

Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward

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ABSTRACT: The right to vote is a fundamental right in a democratic society that ensures each and every citizen is able to participate in the political process. Although all states recognize the right to vote in their constitutions, state legislatures are free to impose time, place, and manner requirements to regulate how individuals exercise this right. Because it is the courts' role to interpret their constitutions, judicial review at the state-level becomes an essential component in determining the scope of individuals' voting rights. Whether the courts will be deferential to the state legislatures' broad lawmaking authority to impose election regulations or if the courts will be more protective of individual citizens' constitutional right to vote depends on how the state court interprets challenged statutes. In the modern era, as fewer individuals vote in-person, and voters become more inclined to cast absentee ballots due to illness, work, disability, or mere convenience, the courts will be faced with an increasing need to scrutinize absentee voting laws. While absentee voting has been historically viewed as a narrow exception to traditional voting, recent developments show the increasing necessity of viewing the absentee voting process as functionally equivalent to voting at the polls. Therefore, any absentee voting regulation that is challenged going forward should require courts to make an initial determination of whether such regulation unduly burdens voters in a way that infringes on the constitutional right to vote.

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I. INTRODUCTION

Since 2000, states have pushed for new election laws that impose stricter requirements on voting.¹ States have viewed these new requirements as necessary to combat election fraud and to preserve the integrity of the electoral process. There is no doubt it is in everyone’s interest that elections are conducted in a fair and honest manner. However, when new requirements become so burdensome to potential voters as to deter them from participating in the voting process altogether, the courts must intervene to regulate the scope of the states’ regulations.

This Note analyzes the interaction between the states, courts, and individual voters when it comes to resolving voting law disputes. Part II of this Note briefly introduces the origins of the right to vote and how states have broad constitutional authority to regulate the “time, place, and manner” of holding elections. Next, Part III discusses how various voting regulations imposed by state legislatures have led to infringements on the constitutional right to vote. Lastly, Part IV proposes viewing the right to vote as a fundamental right, which will help guide courts in judicial review of stricter voting requirements going forward.

1. Oliver Roeder, *Tighter Restrictions Are Losing in the Battle Over Voter ID Laws*, FIFETHIRTYEIGHT (Aug. 3, 2016, 11:56 AM), <https://fivethirtyeight.com/features/tighter-restrictions-are-losing-in-the-battle-over-voter-id-laws> [<https://perma.cc/86Y6-HL9B>].

II. BACKGROUND: HISTORY OF THE CONSTITUTIONAL RIGHT TO VOTE

In the United States, the right to vote is considered the most fundamental right, and thus warrants the utmost protection under the laws of a democratic society.² While the U.S. Constitution contains several provisions that mention the right to vote,³ all 50 states have explicitly granted this right as a constitutional guarantee to any citizen who meets certain enumerated qualifications.⁴ Most of these provisions provide that every United States citizen, who is 18 years or older, is qualified to vote in the state in which the citizen resides for a specified period of time.⁵ Therefore, subject to very limited circumstances,⁶ so long as the individual meets the minimum citizenship, age, and residency requirements of the applicable state constitution, that individual has a constitutionally protected right to vote.⁷ This right “necessarily includes the right to be free from restrictions that deny the franchise or render its exercise so difficult and inconvenient as to amount to the denial of the right to vote.”⁸

However, the right to vote is not without its limitations. The U.S. Constitution expressly empowers state legislatures to regulate the time, place, and manner of holding elections for members of Congress.⁹ States have incorporated this delegation into their own constitutions, allowing state legislatures to impose time, place, and manner restrictions for state and local elections.¹⁰ Through its lawmaking authority, state legislatures establish the procedural mechanisms of holding elections and may prescribe additional

2. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 120 (2014).

3. Unlike state constitutions, the U.S. Constitution does not contain a direct textual provision explicitly granting citizens the right to vote. Nevertheless, it is repeatedly recognized and discussed throughout the entire text as a legitimate, constitutional right. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”); U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

4. Douglas, *supra* note 2, at 100–01.

5. *Id.* at 101.

6. *See id.* at 102 (discussing how some state constitutions deny the constitutional right to vote “to convicted felons or mentally incompetent persons” even if the minimum qualifications are met).

7. *Id.* at 101–02.

8. 25 AM. JUR. 2D *Elections* § 97 (2019) [hereinafter 25 *Elections*].

9. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”).

10. 26 AM. JUR. 2D *Elections* § 302 (2019) [hereinafter 26 *Elections*].

requirements that they deem necessary to maintain the fairness of the democratic process.¹¹ The U.S. Supreme Court has held that the authority to regulate the electoral process is largely discretionary, and state legislatures are free to prescribe such restrictions, so long as the restrictions do not violate other provisions of the Constitution.¹² However, because election laws governing the qualifications and eligibility of voters “inevitably affect[], at least to some degree, the individual’s right to vote,” there is a tension between state legislatures’ broad authority to impose restrictions on the electoral process, and the constitutional right to vote.¹³ More recently, state legislatures have increasingly imposed strict rules that control the manner of absentee voting, which has made it harder for those who cast their ballots by mail to ensure their votes will be counted.¹⁴

A. *THE RISE OF ABSENTEE VOTING*

Absentee voting or so-called “convenience voting” has rapidly expanded over the past few decades.¹⁵ Most states have enacted absentee voting laws to give citizens an opportunity to exercise their constitutional right to vote, even if they are unable to be physically present at the polls.¹⁶ For the purposes of this Note, absentee voting refers to the general process in which qualified voters may, by law, cast a ballot prior to election day, either by mail or in person.¹⁷

Historically, these laws were passed primarily to allow qualified voters serving in the military to cast their ballots while being temporarily absent from their residence during times of war.¹⁸ However, states have expanded absentee voting to allow ordinary civilians to cast absentee ballots if they are unable to get to the polls under special circumstances, including illness, disability, work-related absence, or being out of town.¹⁹ This expansion was

11. 25 *Elections*, *supra* note 8, § 3.

12. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

13. 25 *Elections*, *supra* note 8, § 4.

14. See Pam Fessler, *Want Your Absentee Vote to Count? Don't Make These Mistakes*, NPR (Oct. 22, 2014, 4:31 PM), <https://www.npr.org/2014/10/22/358108606/want-your-absentee-vote-to-count-dont-make-these-mistakes> [<https://perma.cc/9BQK-6Q5V>] (“[T]ens of thousands of these mail-in ballots are likely to be rejected—and the voter might never know, or know why.”).

15. *Your Ballot's in the Mail: Vote by Mail and Absentee Voting*, PROJECT VOTE (July 9, 2007), http://www.projectvote.org/wp-content/uploads/2007/07/PB13-Vote_by_Mail.pdf [<https://perma.cc/R7PY-97XH>].

16. See *Adkins v. Huckabay*, 755 So. 2d 206, 211 (La. 2000) (explaining that absentee voting “is an exception to the traditional method of voting at the polls”).

17. See *Absentee and Early Voting*, NAT’L CONF. ST. LEGISLATURES (July 30, 2019), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/L5FS-CY32>].

