier to vote and harder to cheat."<sup>91</sup> Nonetheless, one lower court dismissively chided a plaintiff for arguing "without citation . . . that the purpose of HAVA is to give the voters more confidence in the electoral process."<sup>92</sup> In that case, officers of the Alabama Democratic Party sought to challenge the appointment of the state's Republican governor to oversee compliance with HAVA, arguing that the appointment fostered the perception of partisan control of the process.<sup>93</sup> The court rejected the officers' reliance on the "conclusory and bald allegation of a mere 'perception,' " since perceptions are "entirely remote and speculative" in the absence of actual evidence of partisan manipulation.<sup>94</sup>

At the appellate level, the Eleventh Circuit rejected an equal protection claim from Florida voters concerned that their voting machines would prevent adequate review in the event of a recount.<sup>95</sup> The court refused to apply strict scrutiny, holding that the alleged burden—"the mere *possibility* that . . . [plaintiffs'] ballots will receive a different, and allegedly inferior, type of review"—was speculative, and thus minimal.<sup>96</sup>

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714 (criticizing the use of appearances of corruption as an "amorphous and dangerous standard for regulating political speech").

90. Persily & Lemmie, *supra* note 85, at 137–39, 148–50 (contending that "mass perceptions of corruption derive principally from attitudes unrelated to the problem of undue influence").

91. COMM'N ON FED. ELECTION REFORM, *supra* note 34, at 2.

92. United States v. Alabama, No. 2:06-cv-392-WKW, 2006 U.S. Dist. LEXIS 55305, at \*12 (M.D. Ala. Aug. 8, 2006).

93. *Id.* at \*4–5.

94. *Id.* at \*14–15.

95. Wexler v. Anderson, 452 F.3d 1226, 1232–33 (11th Cir. 2006).

96. *Id.* at 1232 (emphasis added). In *Crawford* and *Purcell*, the Court suggested that it will accept voter fear as an interest under the *Burdick* balancing test. Whether, despite the seeming unwillingness of the lower courts, voter fear can also qualify as a burden is an important unanswered question. A voter could challenge an element of the state's election administration,

In sum, following the Court's apparent approval in *Purcell* and *Crawford*, states may increasingly rely on fear of fraud as a rationale for passing restrictive voting requirements such as photo ID laws.<sup>97</sup> Since the Court granted its approval without much scrutiny, however, the use of voter fear as a basis for lawmaking, and as a rationale for upholding laws, that affect the right to vote is not so well established as to obviate the need for further analysis and critique. Moreover, the question of whether the state has a compelling interest in addressing fear of fraud remains unanswered. As the next Part demonstrates, substantial risks are inherent in fear-based lawmaking and in inadequate judicial analysis, especially when such laws deny or abridge the right to vote.

### III. A CRITIQUE OF FEAR-BASED LAWMAKING AND THE COURTS THAT UPHOLD IT

Although a democratic government must remain responsive to public opinion, including public fears, the degree of responsiveness embodied in legislation must be somewhat tempered when rights are stake.<sup>98</sup> In such instances, the state's use of fear as the predominant rationale for lawmaking should be cabined. Indeed, the Court has held in other contexts that fear alone is not a valid rationale for government action.<sup>99</sup> In *City of Cleburne v. Cleburne Living Center*, for instance, the Court held that a fear-based zoning restriction did not even satisfy rational basis review.<sup>100</sup> Similarly, courts ought not to

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such as the use of voting machines without paper trails, by arguing that it contributes to his lack of confidence in the integrity of the system. While worth exploring, this intriguing topic is beyond the scope of this Note.

97. For example, in January 2009, the Rhode Island Secretary of State announced the introduction of legislation intended to "fight the widespread perception of voter fraud" by requiring all voters to show a photo ID at the polls. Rhode Island Office of the Secretary of State, *Voter ID & Early Voting Bills Are Introduced*, <http://www.sec.state.ri.us/elections/news-items/voter-id-early-voting-bills-are-introduced> (last visited Oct. 1, 2009). The proposal is modeled after the Indiana law upheld in *Crawford*. *Id.*

98. See THE FEDERALIST NO. 10 (James Madison) (celebrating the promise of republican government to "break and control the violence of faction" by deflecting the "temporary or partial considerations" of a majority that are "adverse to the rights of other citizens"); see also SUNSTEIN, *supra* note 2, at 1 (positing that, in a deliberative democracy, "responsiveness is complemented by a commitment to deliberation, in the form of reflection and reason giving").

99. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (commenting that government action based on "vague, undifferentiated fears" is invalid because it permits "some portion of the community to validate what would otherwise be an equal protection violation"); see also Persily & Lammie, *supra* note 85, at 124 ("Catering to irrational fears never constitutes a compelling state interest.").

100. *City of Cleburne*, 473 U.S. at 449-50.

adopt social perceptions such as fear as the central foundation for constitutional decisions.<sup>101</sup> Yet the *Crawford* Court, shirking its duty to conduct probing analysis, accepted the state's fear-based rationale with minimal comment. The unquestioned use of fear to restrict the right to vote thus constitutes both a legislative and judicial failure.

### A. Legislative Failures

In his inaugural address, President Roosevelt warned against acting pursuant to fear, since fear is often “nameless, unreasoning, unjustified.”<sup>102</sup> Reliance on perceptions such as fear is generally a tenuous rationale for lawmaking.<sup>103</sup> Fear is often irrational; it may or may not have a basis in fact.<sup>104</sup> And even if reasonable at one point in time, fear, like other forms of public opinion, is fickle and malleable; worse, it is easily manipulable.<sup>105</sup> Finally, fear is a vague, undefined harm.

Fear-based lawmaking is particularly misguided when the fundamental right to vote is at stake. In the photo ID context, the actual rights of eligible voters who lack an ID are sacrificed to address the fears of other voters.<sup>106</sup> Those individuals who are harmed by photo ID laws are robbed of the very means by which they can fight back—participation in the political process.<sup>107</sup> Unlike fearful voters who wish to express their discontent with the state of the electoral system, voters without IDs can no longer effectively contribute to the debate over ballot access versus ballot security.

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101. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 536 (1993) (warning of the “spectre of legal decisions turning on public opinion surveys”); cf. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675–676 (9th Cir. 1988) (rejecting petitioners’ “[s]ubjective apprehensions and unsupported predictions” as bases for issuing an injunction).

102. Roosevelt, *supra* note 1, at 11.

103. See generally SUNSTEIN, *supra* note 2, at 1–5, 35–61.

104. Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 119–20 (2007).

105. SUNSTEIN, *supra* note 2, at 94–95, 103.

106. Three commissioners dissented from the Carter-Baker Report’s photo ID recommendation, insisting that “[t]he mere fear of voter fraud should never be used to justify denying eligible citizens their fundamental right to vote.” COMM’N ON FED. ELECTION REFORM, *supra* note 34, at 89.

107. Cf. *Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (noting that the consequences of malapportionment had left voters with “no ‘practical opportunities for exerting their political weight at the polls’”) (Clark, J., concurring) (quoting *MacDougall v. Green*, 335 U.S. 281, 284 (1948)).

### 1. Fear Is Irrational

Fear is often irrational. People may fear something that does not exist, or they may fear something that does exist disproportionately to the harm it poses.<sup>108</sup> Professor Cass Sunstein discusses the frequency of “probability neglect” when fear informs decisionmaking.<sup>109</sup> In this phenomenon, emotion tends to overwhelm all other factors in the deliberative process, leading fearful individuals to ignore the probability of whatever they fear actually occurring.<sup>110</sup> Accordingly, any government action based on this type of fear will have a corresponding irrationality. Professor Sunstein explores this issue in the context of regulatory risk analysis, arguing that government action based on fear can lead to either “costly expenditures for little or no gain” or “indifference to real risks.”<sup>111</sup>

Evidence of in-person voter fraud, the only type of fraud that photo ID requirements would squarely address, is notoriously scant.<sup>112</sup> Indiana,<sup>113</sup> Georgia,<sup>114</sup> and Missouri<sup>115</sup> all failed to produce any evidence of such fraud in support of their respective photo ID laws.<sup>116</sup> As such, critics of these laws contend that they are akin to “us[ing] a

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108. Flanders, *supra* note 104, at 119–20.