18. See *De Flesco v. Mercer Cty. Bd. of Elections*, 129 A.2d 38, 40 (N.J. Super. Ct. App. Div. 1957).

19. See *Forrest v. Baker*, 698 S.W.2d 497, 497–98 (Ark. 1985) (reasoning that being out of town, at work, or having a sick family member are sufficient reasons for a person to be unable to get to the polls).

initially driven by the belief that voter turnout would increase if voting were made more convenient.²⁰ Although absentee voting has not been shown to directly increase voter turnout,²¹ states have still moved towards progressive legislative reforms that are aimed at providing voters with “ample time and opportunities to vote” by making the process more easily accessible to everyone.²² For example, the option for individuals to cast their ballots from home gets rid of a barrier for people with disabilities, or the elderly, who may find it more difficult to obtain the necessary transportation to get to the polls.²³ Currently, there are 19 states that require voters to provide a valid excuse or justification before absentee voting is permitted, while 28 states and the District of Columbia allow no-excuse absentee voting if requested by an otherwise qualified voter.²⁴

B. ABSENTEE VOTING AS A PRIVILEGE: PURPOSES AND EFFECTS OF
ABSENTEE VOTING LAWS

State legislatures began enacting mail-in and no-excuse absentee voting laws to make voting more convenient and to reduce the costs associated with the process “by expanding either the timeframe or the places in which people can vote.”²⁵ For example, some states permit voters to cast an absentee ballot 40 to 45 days prior to the election date, while others only provide a one-week timeframe.²⁶ The convenience of being able to cast a ballot prior to election day is extremely popular with voters as people are increasingly taking advantage of it.²⁷ According to the Census Bureau’s post-election surveys, the percentage of voters who reported using a non-traditional method of voting—either by mail or in-person prior to election day—increased from 10.5

20. Hans A. von Spakovsky, *Early Voting Disadvantages Seem to Outweigh Benefits*, HERITAGE FOUND. (Oct. 18, 2017), <https://www.heritage.org/election-integrity/commentary/early-voting-disadvantages-seem-outweigh-benefits> [<https://perma.cc/KK68-WZR5>].

21. *Id.*

22. Tyler Creighton, *Strong Support for Early Voting and No-Excuse Absentee at First Election Law Hearing*, COMMON CAUSE (Dec. 5, 2013), <https://www.commoncause.org/democracy-wire/strong-support-for-early-voting-and-no-excuse-absentee-at-first-election-law-hearing> [<https://perma.cc/Y5GF-FQFH>].

23. See Daniel Castro, *The Importance of Absentee Voting for Accessible Elections*, INNOVATION FILES (May 21, 2012), <https://www.innovationfiles.org/the-importance-of-absentee-voting-for-accessible-elections> [<https://perma.cc/P8PH-5HUA>] (describing how “transportation is the most frequently cited barrier to voting for people with disabilities”).

24. *Absentee and Early Voting*, *supra* note 17.

25. Marc Meredith & Zac Endter, *Aging into Absentee Voting: Evidence from Texas 1* (May 14, 2016) (unpublished manuscript) (on file with Author).

26. Paul Gronke et al., *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 440 (2008).

27. See Michael P. McDonald, *A Brief History of Early Voting*, HUFFPOST, https://www.huffingtonpost.com/michael-p-mcdonald/a-brief-history-of-early_b_12240120.html [<https://perma.cc/Xg8F-K9XC>] (“[T]he number [of] voters who cast their ballots prior to Election Day has steadily risen from less than a tenth to about a third.”).

percent in 1996 to 32.8 percent in 2012.²⁸ It is difficult, however, to gauge the tangible benefits of reducing the barriers to voting primarily because the cost of voting is not the same for everyone within the voting population.²⁹ Despite the uncertainties regarding voter turnout, absentee voting has been a clearly recognized method of voting.

However, because state legislatures are responsible for enacting absentee voting laws, many states have treated this method of voting as “a privilege granted to electors, not an absolute right.”³⁰ Thus, legislatures have been left free to determine the scope of the absentee voting process and to restrict its use “to specifically enumerated situations and qualifications.”³¹ Although states have liberalized the eligibility requirements for *who* can vote in absentia, legislatures have continued to impose various procedural requirements that restrict *how* a voter casts the ballot.³² As the Tenth Circuit has previously stated, “[a]bsentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures.”³³ When establishing the procedural requirements, state legislatures are guided by “the purposes of enfranchising qualified voters, preserving ballot secrecy, preventing fraud, and achieving a reasonably prompt determination of election results.”³⁴ Because the time, place, and manner authority is largely discretionary, there are many state variations that dictate how a person must apply for an absentee ballot, how a person must return the ballot, and what information must be provided with the ballot.³⁵

As absentee voting laws have become more common, there has been an increasing concern that as voting becomes more convenient it will get more difficult to “protect the secrecy of the ballot[s].”³⁶ While state legislatures strive to ensure that voters are able to participate in the electoral process, they

28. Drew Desilver & A.W. Geiger, *For Many Americans, Election Day Is Already Here*, PEW RES. CTR. (Oct. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/10/21/for-many-americans-election-day-is-already-here> [https://perma.cc/9JW-AJZV].

29. See Gronke et al., *supra* note 26, at 446. The “cost of voting” refers to the common barriers that keep individuals from voting, such as time, photo ID requirements, access to transportation, availability to take time off from work, etc. instead of monetary costs. See Quan Li et al., *Cost of Voting in the American States*, 17 ELECTION L.J. 234, 236 tbl.1 (2018).

30. Boardman v. Esteve, 323 So. 2d 259, 264 (Fla. 1975) (citation omitted); see, e.g., Bell v. Gannaway, 227 N.W.2d 797, 802 (Minn. 1975) (“Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” (citations omitted)); Mommsen v. Sch. Dist. No. 25, Holt Cty., 147 N.W.2d 510, 513 (Neb. 1966).

31. Adkins v. Huckabay, 755 So. 2d 206, 211 (La. 2000).

32. See De Flesco v. Mercer Cty. Bd. of Elections, 129 A.2d 38, 40 (N.J. Super. Ct. App. Div. 1957).

33. ACLU of N.M. v. Santillanes, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted).

34. 26 *Elections*, *supra* note 10, § 333.

35. See Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL. L. REV. 1261, 1263–64 (1985).

36. See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 508 (2003).

are also responsible for ensuring that elections remain fair and honest.³⁷ It has been widely believed “that absentee voting is much more susceptible to illegal activity than voting in person at the polling place”³⁸ because absentee ballots are cast in private.³⁹ While election officials are able to monitor ballots cast in person, in the presence of many observers, absentee ballots are cast at various times without the same physical accountability, making it harder to detect fraudulent conduct.⁴⁰ With mail-in ballots, states are aware of the heightened risks that the votes may have been subjected to pressure or intimidation, or stolen from mailboxes.⁴¹

To combat the heightened risk of voter fraud inherent in absentee voting, some states have prescribed stricter requirements as procedural safeguards.⁴² As a consequence, however, the additional burdens have deterred voters from casting absentee ballots altogether in some states,⁴³ further undermining the crucial objective of absentee voting laws—the enfranchisement of qualified voters. This tension arises because there is no bright-line standard to determine what proper safeguards are adequate to prevent fraud and dishonesty, without excessively inconveniencing the voter.⁴⁴

37. See William T. McCauley, Comment, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 631–32 (2000).

38. *Id.* at 632.

39. *Voting by Mail and Absentee Voting*, MIT ELECTION DATA & SCI. LAB, <https://electionlab.mit.edu/research/voting-mail-and-absentee-voting> [<https://perma.cc/3H7B-RMSV>].

40. See *id.* (explaining that when a “ballot is cast outside the public eye . . . the opportunities for coercion and voter impersonation are greater”); see also Fortier & Ornstein, *supra* note 36, at 513.

41. See Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES (Oct. 6, 2012), <https://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html> [<https://perma.cc/S293-6U94>]; see also Emery Dalesio & Jonathan Drew, *Political Operative, Four Others Arrested in North Carolina Ballot Fraud Scandal*, USA TODAY (Feb. 27, 2019, 6:54 PM), <https://www.usatoday.com/story/news/politics/2019/02/27/north-carolina-ballot-braud-scandal-five-arrests/3010048002> [<https://perma.cc/3X4W-2V9W>] (describing how the North Carolina congressional race was compromised after discovering that certain individuals working for a running candidate “illegally gathered up absentee ballots from voters by offering to put them in the mail, and in some cases forged signatures and filled in votes for local candidates”).

42. See Jenna Portnoy, *Va. House Approves ID Requirement for Absentee Voting Requested by Mail*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/local/virginia-politics/va-house-approves-id-requirement-for-absentee-voting-requested-by-mail/2015/02/09/8e361cae-bo7f-11e4-854b-a38d13486ba1_story.html [<https://perma.cc/7NHT-C9R3>] (discussing a proposed Virginia bill that would require voters to submit a copy of a valid photo ID when casting an absentee ballot, as required in several other states); see also Fortier & Ornstein, *supra* note 36, at 513 (explaining that Florida’s legislature imposed tighter standards on its signature, voter identification, and witness requirements in response to claims of absentee voting fraud during elections).