109. SUNSTEIN, *supra* note 2, at 39.

110. *Id.* at 76.

111. *Id.* at 65.

112. See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD 7* (2007) (reporting that, “by any measure, voter fraud is extraordinarily rare”). See generally Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1.

113. The Court found that “the record contains no evidence of any such fraud actually occurring in Indiana in any time in its history.” *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618–19 (2008).

114. Georgia’s secretary of state reported “no documented cases of fraudulent voting” by individuals who “misrepresent[ed] their identities.” *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1304 (N.D. Ga. 2006).

115. A state elections official testified that “she has not received any reports of voter impersonation fraud from anywhere in the state.” *Weinschenk v. Missouri*, 203 S.W.3d 201, 210 (Mo. 2006).

116. Some courts and commentators opine that states cannot effectively discover in-person fraud without more restrictive ID laws. *E.g.*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008) (positing that the lack of election fraud prosecutions is due to the “extreme difficulty of apprehending a voter impersonator”); Hans A. von Spakovsky, *Disadvantaged Arguments*, NAT’L REV., May 20, 2008, <http://article.nationalreview.com/?q=OTZmNzViZGJjOTNmN2QzNmMzNGNiMmNmODE4MDZhZjk=> (“Election officials cannot discover an impersonation if they are denied the very tool needed to detect it, an identification requirement.”). In response, Justice Souter mockingly described such arguments as “like saying the ‘man who wasn’t there’ is hard to spot.” *Crawford*, 128 S. Ct. at 1637 (Souter, J., dissenting).

sledgehammer to hit either a real or imaginary fly on a glass coffee table.”<sup>117</sup> If the harm was present, the solution was nonetheless disproportionate to the problem. If no harm existed, all one has accomplished is breaking a table.

Sometimes the costs of policy decisions influenced by probability neglect are wasted resources and unnecessary regulation.<sup>118</sup> The cost in the photo ID context is abridgment of a fundamental right, since laws that address one group of voters’ fear of fraud that may or may not exist do so at the expense of another group of would-be voters’ actual right to vote. Lawmaking that places a higher priority on preventing hypothetical harms than protecting actual rights seemingly adopts William Faulkner’s rumination that “there is a might-have-been which is more true than truth”<sup>119</sup> into the legislative process.

Further, by focusing on what is feared, laws may fail to address what is actually harmful. For example, the Missouri photo ID law only addressed in-person voter fraud, of which the state had no evidence.<sup>120</sup> By contrast, it had no effect on absentee ballot fraud, which had occurred.<sup>121</sup> In such instances, the check of public accountability is undermined, since Missouri voters “could believe that the new law . . . prevented fraud in Missouri elections” when it actually did nothing to address the only type of fraud that did exist in the state.<sup>122</sup> The appearance of action to address a perceived problem may cause individuals to wrongly believe that government has served their needs, a misperception that could influence their votes.

## 2. Fear Is Malleable, Manipulable

Fears, particularly when they bear only a tenuous relationship to fact, are easy to sway. Professor Sunstein explains that a particularly compelling or vivid depiction of a threatened harm can heighten public fear of that harm, even if it is unlikely to occur.<sup>123</sup> The Missouri Supreme Court expressed this concern when it struck down a

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117. *Crawford*, 472 F.3d at 955 (Evans, J., dissenting).

118. See SUNSTEIN, *supra* note 2, at 65, 83–85 (providing examples of instances in which probability neglect led to wasteful or unnecessary government action).

119. WILLIAM FAULKNER, *ABSALOM, ABSALOM!* 115 (Vintage 1990) (1936).

120. *Weinschenk*, 203 S.W.3d at 210.

121. *Id.* at 204–05, 209–10.

122. *Id.* at 218.

123. SUNSTEIN, *supra* note 2, at 36–38.

photo ID law in *Weinschenk v. Missouri*.<sup>124</sup> The court worried that public perceptions were “malleable” and thus not a firm foundation for lawmaking, warning that “protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.”<sup>125</sup>

Shifting to more invidious dangers, the court further warned that “the tactic of shaping public misperception could be used . . . as a mechanism for further burdening the right to vote.”<sup>126</sup> Parties with an interest in deterring the types of voters least likely to own a photo ID have an interest in propagating fears of voter fraud, which they can fairly easily accomplish through media appearances, publications, and political speeches.<sup>127</sup> Since individuals tend to be more afraid of threats they can easily imagine, such actions tend to make an otherwise remote occurrence seem more likely.<sup>128</sup> Similarly, a law enacted to address a certain threat can itself promote public consciousness, and public fear, of that threat.<sup>129</sup> By placing even isolated incidents of fraud in the public eye, self-interested parties can foment fear, which in turn serves as the basis for further restrictions.

### 3. Fear Is an Undefined Harm

While the state’s interest in ensuring confidence in the election system is important, it is also an abstract interest. Fear is not easily measured. By contrast, *Burdick* requires the state to articulate the “precise interests” that it intends a law to serve.<sup>130</sup> Without a defined harm to target, states cannot ensure that their laws will be effective. Such laws will invariably be over- or underinclusive.<sup>131</sup> Other, narrower measures may sufficiently address voters’ fears without

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124. *Weinschenk*, 203 S.W.3d at 218. Since the Missouri Constitution explicitly guarantees the right to vote, election laws are more likely to be subject to strict scrutiny than under the Federal Constitution. *Id.* at 210–11. As such, *Weinschenk* provides an important example of how federal courts may evaluate photo ID laws when a *Burdick* analysis determines that heightened scrutiny is warranted.

125. *Id.* at 218–19.

126. *Id.* at 218.

127. *See infra* notes 235–38 and accompanying text. In his *Crawford* dissent, Justice Souter made the related point that “the interest in combating voter fraud has too often served as a cover for unnecessarily restrictive electoral rules” such as poll taxes. 128 S. Ct. 1610, 1639 n.32 (2008) (Souter, J., dissenting).

128. SUNSTEIN, *supra* note 2, at 36–37.

129. *Id.* at 104.

130. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

131. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 667 (2007).

infringing upon the rights of a different group of voters.<sup>132</sup> Conversely, fearful voters may remain fearful; they may realize that photo ID requirements do nothing to prevent absentee ballot fraud. Or perhaps their fear stems from something else entirely, such as the type of voting machinery used.<sup>133</sup> Indeed, one study revealed that voters in jurisdictions with photo ID laws feared fraud at similar levels as voters in jurisdictions without such laws.<sup>134</sup> If laws with such a broad and ill-defined purpose are constitutional, few logical limitations on government action exist, enabling the state “to enact almost any constraint on voting that it chooses” in hopes of addressing some vague harm.<sup>135</sup>

#### 4. Substitute Risks

Finally, fear-based decisionmaking can obscure the potential consequences of the decision. Fearful individuals may be too singularly focused on the source of their present fear to consider the big picture.<sup>136</sup> This phenomenon is especially acute when the costs are not borne by the beneficiaries.<sup>137</sup> If they believe that a law will sufficiently address their fear, individuals have little incentive to consider the other consequences of that law. Deliberation grounded in fear thus fails to “produce a fair accounting of the universe of dangers.”<sup>138</sup>

This failure is problematic, as steps undertaken to address oneharm may create new harms, what Professor Sunstein refers to as “substitute risks.”<sup>139</sup> The most obvious substitute risk stemming from

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132. *See id.* at 678–80 (positing a series of alternative measures such as signature comparison, affidavits, and a wider range of possible identifying materials).

133. *Cf. Persily & Lammie, supra* note 85, at 137 (noting that perceptions of political corruption may stem from factors other than the perceived risks of undue influence in a system of campaign contributions).

134. Ansolabehere & Persily, *supra* note 60, at 1754–58.

135. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 475 (Mich. 2007) (Cavanagh, J., dissenting).*

136. *See SUNSTEIN, supra* note 2, at 14–15 (arguing that laws based on fear seem warranted only if “we blind ourselves to many aspects of risk-related situations and focus on a narrow subset of what is at stake”).