43. See J. Eric Oliver, *The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout*, 40 AM. J. POL. SCI. 498, 511 (1996) (“In those states with restrictive laws, absentee voting is a relatively minor phenomenon limited to students and the elderly.”).

44. See Fortier & Ornstein, *supra* note 36, at 509.

C. COURTS' VARIOUS STATUTORY CONSTRUCTIONS OF ABSENTEE VOTER LAWS

Generally, courts have been reluctant to interfere with state legislatures' authority to oversee that the democratic process is operated fairly and efficiently.⁴⁵ However, the judiciary is the key actor that "shape[s] the meaning of the constitutional right to vote."⁴⁶ Since most state legislatures allow voters to cast absentee ballots through permissive legislative enactments, voters may seek judicial relief if "legislative action or inaction has caused their inability to cast a ballot."⁴⁷ When adjudicating cases involving absentee voting laws and procedures, courts have the ability to directly affect voters and state elections by establishing the validity of a ballot, or the constitutionality of the statute itself.⁴⁸

In interpreting absentee voting laws, lower courts have generally applied two main types of statutory construction to dictate whether a ballot should be counted as a lawful vote.⁴⁹ First, courts in some jurisdictions opt for a strict construction of absentee voting provisions, holding that the "failure to comply literally with the technical requirements set forth in a statute conferring the privilege of absentee voting invalidates the ballots cast."⁵⁰ Under this approach, the burden is on the voter to ensure that he or she complies with each and every procedural requirement imposed by the law.⁵¹ Courts applying strict compliance review tend to emphasize the need to preserve the integrity of absentee ballots, and thus defer to state legislatures in prescribing the necessary safeguards to prevent abuse.⁵² This view supports "the notion that absentee voting is not a right but rather is a mere privilege."⁵³ Since absentee voting is not considered a constitutional entitlement in these jurisdictions, courts are reluctant to reinterpret the plain text of a statute just to guarantee an absentee vote.⁵⁴

The main criticism concerning strict compliance review is that ballots may be thrown out for the mere failure, of an otherwise qualified voter, to comply with the technical requirements of an absentee voting law, no matter

45. 25 *Elections*, *supra* note 8, § 4.

46. Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 7 (2016).

47. Note, *The Submerged Constitutional Right to an Absentee Ballot*, 72 MICH. L. REV. 157, 161 (1973).

48. Douglas, *supra* note 46, at 10.

49. See M.C. Dransfield, Annotation, *Construction and Effect of Absentee Voters' Laws*, 97 A.L.R.2d 257 § 2 (1964).

50. 26 *Elections*, *supra* note 10, § 335.

51. Dransfield, *supra* note 49, § 5(a).

52. *Id.*

53. *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (en banc).

54. See *id.* ("[T]he rule of strict construction is rooted in the legislature's duty to safeguard the purity of elections.").

how trivial the error may be.⁵⁵ When absentee ballots are invalidated due to such technical restrictions, it is argued that the result is a “needless disenfranchisement of absent voters.”⁵⁶ Not only does that take away a voter’s ability to participate in the political discussion, but it also creates doubt as to the election results because election officials have the discretion to determine whether a vote is valid or not.⁵⁷ Strict compliance, therefore, imposes additional burdens on voters to know exactly what the law requires, and how to properly adhere to every requirement before casting a ballot.⁵⁸

On the other hand, most jurisdictions have moved towards the second type of statutory construction, which supports the view that absentee voting laws should be liberally construed.⁵⁹ Instead of mandating strict compliance with the law, courts in these jurisdictions require substantial compliance in which absentee ballots only need to “contain a voter’s place of residence, reason for voting by absentee ballot, and signature to be counted.”⁶⁰ Courts applying this standard of construction tend to focus primarily on the “purpose of protecting and furthering the right of suffrage.”⁶¹ The underlying justification for this approach is to prevent courts from imposing rigid and technical interpretations that will unduly interfere with the constitutional guarantee of the right to vote.⁶² Further, these jurisdictions recognize that “in light of the realities of modern life,” there are many voters who have legitimate reasons for being unable to be physically present at the polls, who should nevertheless be able to express their views “without being encumbered by an unyielding standard of statutory exactitude.”⁶³

A main criticism of substantial compliance review is that if courts become too tolerant of irregularities found in absentee ballots, such leniency could “lead to a manipulation of an election or affect the integrity of an election or the sanctity of the ballot.”⁶⁴ This would be especially problematic in cases involving a close election,⁶⁵ where absentee ballots are likely to be determinative of the outcome, and it would be difficult to tell if there was any

55. See *Wells v. Ellis*, 551 So. 2d 382, 383 (Ala. 1989) (“By that construction, incomplete compliance, or lack of compliance, with any requirement of the statute, technical though it may be, invalidates the ballot.”).

56. *Erickson*, 670 P.2d at 755.

57. See *Rogers v. Holder*, 636 So. 2d 645, 651 (Miss. 1994) (“Disenfranchisement of a significant number of voters may create sufficient doubt as to the election results to warrant a special election, even absent evidence of fraud.”).

58. See *Parra v. Harvey*, 89 So. 2d 870, 872 (Fla. 1956).

59. Dransfield, *supra* note 49, § 5(b).

60. Lori A. Tarle, Comment, *Statutory Interpretation and the Alabama Absentee Ballot Controversy*, 26 CUMB. L. REV. 197, 205 (1995).

61. Dransfield, *supra* note 49, § 5(b).

62. See *Applications of Austin*, 165 N.Y.S.2d 381, 390–91 (Sup. Ct. 1956).

63. *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (en banc).

64. *Adkins v. Huckabay*, 755 So. 2d 206, 215 (La. 2000).

65. See *infra* notes 72–75 and accompanying text.

fraud or abuse involved in the absentee voting process.⁶⁶ Due to the inability to carefully monitor mail-in ballots, election officials are more likely to exercise caution when assessing these ballots, and thus more reluctant to count the votes, as compared to ballots that are cast at the polls.⁶⁷ Therefore, by requiring only substantial compliance with the requirements set forth by the legislatures, courts may be undermining the integrity of the entire election due to the inherent risks associated with absentee voting.

Whether courts have adopted strict compliance or substantial compliance is an important distinction because it directly affects the burden that is placed on the individual voter.⁶⁸ Courts adhering to strict compliance are generally looking at the plain statutory language of absentee voting laws, without much consideration for anything else, and thus the burden is wholly on the voter to abide by the statutory requirements.⁶⁹ On the other hand, courts adhering to substantial compliance will give primary consideration to the “public policy interest[s] in protecting . . . [the] right to vote” and “legislative intent,” which in effect, reduces the cost of voting by making the process more convenient for the voter.⁷⁰ This is not to say that courts do not take into consideration both the statutory text and public policy interests surrounding the law when using judicial interpretation. The difficulty arises when a plain reading of the statute renders a ballot invalid, which goes directly against the legislative intent of preserving the fundamental right to vote.⁷¹

In 2000, election officials in Florida directly faced the tension between whether to adhere strictly to the absentee voting requirements prescribed by the law to safeguard against voter fraud or whether to ensure that the most votes were counted for.⁷² During an investigation of the closest presidential election in history between George W. Bush and Al Gore, it was revealed that “Florida officials accepted hundreds of overseas absentee ballots that failed to comply with state laws.”⁷³ Upon a state-wide recount of all the votes, there were

66. See *Adkins*, 755 So. 2d at 215 (explaining that the potential for abuse is inherent in absentee voting where it is unclear whether the irregularities in the absentee voting process were caused by human errors or involved actual fraud).

67. See Liptak, *supra* note 41 (“In the last presidential election, 35.5 million voters requested absentee ballots, but only 27.9 million absentee votes were counted.”).

68. 26 *Elections*, *supra* note 10, § 341 (discussing how the failure to comply with the statutory provisions will invalidate the ballots under strict compliance whereas substantial compliance will invalidate the ballots only if the irregularities “adversely affect[ed] the sanctity of the ballot and the integrity of the election”).

69. See Tarle, *supra* note 60, at 220–22 (explaining how the textual approach to determine the validity of an absentee ballot requires judges to conclude that the statutory language used by the legislatures is mandatory and not subject to considering other policy factors).

70. *Id.* at 223.

71. *Id.* at 224.

72. See David Barstow, *Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES (July 15, 2001), <https://www.nytimes.com/2001/07/15/us/examining-the-vote-how-bush-took-florida-mining-the-overseas-absentee-vote.html> [perma.cc/68TK-7BZT].

73. *Id.*

many inconsistencies between counties in which some election officials had counted ballots that lacked witness signatures and addresses, while others had strictly invalidated defective ballots.⁷⁴ When making decisions “particularly with ballots that appeared to be from legitimate voters yet did not comply with the rules. . . . [B]oard members said they had used common sense.”⁷⁵ This was in compliance with the recount procedures adopted in a Florida Supreme Court decision, which ordered election officials to consider the intent of the voter as the test to determine whether contested ballots should be counted as a legal vote.⁷⁶ In reaching this interpretation, the Florida Supreme Court relied on “a long-standing principle of Florida law, derived from the Florida Constitution, which declares the ‘right of suffrage preminent.’”⁷⁷

In *Bush v. Gore*, the U.S. Supreme Court reversed Florida’s decision, concluding that its order to consider the intent of the voter failed to “satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to vote].”⁷⁸ The Court reasoned that although the Florida Supreme Court had the power to implement a statewide remedy to resolve disputes over the election results, as authorized by statute, the court’s failure to provide local counties with uniform standards and recount methods violated the constitutional guarantee of equal protection.⁷⁹ Although concluding that the Florida Supreme Court’s order violated equal protection, the majority opinion “suggested that if the local governments themselves had implemented the unequal treatment of voters, there would be no equal protection violation.”⁸⁰ By making this distinction, the *Bush* decision essentially undermined “state judicial review of the accuracy of election results.”⁸¹ The next Part of this Note discusses how state legislatures responded to the *Bush v. Gore* decision, and how the focus shifted from protecting the right of suffrage, to preserving the integrity of elections and

74. *Id.*

75. *Id.*

76. *See* *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (explaining that Florida’s order to ascertain intent of an inanimate object required an interpretation of the marks or holes of the ballots that may not have been validly counted for during the machine count).

77. Geoffrey R. Stone, *Equal Protection? The Supreme Court’s Decision in Bush v. Gore*, FATHOM ARCHIVE, <http://fathom.lib.uchicago.edu/1/777777122240> [<https://perma.cc/NA2K-YNHP>].

78. *Bush*, 531 U.S. at 105.

79. *See id.* at 109. The Court held that the Equal Protection Clause of the Fourteenth Amendment was violated by Florida’s order because the recount procedures did not specify how the canvassing boards were supposed to ascertain a voter’s intent from a piece of paper, which subsequently led local counties to establish their own standards for when to accept or reject a contested ballot. *Id.* at 106. The Court explained that an equal protection issue was implicated in this case because “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Id.* at 104–05.

80. Steven G. Gey, *The Odd Consequences of Taking Bush v. Gore Seriously*, 29 FLA. ST. U. L. REV. 1005, 1008 (2002).

81. *See id.* at 1006.

the voting process; ultimately producing a consequential disenfranchisement of eligible voters in following elections.

III. HOW OSTENSIBLY “REASONABLE” RESTRICTIONS CONTRAVENE THE RIGHT TO VOTE

Following the 2000 presidential election controversy involving defective ballots, a wave of new election laws were passed in response to the dip in public confidence with the fairness of the electoral process.⁸² However, a simultaneous effect of this legislative response was that courts began taking a more active role in closely scrutinizing whether the newly imposed voting procedures could be carried out fairly.⁸³ How courts would interpret voting procedures within the scope of their state constitutions would either “open up the process to more people . . . [or] ultimately make voting harder.”⁸⁴ First, Section III.A discusses how the U.S. Supreme Court has not clearly set forth a standard for reviewing election law disputes, leaving lower courts to arbitrarily determine their own standard of review. As a consequence, the variations to the cost of voting for citizens in different states essentially undermine the principle that the right to vote is a fundamental right that is guaranteed to every qualified voter. Using that general background, Section III.B then focuses on three specific, commonly imposed absentee voting requirements—signature-matching, voter ID, and early voting periods—to illustrate how different lower courts have reviewed these statutory provisions in relation to the constitutional right to vote.

A. UNDUE BURDENS ON THE GENERAL RIGHT TO VOTE

Despite the critical importance in judicial resolution of election law disputes, lower courts face difficulty in determining the appropriate standard of review for when the fundamental right to vote is at stake because the U.S. Supreme Court has refrained from clearly indicating the level of scrutiny to be used.⁸⁵ There is little guidance for lower courts when some U.S. Supreme Court cases have determined that strict scrutiny should be applied because the right to vote is a fundamental right, whereas another line of cases have indicated that a more flexible balancing test, which weighs the burdens imposed by the law on the voter against the state interests, is sufficient.⁸⁶ Thus, lower courts have been left to make their own determinations on which laws

82. See Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1870 (2013).

83. *Id.* at 1899 (suggesting that “courts may be taking their cue from *Bush v. Gore* to more aggressively police election rules”).

84. Douglas, *supra* note 46, at 24.

85. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 170 (2008).

86. See *id.*

deserve strict scrutiny versus a lower standard of review.⁸⁷ This lack of consistency not only provides uncertainty to voters affected by new election laws, but it also has the greater societal implication of “undermining the importance of the right to vote.”⁸⁸

Under the balancing test, the U.S. Supreme Court has determined that “the State’s important regulatory interests are generally sufficient to justify” the restrictions” when the voting law “imposes only ‘reasonable, nondiscriminatory restrictions’” on the right to vote.⁸⁹ The Court distinguished “reasonable . . . restrictions” with those restrictions that so severely burden the right to vote, for which the State is required to show a compelling justification for imposing the burden.⁹⁰

In *Crawford v. Marion Cty. Election Bd.*, the Supreme Court upheld an Indiana statute that required citizens to present valid photo identification when voting in person, on or prior to election day, concluding that Indiana’s interests sufficiently made it a reasonable regulation.⁹¹ The Court explained that Indiana’s interests in guarding against the risk of voter fraud at polling places and safeguarding “public confidence in the integrity of the electoral process” were sufficient justifications because the voter ID requirement imposed only a limited burden on the right to vote.⁹² Although the Court acknowledged that there was no evidence of in-person voter fraud occurring in the past, it nevertheless determined that states could “rationally adopt voter identification requirements to protect the integrity of its elections against the possibility that some form of in-person impersonation fraud might emerge in the future.”⁹³ *Crawford* essentially deemed the balancing test to be an extremely deferential standard by determining that states did not have to present concrete evidence in support of its advanced interests, which in effect, undermined meaningful judicial scrutiny.⁹⁴

The *Crawford* Court applied a lower standard of scrutiny only after ascertaining that “the inconvenience [to voters] of making a trip to the [driver’s license station], gathering the required documents, and posing for a photograph surely [did] not qualify as a substantial burden on the right to vote.”⁹⁵ However, the Court did not properly give weight to the reality that

87. *Id.* at 173.

88. *Id.* at 174 (explaining that applying anything less than strict scrutiny to a law that directly imposes burdens on an individual’s right to vote indicates that the courts do not view the right to vote as a fundamental right).

89. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983)).

90. *Id.*

91. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008).

92. *Id.* at 194–97, 203.

93. Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 147 (2018).

94. *Id.* at 148.