137. *Id.* at 207–08. While a photo ID requirement affects all voters, it clearly has a greater effect on certain generally disadvantaged groups. Ignoring the inequities of such a requirement because it has some effect on everybody is akin to sincerely adopting the argument that “the majestic equality of the law, forbids rich and poor alike to sleep under bridges,” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 799 (2007) (Stevens, J., dissenting).

138. SUNSTEIN, *supra* note 2, at 62–63.

139. *Id.* at 32. Indeed, Professor Sunstein warns that “precautions against some risks almost always create other risks.” *Id.* at 53.

a photo ID law is the disenfranchisement of voters who lack an ID. Other, less drastic harms may follow as well. When the Court expressed concern in *Purcell v. Gonzalez* for voters who “feel disenfranchised” by their fear of fraud,<sup>140</sup> it failed to acknowledge that new, empirically unfounded restrictions on the right to vote that fall disproportionately on certain groups of voters may cause those voters to feel disenfranchised.<sup>141</sup> Such voters are unlikely to have much confidence in a system that appears to single them out for harsher treatment.<sup>142</sup> Even if the government is justified in responding to voter fear, it quickly faces a no-win situation, as one group will always fear that their votes have been somehow discounted.

### B. Judicial Failures

Despite these concerns, states have engaged in fear-based lawmaking that restricts the right to vote. As such, the courts must exercise their institutional duty to protect this right.<sup>143</sup> The Court has long held that it will take a hard look at laws that interfere with the political process, because such laws will not be sufficiently checked by that process.<sup>144</sup> Photo ID requirements make voting more difficult for some voters and impossible for others. Either result indisputably interferes with participation in the political process; courts need not quibble over the meaning of “effective exercise of the electoral

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140. 549 U.S. 1, 4 (2006) (per curiam).

141. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 36 (2007).

142. *Id.* at 25, 36; see also *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 77 (Mich. 2007) (expressing concern for voters who lack a photo ID and “who fear they will suffer harassment and intimidation through the affidavit challenge process”). Aside from the obvious threats to individual rights, certain structural harms will arguably follow from photo ID laws that deny the franchise to otherwise legitimate voters. For example, political allies of these disenfranchised voters face a type of vote dilution, as they are unable to effectively aggregate their preferences. Overton, *supra* note 131, at 673–74.

143. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–03, 117 (1980) (describing the courts as “comparative outsiders” to the political system and thus uniquely suited to protect access to that system, and cautioning that the role of safeguarding the right to vote “cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo”). Professor Ely quotes Alexander Bickel for the proposition that the job of guaranteeing access to the political process “will not likely be performed elsewhere if the courts do no assume it.” *Id.* at 103.

144. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” may warrant heightened scrutiny).

franchise”<sup>145</sup> when an individual lacks access to the ballot box.<sup>146</sup> For the reasons discussed in Part III.A, a hard look is especially warranted for fear-based restrictions.<sup>147</sup> Yet courts that have evaluated such restrictions have generally foregone probing analysis of either the law or the perceptions driving its passage.<sup>148</sup>

The initial shortcoming of courts faced with the novel argument that states can invoke public fears to restrict the right to vote has been their failure to cogently identify the nature of the harm in a fearful electorate. Without identifying the harm of voter fear, courts cannot effectively determine whether the state’s interest in addressing it is compelling, or even rational, and thus a valid basis for lawmaking under *Burdick*. Despite the state’s repeated references to voter confidence at the *Crawford* oral argument, the Justices never sought an explanation of the nature of this interest; the only question from the bench on the subject was Justice Souter’s offhand inquiry into whether the threat to confidence may have come from a source other than the lack of an ID requirement.<sup>149</sup> In its opinion, the Court adopted Indiana’s argument that fear of fraud undermines “the integrity and legitimacy of representative government” without explaining *why* fear denigrates electoral integrity.<sup>150</sup> In *Purcell*, the Court expressed its concern for fearful voters who “feel disenfranchised,” but likewise offered no explanation of what feeling disenfranchised means or why such feelings are sufficiently bad to

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145. *Beer v. United States*, 425 U.S. 130, 141 (1976); see also *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) (admitting that “we have never determined the meaning of ‘effective exercise of the electoral franchise’” (quoting *Beer*, 425 U.S. at 141)).

146. See *Flanders*, *supra* note 104, at 149 (“The person is harmed simply by not being able to cast a ballot- not the ability to cast a meaningful or effective ballot, but purely by not being able to cast a ballot.”); *Tokaji*, *supra* note 31, at 719 (explaining that restrictive voter requirements like photo ID laws “implicate the value of participation, and not merely the value of aggregation”).

147. The Court reviewed one such restriction in *Carrington v. Rash*, invalidating a provision of the Texas Constitution that denied the right to vote in state elections to military personnel stationed in Texas. 380 U.S. 89, 89 & n.1, 96–97 (1965). Texas passed the law out of concern that the soldiers would vote as a bloc and overwhelm the preferences of the local civilian population. *Id.* at 93. The Court rejected this argument, emphasizing that the right to vote “cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.” *Id.* at 94.

148. Sometimes the court itself seems to fear fraud. See, e.g., *Ohio Republican Party v. Brunner*, 544 F.3d 711, 734 (6th Cir. 2008) (Moore, J., dissenting) (criticizing the majority for basing its decision on an “unsubstantiated fear” of voter fraud if it failed to uphold a temporary restraining order), *rev’d*, 129 S. Ct. 5 (2008).

149. Transcript of Oral Argument at 42, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (Nos. 07-21, 07-25).

150. *Crawford*, 128 S. Ct. at 1620.

warrant legislation, especially legislation that results in at least some degree of actual disenfranchisement.<sup>151</sup>

Some courts and commentators have sought to define the harm of voter fear by focusing variously on the power of appearances, expansive conceptions of vote dilution, or analogies to campaign finance laws. Others seem to rest solely on intuition or an assumption that fear is a harm worth addressing. As this Section demonstrates, however, none of the rationales intimated by courts or suggested by commentators satisfactorily explain the state's interest in addressing fear of fraud.

### 1. *Shaw* Redux: The Return of Expressive Harms?

Admittedly, fear of fraud seems like a bad thing, though in the same way that the bizarrely shaped congressional district in *Shaw v. Reno*<sup>152</sup> seemed like a bad thing: in both cases, offensive appearances allegedly constituted harms. *Shaw* held that white voters in North Carolina had stated an equal protection claim when they brought suit against the state for considering race when drawing congressional districts.<sup>153</sup> The decision rested in significant part on the fact that the challenged majority-minority district had a bizarre appearance that suggested an improper racial gerrymander.<sup>154</sup> Indeed, the Court explained its holding by asserting that "reapportionment is one area in which appearances do matter."<sup>155</sup>

*Shaw* thus seemed to recognize a new type of constitutional voting rights claim, in which a district violates equal protection if "government appears to use race . . . in a way that subordinates all other relevant values."<sup>156</sup> A voter is harmed if he perceives the drawing of the district as an impermissible use of race, regardless of whether the government actually used race impermissibly.<sup>157</sup> Professors Richard Pildes and Richard Niemi described these new

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151. See Hasen, *supra* note 141, at 36 (criticizing *Purcell* for providing "no explanation why it is appropriate to balance feelings of disenfranchisement against actual disenfranchisement").

152. 509 U.S. 630, 635–36 (1993).

153. *Id.* at 658.

154. *Id.* at 633–34, 644.

155. *Id.* at 647; see also *id.* at 641 ("It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.") (emphasis added).

156. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 509 (1993).