95. *Crawford*, 553 U.S. at 198.

inconveniences associated with obtaining a valid photo ID can constitute “indirect costs to voting [that] can create disincentives for voting.”⁹⁶ Research suggests that imposing photo identification and registration requirements can be of such a substantial cost to certain individuals that it will effectively disincentivize, otherwise eligible voters, from being a part of the electorate.⁹⁷ Despite the possibility of disenfranchising voters, many lower courts have upheld voter ID laws on the grounds that the plaintiffs challenging the laws have not been able to show “sufficient evidence of voters being impacted by the identification laws.”⁹⁸

On the other hand, some lower courts have struck down voter ID laws and “determined the evidentiary record sufficient to support an attack on the photo identification laws.”⁹⁹ This disparity is caused by the likelihood that courts will be highly deferential to state legislatures when the plaintiff challenging a voting law does not “present concrete evidence of how the indirect cost[s] . . . frustrated the plaintiff’s right to vote.”¹⁰⁰ Contrarily, when viewed in light of the Court’s reasoning in *Crawford*, it is apparent that state interests, although lacking actual substantiation, can be the primary bases for judicial review.¹⁰¹ In both scenarios, the individual claimant is at a severe disadvantage because the courts are asking for evidence that the plaintiff is not in the best position to have.

This approach was criticized in two dissents to a Michigan Supreme Court decision, which upheld a proposed voter ID law on the grounds that it was a reasonable election regulation when viewed against the state’s interest in preventing voter fraud.¹⁰² The dissenters contended that the state’s interest could not sufficiently justify the law because there was no evidence that the photo identification requirement would actually address the issue of in-person voter fraud, and in their view, the lack of concrete evidence by the state should have invalidated the law, as it unduly burdened the fundamental right to vote.¹⁰³

The Tennessee Supreme Court also followed the *Crawford* approach and unanimously upheld a voter ID law, despite the lack of evidence presented by

96. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1035 (2009) (“Indirect costs are the costs a voter has to expend to become eligible to vote, but the costs are not paid directly to the government or otherwise related to the actual casting of a ballot.”).

97. *Id.* at 1036.

98. *Id.* at 1059.

99. *Id.* at 1062.

100. *Id.* at 1064.

101. *Id.* at 1065.

102. Douglas, *supra* note 46, at 17 (citing *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 474–77 (Mich. 2007) (Cavanagh, J., dissenting); *id.* at 487 (Kelly, J., dissenting)).

103. See *id.* (citing *In re Request for Advisory Op.*, 740 N.W.2d at 474–77 (Cavanagh, J., dissenting); *id.* at 487 (Kelly, J., dissenting)).

the state on alleged voter fraud.¹⁰⁴ However, the court made clear that it was upholding the law after applying strict scrutiny instead of the balancing test used in *Crawford*, which claimed to open the door for plaintiffs to succeed upon similar challenges if they presented “better evidence of the kinds of burdens . . . impose[d]” to overcome the state’s compelling interests.¹⁰⁵

B. *UNDUE BURDENS ON ABSENTEE VOTING*

Just as additional voting requirements can impose high burdens on the general right to vote, the same burdens are also implicated when they are imposed on absentee voting. When individuals cast absentee ballots, they do so with the intent of exercising their constitutional right to vote, in the exact same way that individuals intend to do so at the polls. However, driven by the notion that absentee ballots are susceptible to more fraud, state legislatures have continued to impose stringent requirements, including strict signature-matching, photo identification, and shortened timeframes for absentee voting. With the addition of more procedural requirements, eligible voters wanting to cast an absentee ballot are at a greater disadvantage of ensuring their votes are counted because there is an increased probability that they will make a mistake or will be unable to meet all the requirements.

Absentee voting laws have been challenged on several different grounds, including “the residence of the voters and the necessity of their personal appearance at the polls; the mechanics of voting, including the place and the method of the casting of the ballot, and the counting and canvassing and other treatment of the ballots by the election officials concerned.”¹⁰⁶ Because absentee voting is only permitted by state statute, such challenges generally attack the facial validity of the statutory provisions. To resolve these challenges, courts review the constitutionality of the statute within the purview of the applicable state’s constitutional provisions that confer the right to vote.¹⁰⁷ In other words, if the court finds that the legislature imposed a time, place, and manner requirement that directly conflicts with the constitutional protections of the right to vote, the law will be struck down. Contrarily, if the court finds that the legislature properly prescribed a requirement within the scope of the constitutional right to vote, the law will be upheld.

1. Challenges Based on Signature Matching

One of the most common mistakes resulting in uncounted ballots is when the voter’s signature does not correspond with the signature on file at the

104. *Id.* at 18 (citing *City of Memphis v. Hargett*, 414 S.W.3d 88, 111 (Tenn. 2013)).

105. *Id.* (citing *Hargett*, 414 S.W.3d at 104–05).

106. M.C. Dransfield, *Validity of Absentee Voters’ Laws*, 97 A.L.R.2d 218 § 2 (1964) (footnotes omitted).

107. *See id.* (“[T]he validity of the statutory provisions depends on the applicable constitutional provisions as construed by the courts.” (footnote omitted)).

election office.¹⁰⁸ The primary challenge brought against signature-matching requirements is that they authorize ballots to be thrown out by election officials if the ballots are deemed defective; in some states, voters are not even notified when this occurs, so they may never know that their votes were not counted.¹⁰⁹ In a recent case, *League of United Latin Am. Citizens of Iowa v. Pate*,¹¹⁰ the Iowa Supreme Court conducted an interlocutory review of a temporary injunction issued by the district court, relating to proposed changes in the absentee voting requirements set forth by the legislature in various provisions of the Iowa Code.¹¹¹ First, the court invalidated sections of the Iowa law that authorized the election commissioner to reject an application for a ballot and a completed absentee ballot if the commissioner determined that the signature received did not match the signature on the record of the registered voter.¹¹² Second, the court invalidated a provision of the law that required the registered voter to provide a voter verification number when applying for a ballot.¹¹³ However, the court upheld the legislature's decision to reduce "the timeframe for mailing out or casting absentee ballots from 40 to 29 days."¹¹⁴

The challenges to these provisions were initially brought due to the concern that the legislature was allowing local election officers, without establishing a uniform standard to follow, "to accurately match signatures."¹¹⁵ By giving election officials the authority to void absentee ballots using their own discretion, there was a high risk that "ballots would be thrown out incorrectly if the requirement was allowed to take effect."¹¹⁶ Although the Iowa Supreme Court allowed the state to limit the timeframe for casting absentee ballots prior to an election, according to Guy Cecil, the chairman of a voting rights advocacy organization, "[t]his [was] a major victory for voting

108. Fessler, *supra* note 14.

109. *See id.*

110. *LULAC of Iowa v. Pate*, No. 18-1276, 2018 WL 3946147, at *1 (Iowa Aug. 10, 2018).

111. *Id.*

112. *Id.*; *see also* IOWA CODE § 53.2(5) (2018) (allowing the commissioner to reject an application if the commissioner decides that the signatures do not match and requiring the voter to submit a new application); IOWA CODE § 53.18(3) (2017) (explaining that a returned absentee ballot "shall be considered to contain a defect if it appears to the commissioner that the signature on the envelope has been signed by someone other than the registered voter, in comparing the signature on the envelope to the signature on record of the registered voter named on the envelope").

113. *LULAC of Iowa*, 2018 WL 3946147, at *1 (invalidating IOWA CODE § 53.2(4)(a)(4)); *see also* IOWA CODE § 53.2(4) (defining a "voter verification number" as "the registered voter's driver's license number or nonoperator's identification card number assigned to the voter by the department of transportation or the registered voter's identification number assigned to the voter by the state commissioner").

114. *LULAC of Iowa*, 2018 WL 3946147, at *1.

115. Stephen Gruber-Miller, *Iowa Supreme Court Allows Shorter Early Voting Period for 2018 Election*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/crime-and-courts/2018/08/10/iowa-voter-id-law-iowa-supreme-court-29-day-early-voting-period-2018-election-paul-pate-lulac/958652002> [<https://perma.cc/K6QH-PXEB>] (last updated Aug. 10, 2018, 3:43 PM).