157. See *id.* at 508 & n.92 ("The quest is not for the intent or purpose behind legislation . . . . What matters is the social message [it] conveys . . . .").

claims as “expressive harms.”<sup>158</sup> They explained *Shaw* by casting the harm of the district as government action that failed to take sufficient account of societal values; the shape of the district offended the communal universe of norms, what Professors Pildes and Niemi called the “nomos.”<sup>159</sup>

The arguments in support of photo ID laws seem to cast fear of fraud as a type of “expressive harm.”<sup>160</sup> If voters can be harmed by appearances, states are justified in enacting legislation in response to those appearances. As in the early readings of *Shaw*, the willingness of courts to accept fear of fraud as the rationale for photo ID laws “ultimately rests on judicial concerns for social perceptions.”<sup>161</sup> Courts that uphold fear-based photo ID laws focus on what the electoral system looks like to voters.<sup>162</sup> Just as a strange-looking district suggests an improper gerrymander regardless of legislative intent, an electoral system that appears to enable fraud harms voters whether or not fraud occurs. Proponents of photo ID laws could also argue that the government’s failure to address fear of fraud would offend the nomos, exhibiting an insufficient level of respect for the citizenry’s sense of confidence in the electoral system.

However, subsequent districting cases made clear that offensive shapes were only evidence of a harm, not the harm itself.<sup>163</sup> The Court explicitly rejected a reading of *Shaw* as holding that “in certain instances a district’s appearance . . . can give rise to an equal protection claim” or that “bizarreness is a necessary element of the constitutional wrong.”<sup>164</sup> These cases clarified that the harm identified in *Shaw* was the government’s actual predominant use of race,<sup>165</sup> which courts have long held is inherently suspect and thus subject to strict scrutiny.<sup>166</sup> The shape of the district was just one piece of evidence that helped prove the state’s actual race-based intent.<sup>167</sup>

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158. *Id.* at 485.

159. *Id.* at 507–08.

160. *Id.* at 507.

161. *Id.* at 536.

162. See Flanders, *supra* note 104, at 115 (charging that courts concerned with structural concepts like electoral integrity “are making choices and assumptions about what a healthy democracy should look like”).

163. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 912–13 (1995).

164. *Id.*

165. *Id.* at 904–05.

166. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

167. *E.g.*, *Miller*, 515 U.S. at 917 (invalidating a bizarrely shaped district but noting the existence of “considerable additional evidence showing that the General Assembly was motivated

After all, the Court did not invalidate equally bizarrely shaped majority-white districts in the absence of evidence that their creation was racially motivated.<sup>168</sup>

By affirming that *Shaw* was a more traditional equal protection race case, the Court rejected the interpretation that bizarre districts violated the Constitution because they were expressive harms. Further, the Court associated bizarre districts with a defined harm and an established analytical framework.<sup>169</sup> Appearances were not, ultimately, an independent harm that offended society's normative sensibilities. As such, making voters comfortable with the shapes of districts was not an interest with "independent significance."<sup>170</sup> In order to legitimately accept addressing fear of fraud as a permissible goal, courts must likewise rely on more than social perceptions to define the harm.

## 2. Only One Side of the Ledger

Nor can fear of fraud reasonably be cast as a form of quantitative vote dilution, one of the major harms recognized in voting rights law.<sup>171</sup> When in-person voter fraud actually occurs, an argument can be made that "the right to vote is on both sides of the ledger"<sup>172</sup> when evaluating a photo ID law. Proponents of this view cast voter fraud as a form of vote dilution, in which legitimately cast votes are worth less due to the presence of fraudulent votes.<sup>173</sup> As

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by a predominant, overriding desire to assign black populations to . . . permit the creation of a third majority-black district") (citing *Johnson v. Miller*, 864 F. Supp. 1354, 1374–78 (S.D. Ga. 1994)).

168. See *Bush v. Vera*, 517 U.S. 952, 1019–20 & n.18 (1996) (Stevens, J., dissenting) (contending that the existence of numerous equally bizarrely shaped districts based upon political, rather than racial, gerrymandering suggests that appearance is "largely irrelevant").

169. Admittedly, the framework for equal protection districting claims is not entirely equivalent to typical equal protection claims; a districting plan is subject to strict scrutiny only when race is the "predominant factor" in its passage, *Miller*, 515 U.S. at 916, while laws outside of this context are subject to strict scrutiny when race is a "motivating factor," *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265–66 (1977). Nonetheless, predominant factor is an articulated framework (even if one difficult to administer).

170. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008).

171. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 555, 568 (1964) (holding that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

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

173. *Id.* at 952; see also Attorney General Michael Mukasey, Remarks at Ballot Access and Voting Integrity Symposium (July 2, 2008), <http://www.usdoj.gov/archive/ag/speeches/2008/ag-speech-0807027.html> ("[I]f some voters engage in fraud, . . . that dilutes the voting rights of all legitimate voters."). This argument is far from universally accepted, and assuredly has its critics.

such, a photo ID law may disenfranchise voters without an ID, but failure to pass an ID law dilutes votes by enabling fraud. Since both results abridge the right to vote, neither is a worse harm; the state can decide how best to strike a balance.

When the target is fear of fraud, however, this argument loses much of its force. A legitimate vote has the same weight, regardless of the psychology of the voter. Without the risk of vote dilution, the state is no longer balancing two arguably equal harms. Yet in its discussion of voters who “feel disenfranchised,” the *Purcell* Court seemingly fails to recognize the disparity in value between a fearful vote and no vote at all. The Court cites cases involving actual disenfranchisement as support for the proposition that voters who fear fraud suffer the harm of feeling disenfranchised,<sup>174</sup> blurring the line between the two and thus legitimizing the latter by association. Professor Michael Dorf worries that this association enables the Court to take the position that “hypothetical feelings of disenfranchisement based on hypothetical worries about voter fraud somehow count as actual disenfranchisement.”<sup>175</sup> If the specter of a harm that may or may not exist does not lead to vote dilution, it cannot have much weight when compared with actual deprivation of the right to vote.<sup>176</sup>

### 3. Campaign Finance: An Imperfect Analogy

Other commentators analogize to the campaign finance context, contending that fear of fraud is the same type of harm as the appearance of corruption.<sup>177</sup> The commentators who make this analogy refer to voter fear as the “appearance of fraud.”<sup>178</sup> Yet the concept of an “appearance of fraud” makes no sense. Campaign contributions

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See, e.g., Pamela Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 765 (2007) (criticizing the both sides of the ledger argument as a “breathtaking expansion of the concept of vote dilution”).

174. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964) (quantitative vote dilution) and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (disenfranchisement)).

175. Michael Dorf, *In a Brief, Unsigned New Opinion, The Supreme Court Sends the Wrong Signal on Voter ID and Voter Fraud*, FINDLAW'S WRIT, Nov. 6, 2006, <http://writ.news.findlaw.com/dorf/20061106.html>.

176. Cf. David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 530 (“If one pits an unproven or unsubstantiated government interest against a demonstrated burden, the weight assigned to the interest has to be nearly zero.”).

177. E.g., DeLaney, *supra* note 60, at 847–51. Likewise, Indiana almost exclusively cited campaign finance cases as support for its proposition that its ID law was necessary to preserve public confidence. Brief for State Respondents, *supra* note 71, at 53–55.

178. DeLaney, *supra* note 60, at 858–59.

lead to an appearance of corruption because a contribution followed by a vote friendly to the source of that contribution looks like corruption whether it actually is or not. This appearance is “inherent”<sup>179</sup> in the system because determining whether an actual quid pro quo has occurred is a difficult, chicken-or-the-egg inquiry: Did the contributor give money because the politician supports his positions, or did the politician support his positions because he contributed?<sup>180</sup> The appearance of corruption exists when one knows that a financial contribution was made and who made it, yet cannot tell whether it had a corrupting effect.<sup>181</sup> This uncertainty stems from the fact that the existence of corruption is hard to prove or disprove, even when one has all the relevant information.

By contrast, fear of fraud stems from *not* knowing who is voting or whether a fraudulent ballot was cast. Thus, one cannot logically discuss an “appearance of fraud” in the way the Court described it in the campaign finance cases. If one knew the identity of each voter, uncertainty as to the legitimacy of the votes would no longer exist. Similarly, while the analysis in *Buckley* suggested that each contribution is inherently suspect,<sup>182</sup> not even proponents of photo ID laws suggest that every vote that is cast is potentially fraudulent. Fear of fraud is simply not “inherent” in a system of elections the way fear of corruption inheres in a system of private political funding.

Further, while studies on whether large contributions actually lead to corruption have failed to reach a consensus,<sup>183</sup> research on in-person voter fraud consistently concludes that such fraud rarely, if ever, occurs.<sup>184</sup> Because of these distinctions, the analogy to campaign finance laws and *Buckley* is necessarily imperfect. A state’s concern

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179. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam).

180. *Cf. La Pierre*, *supra* note 89, at 714 (“[I]f a presumption of corruption arises from the mere fact that a public official votes in a way that pleases contributors, then ‘legislatures could constitutionally ban all contributions except those from . . . [an] official’s opponents, a patent absurdity.’” (quoting *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998)) (alteration in original)).

181. *See Buckley*, 424 U.S. at 27–28 (discussing the risks “inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed”).

182. *Id.*

183. *See Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 394–95 (2000) (identifying competing studies with conflicting results on the issue).

184. *See Ian Urbina*, *U.S. Panel is Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, at A1 (describing a report prepared for the Election Assistance Commission finding “widespread but not unanimous agreement that there is little polling place fraud”); *see also* LEVITT, *supra* note 112, at 7 (reporting that, “by any measure, voter fraud is extraordinarily rare”).

with the perception of fraud is simply different in kind than its concern with the perception of corruption.<sup>185</sup>

#### 4. Assumptions

In the absence of a defined harm, all that remains for judges to rely upon is their own intuition or assumptions. Fear seems bad, so the state must have an interest in addressing it. Courts perhaps posit that fear is generally an unpleasant sensation—no one wants to be afraid. According to Professor Terry Maroney, however, such “emotional common sense” can make for a “potentially unstable partner with law” due to its necessarily subjective nature.<sup>186</sup> Indeed, the Court has rejected such reliance in other areas of the law.<sup>187</sup>

This reliance on judicial intuition is of no use, and may in fact do harm, unless it can be clearly articulated as a legal principle.<sup>188</sup> Such articulation is necessary both to justify courts’ acceptance of voter fear as a rationale and to ensure consistency and manageability. Otherwise, courts that evaluate laws enacted to address voter fear will continue to proceed through an unguided analysis, and judicial impulse may “degenerate into . . . a manipulable tool.”<sup>189</sup> Just as public perception is often fickle or malleable, analysis based on a judge’s intuition risks inconsistent and subjective decisions.<sup>190</sup>

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185. Ultimately, campaign finance laws are also less restrictive than photo ID requirements; they do not prevent any given individual from participating at all, only regulate how much he can participate.

186. Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 859 (2009).

187. See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (invalidating as violative of the Confrontation Clause a state law allowing child victims of sexual abuse to testify behind a screen and refusing to rely upon the state’s “legislatively imposed presumption of trauma” in such situations); cf. *Williams v. Planned Parenthood of Shasta-Diablo, Inc.*, 520 U.S. 1133, 1135 (1997) (Scalia, J., dissenting) (rejecting the “emotional upset” justification for limits on abortion clinic protests). In these cases, the Court has determined that “such rights are not to be abridged on the basis of supposition as to their emotional impact on others.” Maroney, *supra* note 186, at 909.

188. Cf. Pildes & Niemi, *supra* note 156, at 485 (insisting that the impulse behind *Shaw* must be “transformed into legal principles that courts . . . can apply with at least some consistency and certainty”).

189. *Id.*

190. See Richard Hasen, Op-Ed., *A Voting Test for the High Court*, WASH. POST, Sept. 19, 2007, at A23 (comparing the partisan affiliation of judges with their votes in ID cases and concluding that, even if not in an intentional attempt to favor one party, “judges come to these cases with the same partisan worldviews as the rest of us about the credibility of voter fraud and vote-suppression claims”); cf. Maroney, *supra* note 186, at 867 (arguing that analysis based on “common sense often . . . will signal a person’s appraisal of the specific attributes of a situation as it relates to her own beliefs, goals, and values”). The inconsistent treatment of public

Further, courts cannot meaningfully measure a state's interest in an assumed harm when balancing such an interest against burdens on the right to vote under *Burdick*. Heightened scrutiny demands more than a state interest that *seems* compelling.

The absence of meaningful judicial review of fear-based voting laws creates the risk of a flurry of restrictions on the right to vote, passed to serve an abstract interest and upheld under a standardless analysis. To guard against this outcome, the next Part proposes a series of questions that should form at least the initial basis of a judicial framework for evaluating the nature and strength of a state's interest in addressing fear of fraud.

#### IV. MORE THAN FEAR ITSELF: AN EVALUATIVE FRAMEWORK FOR FEAR-BASED VOTER ID LAWS

When evaluating a fear-based law that restricts the right to vote, courts must ask more questions. The application of low-level scrutiny in *Crawford* perhaps excuses the lack of inquiry,<sup>191</sup> but heightened scrutiny surely demands more probing analysis. This demand stems from both the generally greater strictures of heightened scrutiny and the fact that the use of fear as rationale in the voting context is new, given the Court's command that "[t]he quantum of . . . evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty . . . of the justification raised."<sup>192</sup>

The courts must craft an analytical framework to determine when the state's interest in addressing fear of fraud is sufficiently compelling to survive heightened scrutiny. Such a framework is necessary both to provide courts with a generally applicable standard of analysis for future cases and to safeguard the right to vote. Further, adequate judicial analysis provides a greater likelihood that a law

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perceptions in the voting context is further evidence of the need for an articulated framework. See *supra* Part II.B.4.b.

191. *But see* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–49 (1985) (laws based on fear fail even rational basis).

192. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000), *quoted in* *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1642 (2008) (Souter, J., dissenting). Some courts and commentators have argued that the state has no duty to provide evidence in support of its interests. In its decision upholding Georgia's photo ID law, the Eleventh Circuit cited *Anderson*, *Burdick*, and *Crawford* for this proposition. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). However, *Burdick*, 504 U.S. 428, 439 (1992), and *Crawford*, 128 S. Ct. at 1623 (majority opinion), applied low level scrutiny, so the states were able to win without much evidence; in *Anderson*, the Court invalidated an Ohio law under heightened scrutiny, 460 U.S. 780, 806 (1983), so perhaps Ohio should have provided some supporting evidence.

that is upheld will be regarded as legitimate by those voters whom it disadvantages and their allies. In order to measure the validity of the state interests behind a fear-based election law properly, courts should start by asking three questions: (1) Is the fear real? (2) Is the fear reasonable? and (3) Does the fear correlate with the occurrence of a separate, recognized harm? The first two questions stem from the commonsense notion that the state's interest in responding to something that does not exist or is unreasonable cannot be compelling.<sup>193</sup> The third question tracks the post-*Shaw* districting cases, working to shape impulse into an articulable standard of analysis by associating appearances with a more concrete harm.

While not an exhaustive list, these questions will assist the court in conducting a properly informed application of the *Burdick* test and ruling on a law's validity. This Part examines these questions in greater detail, addresses some of the issues that will arise in the course of the inquiry, and explains why they must be asked and sufficiently answered.

### A. *Is the Fear Real?*

The state cannot have a compelling interest in addressing fear if no one is afraid.<sup>194</sup> Whether fear of fraud exists should be the easiest of the three questions to answer, though perhaps not quite as easy as proponents of photo ID laws believe. While surveys tend to reveal a general lack of confidence in the electoral system,<sup>195</sup> not all of these surveys measure public opinion on in-person voter fraud. Indeed, the authors of one such survey reported that when the researchers used the general phrase "vote fraud," participants said they believed it occurred frequently, but when the researchers asked instead about specific conduct that would constitute fraud, like voting multiple times, participants' belief in its occurrence was lower.<sup>196</sup>

In addition to public opinion polls, the state could provide media reports of fraud as support for the proposition that the public is

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193. See Persily & Lammie, *supra* note 85, at 124 ("Catering to irrational fears never constitutes a compelling state interest."). Courts conduct these analyses in other areas of the law. See *infra* notes 194, 200 and accompanying text.