116. *Id.*

rights and a powerful affirmation of the principle that voting should be easy and accessible for all.”¹¹⁷ He further stated that “the court’s decision means voters in the fall elections ‘will no longer be forced to produce an obscure voter ID number in order to cast an absentee ballot, nor will they be in danger of having their ballot thrown out due to inaccurate signature matching.’”¹¹⁸

Even more recently, the American Civil Liberties Union (“ACLU”) of Georgia filed a lawsuit against state and local election officials after discovering “that more than 1,200 ballots ha[d] been rejected statewide” due to determinations that signatures did not match those in the record, and voters had failed to write-in their addresses or correct birth years.¹¹⁹ Joe Sorenson, a spokesman for the state’s second-largest county, responded that “[t]he handling of absentee ballot applications and the acceptance and rejection of ballots by Gwinnett County has complied with the law and will continue to do so.”¹²⁰ After the lawsuit was filed, a U.S. District Court Judge, the Honorable Leigh Martin May, issued an injunction to prevent state and local election officials “from throwing out absentee ballots when a resident’s signature doesn’t exactly match the signature on their voter registration card.”¹²¹ In issuing the order, she stated that “[t]he Court finds that the public interest is best served by allowing qualified absentee voters to vote and have their votes counted.”¹²²

Although the injunction halted the state from automatically rejecting ballots due to signature mismatches, the exact-match requirement for addresses and birth years still meets controversy.¹²³ Under this law, if a voter fails to correct the application after election officials have declared it to be a no-match, the voter’s “application will be canceled after 26 months, resulting

117. David Pitt, *Iowa Supreme Court Halts Absentee Issues in Voter ID Law*, U.S. NEWS (Aug. 10, 2018, 4:52 PM), <https://www.usnews.com/news/best-states/iowa/articles/2018-08-09/iowa-supreme-court-hears-arguments-in-voter-id-law-appeal> [<https://perma.cc/4WE2-2G7J>].

118. *Id.*

119. Amy Gardner, *Rejection of Hundreds of Absentee Ballots in Suburban Atlanta County Draws Legal Challenges*, WASH. POST (Oct. 16, 2018, 5:48 PM), https://www.washingtonpost.com/politics/rejection-of-hundreds-of-absentee-ballots-in-suburban-atlanta-county-draws-legal-challenges/2018/10/16/dafce19a-d177-11e8-b2d2-f397227b43fo_story.html?utm_term=.fabb49e4556f [<https://perma.cc/HCC9-TZ2T>].

120. *Id.* (quoting Joe Sorenson, Gwinnett County Spokesman).

121. Michael Burke, *Federal Judge Rules Against Kemp in Georgia Absentee Ballot Request*, HILL (Oct. 31, 2018, 2:50 PM), <https://thehill.com/regulation/court-battles/414117-judge-rules-against-kemp-in-absentee-ballot-request> [<https://perma.cc/9ZDU-NDTF>].

122. *Id.* (quoting Judge Leigh Martin May).

123. See P.R. Lockhart, *Georgia, 2018’s Most Prominent Voting Rights Battleground, Explained*, VOX, <https://www.vox.com/policy-and-politics/2018/10/26/18024468/georgia-voter-suppression-stacey-abrams-brian-kemp-voting-rights> [<https://perma.cc/N5KX-X94E>] (last updated Nov. 6, 2018, 8:35 PM) (“On October 9, the Associated Press reported that 53,000 voter registrations . . . were being held by [the state] for failing to clear an ‘exact match’ process that compares registration information to Social Security and state driver records.”).

in the disenfranchisement of legitimate, voting-eligible Georgians.”¹²⁴ The disenfranchisement of voters is at an extremely high risk because “[t]he matching protocol has an extraordinarily high error rate.”¹²⁵ Because the matching protocol is implemented by local election officials, who input the voter’s registration data, the risk of human error is just as likely with the election officials as it is for the voter filling out the form.¹²⁶ Thus, the ongoing federal lawsuit challenging the state’s “exact match” program will have a significant impact on the rights of individuals who are prohibited from voting because of potentially trivial reasons.¹²⁷

Similar to the signature-match requirement that was struck down in Georgia, another U.S. District Court Judge, Landya McCafferty, struck down a New Hampshire law that allowed local election officials to reject absentee ballots solely upon conducting a visual comparison of the signatures provided.¹²⁸ In challenging the law, the ACLU of New Hampshire, and the national ACLU, argued that an individual’s fundamental right to vote is denied when the state allows election officials to throw out absentee ballots, without notifying the voter, based entirely on an arbitrary analysis by “officials—who have no handwriting-analysis expertise.”¹²⁹ The ACLU found that in the state’s three most recent general elections, the requirement of matching signatures disenfranchised close to 770 voters.¹³⁰ In declaring the New Hampshire law unconstitutional, Judge McCafferty emphasized that “[t]he infirmity with the statute begins with vesting moderators with sole, unreviewable discretion to reject ballots due to a signature mismatch.”¹³¹ She further explained that the problem with election officials having such unreviewable discretion derived from the state’s failure to provide objective,

124. James Woo, *Voting Rights Advocates Demand that Georgia Secretary of State Cease Discriminatory ‘No Match, No Vote’ Registration Protocol*, ASIAN AM. ADVANCING JUST. (July 19, 2018), <http://advancingjustice-atlanta.org/story/174?year=2016> [<https://perma.cc/ULF3-VYP3>].

125. *Id.*

126. See Brentin Mock, *How Dismantling the Voting Rights Act Helped Georgia Discriminate Again*, CITYLAB (Oct. 15, 2018), <https://www.citylab.com/equity/2018/10/how-dismantling-voting-rights-act-helped-georgia-discriminate-again/572899> [<https://perma.cc/LE8S-5X52>].

127. See *id.* (“This means that if a person lists his first name as ‘Tom’ on his voter registration form, but his driver’s license record shows his first name as ‘Thomas’ then his file is placed in ‘pending’ status until it is corrected. The same goes for someone who might omit a hyphen in their last name.”).

128. John DiStaso, *Federal Judge Rules NH Absentee Ballot Verification Law Unconstitutional*, WMUR, <https://www.wmur.com/article/federal-judge-rules-nh-absentee-ballot-verification-law-unconstitutional/22730651> [<https://perma.cc/A9KM-ZG8D>] (last updated Aug. 14, 2018, 10:20 PM).

129. Gilles Bissonnette, *ACLU Files Brief Challenging New Hampshire’s Invalidation of Absentee Ballots of Hundreds of Voters, Many of Whom Are Disabled, Without Warning*, ACLU N.H. (Mar. 20, 2018, 3:45 PM), <https://www.aclu-nh.org/en/news/aclu-files-brief-challenging-new-hampshires-invalidation-absentee-ballots-hundreds-voters-many> [<https://perma.cc/J4AE-GQ3C>].

130. *Id.*

131. DiStaso, *supra* note 128.

functional standards that could guide the officials in making the necessary handwriting assessments.¹³²

Currently, there are several states that allow election officials to throw out absentee ballots based upon a comparison between the signature provided on the return envelope, with the digitized signature contained on file.¹³³ When Judge McCafferty struck down the New Hampshire law relating to the signature-matching requirement, she indicated that although “the state ‘has legitimate interests in preventing voter fraud and protecting public confidence in elections,’ . . . the state only presented two cases of absentee-related voter fraud—whereas an estimated 740 absentee voters [have] been disenfranchised in the last three general elections due to signature mismatch.”¹³⁴ The legal director for the ACLU of New Hampshire, Gilles Bissonette, agreed stating that “[a]s the court acknowledged in our case[,] people shouldn’t be denied their fundamental right to vote because of penmanship [W]e’re pleased that this practice is going to end.”¹³⁵

2. Challenges Based on Voter ID Laws

While signature-matching requirements are challenged primarily for their arbitrary and inconsistent application, voter ID laws present similar, but distinct, challenges. It is generally contended that requiring photo identification for casting absentee ballots disadvantages certain citizens within the voting population, and therefore, such requirements are unconstitutional. In 2011, Wisconsin passed a new voter ID law that required potential voters to present a valid photo ID in-person or to provide a copy by-mail, when voting with an absentee ballot.¹³⁶ Further, the law required local election officials to hold absentee ballots that were submitted without a valid photo ID until a certain deadline, and if the voters failed to provide the requisite proof of ID by that date, those ballots would not be counted.¹³⁷ This

132. *See id.*

133. *See, e.g.*, MICH. COMP. LAWS § 168.765a(6) (2019) (“If a signature on the registration card or a digitized signature contained in the qualified voter file and on the absent voter ballot return envelope does not agree . . . the clerk shall mark the envelope ‘rejected’ and the reason for the rejection and shall place his or her name under the notation.”); MISS. CODE ANN. § 23-15-641(1) (West 2012) (listing non-corresponding signatures as one of the reasons the election commissioners shall reject a ballot); N.D. CENT. CODE ANN. § 16.1-07-12 (West 2015) (stating that if “the signatures on the application and affidavit do not correspond . . . the election inspector or election judge shall mark across the face thereof ‘rejected as defective’”).