194. Cf. *Nixon*, 528 U.S. at 390–91, 393–94 (evaluating the evidence offered by the state to show the existence of a perception of corruption among voters). The parties in *Nixon* debated the strenuousness of the state's evidentiary obligation, but not whether it had one. *Id.* at 390–92.

195. E.g., JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 11 (2004) (stating that "the picture . . . polls draw is one of suspicion and cynicism").

196. Ansolabehere & Persily, *supra* note 60, at 1747.

sufficiently aware of voter fraud to fear it.<sup>197</sup> Heavy focus on even one isolated incident may give the impression that such fraud is widespread and endemic.<sup>198</sup> The fact that a state legislature passed a photo ID law suggests that at least the lawmakers believed that in-person fraud was a problem, and the legislature ostensibly reflects public opinion.<sup>199</sup> Legislative history to this effect may thus serve as relevant evidence of the existence of fear. Whatever form the evidence takes, it ought to be jurisdiction-specific. If the state can show that fear of fraud is real, it will satisfy the threshold question as to whether its interest in addressing that fear is compelling.

### *B. Is the Fear Reasonable?*

If the state is able to show that the fear of fraud is real, the court should then ask whether that fear is sufficiently reasonable to warrant legislation. The reasonableness of fear in a given situation is a notoriously difficult question to answer effectively and fairly, yet it is one which courts have dealt with before in other contexts.<sup>200</sup>

If fear is not reasonable, the state is unlikely to have a compelling interest in addressing it. When the public fears something that does not exist, the state arguably has a greater interest in “combating the false perception, not in catering to it.”<sup>201</sup> One commentator has insisted that voter fear must be “warranted” and “grounded in something besides merely the feeling[]” itself before it

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197. See DeLaney, *supra* note 60, at 869–70, 872 (noting that “[t]here are ample newspaper stories . . . that could allow people to infer that the voting system is corrupt”).

198. See SUNSTEIN, *supra* note 2, at 36–38 (discussing the “availability heuristic” which increases the level of fear associated with risks which are readily conceivable, such as those that receive “considerable media attention”).

199. The more cynical view, of course, is that state legislators pass such laws for the sake of partisan advantage, believing that the ID requirements burden would-be Democratic voters. *E.g.*, Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 128 S. Ct. 1610, 1613 (2008).

200. *E.g.*, Guzman v. INS, 327 F.3d 11, 16 (1st Cir. 2003) (upholding an immigration judge’s determination that petitioner’s evidence “fell short of establishing his fear” of persecution if deported to his home country “was objectively reasonable”); United States v. Christian, 187 F.3d 663, 666, 670 (D.C. Cir. 1999) (deciding *de novo* that a police officer had an “objectively reasonable” fear of possible danger supporting his decision to stop and frisk defendant); *see also* People v. Goetz, 68 N.Y.2d 96, 111–13 (N.Y. 1986) (considering whether a defendant’s fear of an attack with deadly force must be objectively or subjectively reasonable to support acquittal on the grounds of self-defense).

201. Flanders, *supra* note 104, at 119–20; *see also* SUNSTEIN, *supra* note 2, at 226 (arguing that democratic governments should pass laws that “reduce, and do not replicate, the errors to which fearful people are prone”).

can serve as the basis for lawmaking.<sup>202</sup> Even Professors Pildes and Niemi, in their discussion of the expressive harm theory, recognized that courts should only credit “relevant social perceptions.”<sup>203</sup> In order to be relevant, perceptions must reflect “acceptance of governing law” and “awareness of relevant general facts.”<sup>204</sup> In the election context, the governing law is the right to vote; the franchise simply cannot be taken away arbitrarily. The relevant general facts for evaluating fear of fraud would certainly include whether fraud is actually occurring. And as discussed in Part III.A.1, evidence of in-person voter fraud is rare.

Whether fear, like any other subjective experience, is reasonable is often a normative question, however. Fear caused by low levels of fraud may not necessarily be unreasonable. Such fear may result not from an irrational understanding of the facts, but rather from a value judgment that even one fraudulent vote undermines the entire system.<sup>205</sup> In the related debate over the validity of photo ID laws passed to address actual fraud, some commentators emphasized the need for additional empirical evidence before courts could make informed decisions,<sup>206</sup> while others pushed for greater analysis of norms.<sup>207</sup> Both views stem from the same impulse that courts must seek out more information and must conduct a more probing analysis.

The reasonableness of fear of fraud may depend upon the likelihood that such fraud is currently occurring undetected. Courts should thus look to the legal landscape of the relevant jurisdiction. If the state has other safeguards in place, such as substantial criminal liability for voter impersonation<sup>208</sup> or identification requirements that do not involve photo IDs,<sup>209</sup> the fear of fraud is less likely to be

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202. Flanders, *supra* note 104, at 119.

203. Pildes & Niemi, *supra* note 156, at 536.

204. *Id.* at 536–37.

205. Flanders, *supra* note 104, at 104–06.

206. Overton, *supra* note 131, at 634–37.

207. Flanders, *supra* note 104, at 108. For a compelling argument that even one instance of disenfranchisement normatively outweighs enabling the risk of low-level fraud, see *id.* at 146, 148–49.

208. *Cf.* *Dunn v. Blumstein*, 405 U.S. 330, 353 (1972) (noting, after striking down a one-year residency requirement, that the state “has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared”). Each act of fraud in a federal election is punishable by up to five years in prison and a \$10,000 fine. 42 U.S.C. §§ 1973i(c), (e) (2000). State law typically provides additional penalties. *E.g.*, TENN. CODE ANN. § 2-19-107 (Supp. 2008); *id.* § 40-35-111(b)(4) (2006 & Supp. 2008) (defining illegal voting as a Class D felony, punishable by two to twelve years in prison or a \$5,000 fine).

209. Currently, twenty-five states require some form of identification above the HAVA minimum; accepted forms of non-photo ID include Social Security cards, utility bills, and bank

reasonable. Courts should also consider evidence of other factors in the electoral system that might increase the risk of fraud. The presence of inflated voter rolls or old-fashioned voting equipment may support a finding of reasonableness.<sup>210</sup> Finally, evidence of other forms of voter fraud or historical occurrences of in-person fraud may have some relevance, though courts should remain cognizant that the challenged law would not address these risks.

Based on this record, the court can ask whether a reasonable voter in the jurisdiction would fear fraud. While the survey of the jurisdiction's laws and practices proposed above is mostly factual, it may also inform the normative analysis. Due to legal and historical distinctions, the reasonable voter in a city with a tradition of clean elections may have a different normative judgment regarding fraud than the reasonable voter in Memphis or Chicago.

### *C. Is the Fear Correlated with an Independently Recognized Harm?*

This is one instance in which, with apologies to President Roosevelt, we must have something more to fear than fear itself. The state's interest in addressing fear of fraud may have "independent significance" from the interest in deterring actual fraud,<sup>211</sup> but it cannot constitute a compelling interest independent of *any* other harm.<sup>212</sup>

An analogy to the districting cases is again helpful. Once the Court clarified that *Shaw* was a race case rather than a novel claim based on appearances and social perceptions,<sup>213</sup> the decision gained a greater degree of legitimacy. Assuredly, *Shaw* still had its critics, but it stood on firmer ground.<sup>214</sup> So, too, must the courts determine

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statements. State Requirements for Voter ID (Aug. 31, 2009), <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm>.

210. *Cf. Crawford v Marion County Election Bd.* 128 S. Ct. 1610, 1619–20 (2008) (accepting as support for Indiana's photo ID law the fact that the state voter rolls contained the names of thousands of ineligible voters).

211. *Id.* at 1620.

212. As recounted in Part III.B, *supra*, proponents of photo ID laws have failed to adequately explain why fear of fraud is itself a harm requiring legislative redress.

213. *See supra* notes 163–70 and accompanying text.