134. Casey McDermott, *Federal Judge Strikes Down N.H.’s ‘Signature Mismatch’ Absentee Voting Law*, NHPR (Aug. 14, 2018), <http://www.nhpr.org/post/federal-judge-strikes-down-nhs-signature-mismatch-absentee-voting-law> [<https://perma.cc/R464-VFJ9>]; *see also supra* notes 128–32 and accompanying text.

135. McDermott, *supra* note 134.

136. WIS. GOV’T ACCOUNTABILITY BD., ABSENTEE VOTING: WISCONSIN’S NEW VOTER PHOTO ID LAW, *available at* http://www.co.pierce.wi.us/Municipal%20Government/Martell_Township/PDF_Files/Absentee_Voting_Voter_ID.pdf [<https://perma.cc/L8M6-WR8F>].

137. *Id.*

“law require[d] people to show a specific type of photo ID to vote—driver’s licenses, state ID cards, passports, [and] limited types of student IDs.”¹³⁸ The major contention behind the new voter ID law was that many voters who had already requested absentee ballots and returned completed absentee ballots were now being required to send photocopies of their IDs for their votes to count.¹³⁹ Furthermore, it was determined that “about 300,000 registered voters in Wisconsin [did] not have IDs that qualify for voting” and that “it would be impossible to issue credentials to all those voters between now and election day.”¹⁴⁰ Opponents of the new voter ID requirement emphasized how the law imposed new burdens on potential voters who would have to figure out how to get a valid ID just to exercise their right to vote.¹⁴¹

In a decision by a U.S. District Court Judge, James Peterson, the state was ordered “to quickly issue credentials valid for voting to anyone trying to obtain a free photo ID for voting but lack[ing] the underlying documents such as birth certificates to obtain one.”¹⁴²

The judge determined that the current process for voters to obtain a valid photo ID to comply with the statutory requirement was unconstitutional because it made it nearly impossible for some voters to get one.¹⁴³ When issuing the order, Judge Peterson stated that the voter ID law did not actually preserve integrity and confidence in the electoral system, which was advanced by the state as its primary interest in protecting against election fraud.¹⁴⁴ Instead, the consequential effect was the disenfranchisement of legitimate voters, which the judge found to undermine the public confidence in elections.¹⁴⁵

Currently, 35 states require voters to present some form of identification before casting a ballot in-person at the polls, whereas the remaining 15 states

138. Jason Stein, *Bid to Get Full Appeals Court Hearing on Voter ID Falls 1 Vote Short*, J. SENTINEL (Sept. 26, 2014), <http://archive.jsonline.com/news/statepolitics/bid-to-get-full-appeals-court-hearing-on-voter-id-falls-1-vote-short-b9935979321-277211831.html> [<https://perma.cc/27BL-LT5U>].

139. *Id.* (explaining that “[m]ore than 11,800 people had requested absentee ballots” without providing a valid photo copy of their IDs).

140. *Id.*

141. *See id.* (stating that many of the affected voters “would not attempt to get IDs because they didn’t know about the ID requirement, couldn’t get time off from work or didn’t have a way to get to a Division of Motor Vehicles service center”).

142. Ed Treleven, *Federal Judge Throws Out Limits on Absentee Voting, Other Voting Restrictions*, WIS. ST. J. (July 30, 2016), https://madison.com/wsj/news/local/govt-and-politics/federal-judge-throws-out-limits-on-absentee-voting-other-voting/article_4411da2e-dfb3-5bfb-b524-9a390c45bb2f.html [<https://perma.cc/S4M4-QENK>].

143. *See id.* Although Judge Peterson framed his decision more specifically to address the disproportionate effect on black and Hispanic citizens, this Note will again focus on the general rationale underlying the decision to assess how burdens of this kind can lead to the problematic disenfranchisement of otherwise eligible voters.

144. *Id.*

145. *Id.*

allow election officials to use some other method of verification to identify the voter.¹⁴⁶ While there are more states that require identification for in-person voting, 13 states have also required a form of ID for absentee voting.¹⁴⁷ It is predictable that the number of states imposing this type of requirement will increase for both in-person and absentee voting as states continue to make efforts to combat voter fraud.¹⁴⁸ However, these laws are likely to continue facing constitutional challenges because, as Rick Hasen, an election law specialist observed, “[t]here are ‘very few documented cases’” of election fraud, while the costs of obtaining an ID remain high and burdensome.¹⁴⁹ For example, there were around 300,000 voters concretely affected by the Wisconsin voter ID law, and nearly 760,000 voters affected by a Pennsylvania voter ID law in 2012 before it was struck down as unconstitutional.¹⁵⁰

Thus, it is important that courts recognize that a lot of the burdens imposed by voter ID requirements have to do with the indirect costs of voting, which can implicate the real, and detrimental, effect of disenfranchisement.¹⁵¹ As Judge Peterson concluded when striking down the Wisconsin voter ID law, an absentee ballot that is voided due to a failure of providing an acceptable form of ID becomes functionally the same as if the voters were disenfranchised of their right to vote in the first place.¹⁵²

3. Challenges Based on Absentee Voting Timeframe Reductions

In addition to signature-matching and voter ID requirements, the final area of contention discussed in this Section relates to the timeframe in which individuals are able to cast their ballots. Every state makes its own determination for how many days are allotted, prior to election day, for

146. Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (Jan. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Details> [https://perma.cc/ZPD7-S97R].

147. See *Absentee Ballot Rules*, VOTE.ORG, <https://www.vote.org/absentee-voting-rules> [https://perma.cc/5VHU-7FR4] (last updated Aug. 11, 2019).

148. See, e.g., Chris Norwood, *New State Law Requires Photo ID When Applying for Absentee Ballot*, DAILY HOME (Aug. 8, 2019), https://www.annistonstar.com/the_daily_home/free/new-state-law-requires-photo-id-when-applying-for-absentee/article_49dd93de-ba3e-11e9-9db9-bf9d9c9046a7.html [https://perma.cc/3JMM-SM92] (“Alabama voters were already required to show identification at the polls and to make copies of their IDs to submit with absentee ballots, but an ID has not been required to apply for an absentee ballot until now.”).

149. Suevon Lee & Sarah Smith, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Mar. 9, 2016, 8:33 AM), <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws> [https://perma.cc/D6ZX-M5AX]; see also Jillian Fisher, *Voter ID Laws: Unnecessary Burden of Our Most Fundamental Right*, ARK. J. SOC. CHANGE & PUB. SERV. (Nov. 3, 2014), <https://ual.edu/socialchange/2014/11/03/voter-id-laws-unnecessary-burden-of-our-most-fundamental-right> [https://perma.cc/E6QG-QWG7] (describing the indirect costs of obtaining an ID, including long travel times, lack of necessary documentation, limited accessibility, limited locations, etc.).