214. Indeed, the nature of the dissents changed. While Justice White's dissent in *Shaw* focused on his belief that "appellants have not presented a cognizable claim, because they have not alleged a cognizable injury," 509 U.S. 630, 659 (1993) (White, J., dissenting), dissents in the subsequent districting cases were more general disagreements with applying the same standard for governmental use of race to enhance majority power as for the use of race to limit majority power, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 1011 (1996) (Stevens, J., dissenting) (arguing that the

whether fear of fraud correlates with a separate, independently recognized harm. If such a correlation exists, the state interest behind the law becomes clearer and more easily measured against the burdens placed on the right to vote.

Admittedly, a state need not always wait for a harm to materialize before taking action to address it.<sup>215</sup> As such, although courts should consider whether the correlative harm has already occurred, its absence will not be dispositive. If fear of fraud has not yet led to an independent harm, the court should evaluate the likelihood of that harm's future occurrence based on theoretical and, perhaps, empirical analysis in the context of the jurisdiction. As part of its *Burdick* balancing test, courts should measure the relative immediacy of the harm to be avoided and of the burdens created by the actions taken to avoid it.<sup>216</sup> In previous opinions, the Court has emphasized that states can sometimes take preemptive action in response to potential threats to the electoral system, "provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."<sup>217</sup> This limit ensures that the state's action at least be in anticipation of some identified harm.

### 1. Fear and Turnout in America

Some decisions and commentators suggest that fear of fraud will drive legitimate voters out of the electoral process.<sup>218</sup> Depressed participation rates are a tangible harm that the government has a strong interest in preventing. While participation in the electoral process is not mandatory, federal and state statutes and a variety of court decisions strongly suggest that it is a value the nation respects.

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creation of majority-minority districts is "simply . . . not the sort of despicable practice that has been taken in the past to exclude minorities from the electoral process").

215. See *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (expressing the belief that states "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

216. See *supra* notes 24–30 and accompanying text.

217. *Munro*, 479 U.S. at 195.

218. *E.g.*, *Crawford v Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008) (implying this correlation by stating that "public confidence in the integrity of the electoral process . . . encourages citizen participation"); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Voter fraud drives honest citizens out of the democratic process. . ."); see also FUND, *supra* note 195, at 2 (asserting that suspicion of the electoral system "lowers voter participation"). *But see* Ansolabehere & Persily, *supra* note 60, at 1750 (describing the correlation between fear of fraud and participation as "a novel conjecture within the academic research on voter turnout").

Many federal<sup>219</sup> and state<sup>220</sup> policies contain the stated goal of encouraging citizens to vote. Similarly, Professor John Hart Ely has argued that courts often play a “representation-reinforcing” role by ensuring access to the political process.<sup>221</sup>

As such, if states can prove a correlation between fear of fraud and depressed turnout, photo ID laws might survive heightened scrutiny. Unlike *Purcell’s* equation of feeling disenfranchised with actual disenfranchisement, the effect on the right to vote can more legitimately be characterized as falling on both sides of the ledger.<sup>222</sup>

Proving this correlation will not be an easy task, however. From both a theoretical and empirical standpoint, fear of fraud does not necessarily lead to decreased turnout among fearful voters. Indeed, a fearful voter may instead proceed to the polling place with an even greater determination to fight back against the threat of fraudulent votes deciding an election. Since no conclusive answers exist and both results are possible, courts should ask the question.

#### *a. Theoretical Analysis*

While ultimately unlikely, the existence of an inverse correlation between fear and turnout is certainly conceivable. In an opinion upholding HAVA’s ID requirement for first-time voters who registered by mail, a federal district court in Ohio spelled out the scenario of voters who, due to fear that their legitimate votes will not count, “conclude that voting does not matter” and as a result “decline to exercise the franchise.”<sup>223</sup> While the court failed to cite any evidence supporting the actual occurrence of this scenario, it at least developed

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219. See, e.g., National Voter Registration Act, 42 U.S.C. § 1973gg(a)(1)–(2) (2000) (finding that voting is a fundamental right and “it is the duty of the Federal, State, and local governments to promote the exercise of that right”). Indeed, the NVRA was enacted “to establish procedures that will increase the number of eligible citizens who register to vote.” *Id.* § 1973gg(b)(1).

220. Among the many state efforts to boost voter participation, of note is the work of then-Ohio Secretary of State (now U.S. Senator) Sherrod Brown, who convinced McDonald’s to print voter registration forms on their paper tray liners. Sherrod Brown, *Mechanisms for Participating*, in *THE DISAPPEARANCE OF THE AMERICAN VOTER RE-VISITED* 60, 61 (1990).

221. ELY, *supra* note 143, at 101–02.

222. Ironically, Judge Posner, the author of the Seventh Circuit *Crawford* opinion, 472 F.3d 949 (2007), might well not consider this effect on turnout a legitimate harm. He felt that a photo ID requirement was not a significant burden, because individuals who do not obtain an ID merely “disfranchise themselves.” *Id.* at 952. Presumably, he would have a similar opinion of voters who do not vote because they fear fraud.

223. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004).

the theoretical idea; voters who are deterred from voting do more than “feel disenfranchised.”<sup>224</sup>

This reasoning follows a “demoralization” theory of voter deterrence.<sup>225</sup> Social scientists have long puzzled over why people vote, since the odds of any one particular vote deciding an election are quite low.<sup>226</sup> If voting is already seen as a relatively useless endeavor, the realization that one’s legitimate vote could be cancelled out by a fraudulent vote may tip the scales in favor of staying home on Election Day. Alternatively, fear of fraud may lead to lower turnout because voters exhibit “disgust for a corrupt system” that enables such fraud to occur.<sup>227</sup> Voters who disrespect the system will not want to associate themselves with it. This theory of non-participation recalls the reasoning in the campaign finance cases, in which the Court held that a system stained with the “perception of impropriety” would “jeopardize the willingness of voters to take part in democratic governance.”<sup>228</sup>

Yet such a result does not necessarily follow. Even if turnout declines, the drop-off can be explained by a variety of other factors. Voting is a classic collective-action problem, a communal cause with limited tangible individual benefits.<sup>229</sup> As such, some individuals will decide to leave the job of participating in elections to others.<sup>230</sup> Would-be voters may dislike the candidates, not know the issues, or not care about the outcome. Institutional barriers such as early registration deadlines, inconvenient polling sites, or even photo ID requirements may make voting seem not worth the effort.<sup>231</sup> In any of these scenarios, the presence or absence of fear of fraud is irrelevant to the decision whether to vote.

Further, fear does not undermine many of the potential benefits of voting. If people still vote even with the full knowledge that the instrumental value of that vote toward the outcome is fairly

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224. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

225. *Flanders*, *supra* note 104, at 119.

226. *See generally* DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 47–50 (1994) (describing the “paradox of voter turnout”).

227. *Ansolahehere & Persily*, *supra* note 60, at 1752.

228. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000). For a discussion of why the analogy with campaign finance is at best imperfect, see *supra* Part III.B.3.

229. GREEN & SHAPIRO, *supra* note 226, at 47.

230. *Id.*

231. *See generally* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON’T VOTE AND WHY POLITICIANS WANT IT THAT WAY* 24–25 (2000) (describing the “legal-institutional theory” of nonvoting, which attributes low turnout to “aspects of electoral law and machinery”).

insignificant, fear of fraud is unlikely to stop them. A vote amidst heavy incidence of fraud is still worth more than no vote at all. Voting may hold a non-instrumental value: some people simply enjoy the act of voting. Alternatively, voting may supply an instrumental benefit aside from influencing the outcome of the particular election in which it is cast. People vote out of a sense of civic duty or to “affirm their partisan identity.”<sup>232</sup> They may wish to signal to their friends and neighbors that they are committed, engaged citizens or to avoid having to admit to those friends that they failed to vote.<sup>233</sup> Such voters derive satisfaction from the sense of “affirmation and compliance” that voting bestows.<sup>234</sup>

The self-interested conduct of political actors provides further evidence that the correlation may not exist. In the heat of the 2008 presidential election, the campaign of Republican nominee John McCain made frequent reference to allegedly massive voter registration fraud on the part of the organization Association of Community Organizers for Reform Now (“ACORN”). In the final presidential debate, Senator McCain warned that ACORN was “now on the verge of maybe perpetrating one of the greatest frauds in voter history.”<sup>235</sup> If Republicans, who are often the strongest supporters of photo ID laws,<sup>236</sup> truly believed that fear of fraud would drive legitimate voters away from the polls, they would seem to lack any incentive to spend so much time talking about voter fraud. The ACORN charge was often repeated at Republican rallies to supporters whom Republicans had the greatest incentive to convince to go to the polls.<sup>237</sup> Former Republican strategist Allen Raymond explained this conduct by positing that fear of voter fraud actually “gins up the base” and that the purpose of raising the issue “is to potentially, maybe, sway some undecided voters in swing states.”<sup>238</sup> Rather than give up

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232. GREEN & SHAPIRO, *supra* note 226, at 67.

233. *Id.* at 51.

234. *Id.*

235. Senator John McCain, Third Presidential Debate (Oct. 15, 2008), <http://www.debates.org/pages/trans2008d.html>.

236. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 & n.21 (2008) (observing that, in the vote on Indiana’s photo ID law, “all of the Republicans in the General Assembly voted in favor . . . and the Democrats were unanimous in opposing it”); Hasen, *supra* note 141, at 19 (explaining that every state legislature that has tightened ID requirements post-2000 was dominated by Republicans).

237. *E.g.*, Larry Eichel, *Palin Defends Attacks on Obama over ACORN*, PHILA. INQUIRER, Oct. 19, 2008, at A5 (describing an ominous depiction of ACORN at a political rally).

238. *Countdown with Keith Olbermann* (MSNBC television broadcast Oct. 14, 2008).

on the process, voters who fear that fraudulent votes are being cast may mobilize in greater numbers in order to counteract such fraud.

*b. Empirical Analysis*

Whether the correlation between fear and turnout exists is a difficult question to answer in the abstract, since either result is conceivable and can find some theoretical support. However, the question need not be considered solely in the abstract, as it can be tested empirically. Indeed, two recent studies addressed the issue.<sup>239</sup>

Professors Stephen Ansolabehere and Nathaniel Persily's survey measured each participant's perceptions of the frequency of voter fraud generally and voter impersonation specifically.<sup>240</sup> Each participant was then asked whether he had voted in the 2006 midterm elections and whether he intended to vote in the 2008 presidential election; the authors also measured actual 2006 turnout based on voting records.<sup>241</sup> When these two factors were compared, the correlation between perception of fraud and turnout proved "extremely weak and almost always statistically insignificant."<sup>242</sup> For instance, 80 percent of participants who believed voter impersonation occurred very or somewhat often intended to vote in the 2008 election.<sup>243</sup> Participants who believed that such fraud occurred rarely or very rarely reported an average intent to vote at a similar rate of 82 percent.<sup>244</sup> Similarly, the actual turnout rates in 2006 of participants who thought fraud occurred very frequently, occasionally, infrequently, and almost never were nearly equal.<sup>245</sup>

Professors R. Michael Alvarez and Thad Hall reached a similar conclusion in their survey of public perceptions of threats to election security. When they compared the responses of individuals who voted in 2004 with individuals who did not vote, they found that the

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239. Ansolabehere & Persily, *supra* note 60, at 1739; R. Michael Alvarez & Thad E. Hall, *Measuring Perceptions of Election Threats: Survey Data from Voters and Elites*, in *ELECTION FRAUD: DETECTING AND DETERRING ELECTORAL MANIPULATION* 71, 78–82 (R. Michael Alvarez et al. eds., 2008).

240. Ansolabehere & Persily, *supra* note 60, at 1744.

241. *Id.* at 1750.

242. *Id.* at 1751.

243. *Id.* at 1754 tbl.3. While self-reported intent to vote is often unreliable as a prediction of actual turnout, it nonetheless serves as a measure of "psychological attachment to the process and interest in electoral politics." *Id.* at 1751.

244. *Id.* at 1754 tbl.3.

245. *Id.* at 1753 tbl.3. The rates were 45 percent, 44 percent, 43 percent, and 42 percent, respectively. *Id.*

nonvoters were actually less concerned about fraud.<sup>246</sup> They concluded that the numbers “strongly suggest that nonvoters are not being kept from the polls because of a concern about election fraud.”<sup>247</sup> While presenting the results of just two surveys, these studies demonstrate that the relevant evidence can be compiled and submitted to a court for consideration.

#### *D. A Word on Tailoring*

Determining whether fear of fraud is real, reasonable, and correlated with a harm such as decreased turnout helps define the strength of the state’s interest in addressing that fear. These determinations are not the end of the story, of course. The absence of these factors will not necessarily lead to invalidation of the law, and their presence will not necessarily save it. Even if these three factors are met and the court deems the state interest compelling, *Burdick* directs the court to balance the interest the law serves against the burden it places on the right to vote, considering the degree to which the former makes the latter necessary.<sup>248</sup> Courts make such an evaluation through the traditional narrowly tailored analysis of strict scrutiny.<sup>249</sup>

The tailoring analysis must address a particularly intriguing issue if a correlation between fear and turnout exists. If the state has a compelling interest in voter participation, that interest must extend to all legitimate voters. Thus, the reviewing court must determine whether the burden a photo ID law would place on the participation of one set of voters is necessary to serve the state’s compelling interest in the participation of other voters. One important consideration in this analysis is the fact that non-participation by fearful voters is not the result of state action. Some commentators argue that the courts should defer to states to make this judgment.<sup>250</sup> As legislators are necessarily self-interested in getting certain groups to vote and other groups not to vote, the risk posed by deference is too great. Just as courts must thoroughly examine whether the photo ID law serves a

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246. Alvarez & Hall, *supra* note 239, at 82.

247. *Id.*

248. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

249. *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

250. *E.g.*, DeLaney, *supra* note 60, at 874–75; *cf.* *McConnell v. FEC*, 540 U.S. 93, 137 (2003) (approving, in the campaign finance context, “deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise”).

compelling interest, so too must courts carefully analyze whether the law is indeed necessary to serve that interest.

## V. CONCLUSION

President Roosevelt's words do echo in the voter fraud context, but not in the way proponents of restrictive voting requirements might claim. Society does have reason to fear fear: the government's use of fear to restrict rights, especially fundamental rights like the franchise. By signaling in *Purcell* and *Crawford* that it was willing to accept the state's interest in addressing fear of fraud, the Court was derelict in its duty to protect the right to vote. Courts have failed to articulate *why* fear is a harm that must be addressed and why abridging the right to vote is necessary to serve that purpose. When a challenge to a fear-based photo ID law successfully triggers heightened scrutiny, the courts must have an analytical framework to evaluate its validity. In order to determine the strength of the state's interest in addressing fear of fraud, courts should, at least, ask if the fear is real, if it is reasonable under the circumstances of the jurisdiction, and if it correlates with an independently recognized harm such as non-participation. This framework presents an appropriately exacting standard for the state to meet, since the right to vote in its purest form is at stake.

If the majority can strip the minority of rights simply by reference to fear, then the foundations of democracy are undermined. Such reasoning lacks a logical stopping point, enabling the state to pass increasingly restrictive voting requirements as long as some percentage of the voting population harbors a crisis of confidence in the electoral system.

The promise of democracy carries with it the risk of uncertainty. Experiences from the past three election cycles, from hanging chads in Florida to an eight-month-long U.S. Senate election in Minnesota, show that the current American electoral system is imperfect. Yet discomfort with imperfection, including fear of voter fraud, seems a small price to pay for the freedom to choose one's leaders. Even if the exclusion of some voters from the political process addresses fear of fraud in the short-run, it ultimately works to undermine the legitimacy of representative government by ensuring that certain voices are not represented. Without the right to vote, individuals who lack photo ID are unable to register their preferences on important policy issues, including the necessity of voting restrictions like photo ID laws. The debate over the appropriate

balance between ballot access and ballot security is ongoing, and, like any debate in a democratic nation, it requires the input of the full range of the citizenry.

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