150. Lee & Smith, *supra* note 149.

151. See *supra* notes 143–45 and accompanying text.

152. See *supra* notes 142–45.

individuals to partake in early voting and to cast absentee ballots.¹⁵³ The early voting period is becoming increasingly important, in light of the fact that over 47 million people reported voting early in 2016, compared to around four million people in 1980.¹⁵⁴ After *LULAC of Iowa* upheld the limitation on early voting,¹⁵⁵ Iowa now has an early voting timeframe of 29 days, instead of the previous 40 days, meaning that individuals are not permitted to request an absentee ballot until October 8.¹⁵⁶ There are several states that allow nearly the same early voting timeframe as Iowa, including Montana, Nebraska, Maine, Indiana, Arizona, and Ohio.¹⁵⁷ Other states such as Illinois, Minnesota, New Jersey, North Dakota, South Dakota, Vermont, and Wyoming allow for a longer timeframe of close to 40 days or more.¹⁵⁸ Contrarily, a majority of the remaining states, including Alaska, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Kansas, Massachusetts, Nevada, New Mexico, North Carolina, and Washington allow a timeframe of approximately two weeks prior to election day.¹⁵⁹ Lastly, on the extreme end and far less common, the remaining states allow a timeframe of less than two weeks, with Oklahoma allotting the smallest amount of time of a mere three days.¹⁶⁰

The difficulty in bringing challenges to state laws that limit the timeframe of early voting is largely due to the fact that the evidence is unclear on whether cutting back the number of days actually has the effect of disenfranchising voters.¹⁶¹ Opponents of the 29-day limitation imposed by the Iowa legislature argued that many people had voted in the first 11 days of the allotted 40-day period in the 2016 election, and thus taking away that opportunity would make early voting more difficult for those voters.¹⁶² However, the Iowa Supreme Court was not convinced because there was no evidence showing

153. See *Absentee Ballot Deadlines*, VOTE.ORG, <https://www.vote.org/absentee-ballot-deadlines> [<https://perma.cc/N945-63BT>] (last updated Aug. 11, 2019).

154. Emily Stewart, *The Battle Over Early Voting, Explained*, VOX, <https://www.vox.com/2018/10/29/18018634/early-voting-2018> [<https://perma.cc/6GAG-XCJG>] (last updated Nov. 4, 2018, 9:07 AM).

155. *LULAC of Iowa v. Pate*, No. 18-1276, 2018 WL 3946147, at *1 (Iowa Aug. 10, 2018).

156. See *2018 General Election: Voter Registration Deadlines, Absentee Ballot Deadlines, and Early Voting Timeframes*, NAT'L ASS'N SECRETARIES ST., <https://www.nass.org/resources/2018-election-information> [<https://perma.cc/C8EU-96RU>]. The deadlines used in this Section are based on the 2018 state election calendars and may vary slightly from year to year.

157. See *id.* (ranging the days from early October to the day before or a couple days before election day).

158. *Id.*

159. *Id.*

160. *Id.*

161. See Adam Sullivan, *Fewer Early Voting Days Does Not Always Entail Fewer Voters*, GAZETTE (Aug. 13, 2018), <https://www.thegazette.com/subject/opinion/staff-columnist/fewer-early-voting-days-does-not-always-entail-fewer-voters-20180813> [<https://perma.cc/ZJ6B-YUJ5>].

162. *Id.*

that those same voters would subsequently be deterred from participating in early voting in the upcoming election due to the shortened period.¹⁶³

According to a study conducted by the Brennan Center for Justice, the ideal time period for early voting should be set to two weeks prior to election day.¹⁶⁴ Data shows that states with the highest percentage of voters participating in early voting have laws that allocate a period between two and three weeks.¹⁶⁵ On the other hand, “states offering significantly more or less time to cast an early ballot have not seen greater use of early in person voting,” and even more notably, these states actually report far fewer numbers of early in-person voting turnout.¹⁶⁶ This study also interviewed election officials and discovered that the administrative costs of opening up the early voting period for more than two weeks would not be beneficial, explaining that the administrative benefits of decreasing wait-times and crowding on election day were most optimally satisfied during this window.¹⁶⁷ This supports the notion that limiting the time frame of early voting is not likely to raise constitutional concerns, unless the time frame is drastically reduced.

The next Part of this Note will analyze the recent decisions and studies surrounding signature-match requirements, voter ID requirements, and early voting times discussed above. Part IV will also propose that to reach an ideal absentee voting law that will not unconstitutionally disenfranchise individuals of their right to vote, lower courts will need to use the balancing test set forth by *Crawford*, with a presumption that weighs in favor of the voter’s interests, specifically in cases involving these provisions.

IV. USING *CRAWFORD*’S BALANCING TEST: THE “IDEAL” ABSENTEE VOTING LAW MOVING FORWARD

The balancing test used by the U.S. Supreme Court in *Crawford*¹⁶⁸ is an appropriate standard of review that lower courts should use as a precedential guide to determine whether certain absentee voting requirements unconstitutionally disenfranchise citizens of their right to vote. Instead of being largely deferential to state legislatures and allowing mere skepticism to justify state interests, the courts should require the state to provide actual,

163. *Id.* In fact, Eric Van Lancker, a local election commissioner in Eastern Iowa indicated that the county office was receiving the same number of absentee ballots as in the last 2014 midterm election, just in a shorter time period. See Erin Murphy, *Iowa Early Voting Strong, Even with Fewer Days*, GAZETTE (Nov. 4, 2018), <https://www.thegazette.com/subject/news/government/iowa-early-voting-numbers-strong-suppression-midterms-20181104> [https://perma.cc/BR44-L3XY].

164. DIANA KASDAN, BRENNAN CTR. JUSTICE, EARLY VOTING: WHAT WORKS 12 (2013), https://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf [https://perma.cc/7RPF-2RP3].

165. *Id.*

166. *Id.*

167. *Id.*

168. See *supra* notes 91–95 and accompanying text.

concrete evidence that shows how the specific voting requirement at issue will directly promote the state's interests. Correspondingly, the courts should no longer place the burden on the individual claimant to present concrete evidence of the indirect costs that frustrated the individual's right to vote.

The *Crawford* balancing test is sensible for three primary reasons. First, when the constitutional right to vote is viewed as a *fundamental* right, the focus is on the individual voter, with the primary goal of ensuring that every qualified citizen is able to participate in the political process. Second, this approach does not prevent state legislatures from imposing reasonable regulations on the absentee voting process; rather it merely prohibits restrictions that unduly burden voters by increasing the cost of voting without any sufficient and concrete justifications. Lastly, using a balancing test instead of strict compliance allows courts to consider whether the voter substantially complied with the requirements mandated by the legislature, and thus protects votes from being thrown out due to trivial procedural errors.

In both case examples from Iowa and Georgia, the state courts invalidated voting requirements imposed on absentee voting on the grounds that there was a real risk of disenfranchising eligible voters.¹⁶⁹ Although absentee voting laws “are not designed to insure a vote but rather to permit a vote in a manner not provided by common law[,]”¹⁷⁰ it is clear that some courts are starting to use the same legal justifications to strike down strict absentee voting laws as they would for traditional voting laws. As the number of voters casting absentee ballots continue to increase, it is predictable that courts will start facing more challenges pertaining to absentee voting requirements.¹⁷¹ Given that “[t]he number of absentee ballots cast by absentee voters nearly doubled, from 14.7 million in 2004 to 24.8 million in 2016[,]” it is apparent that a large segment of the eligible voter population relies on this alternative method of voting.¹⁷² While the lawsuit against Georgia is still ongoing,¹⁷³ the number of absentee ballots that were mailed prior to this 2018 midterm election has almost doubled in the state compared to the 2014 election.¹⁷⁴ In addition to the increasing number of absentee

169. See *supra* notes 110–22 and accompanying text.

170. 3 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12:41 (3d ed. 2018).

171. U.S. ELECTION ASSISTANCE COMM'N, EAVS DEEP DIVE 4 (2017) (“EAVS data show that the percentage of voters who cast their ballots on a voting machine at a polling place on Election Day has declined steadily over the past decade, while the number of states offering early voting, no-excuse absentee voting, and vote by mail has increased.”).

172. *Id.* at 2.

173. See *supra* notes 123–27 and accompanying text.

174. Mark Niese, *Early Voting by Mail Surges Ahead of Georgia 2018 Election*, ATLANTA J. CONST. (Oct. 3, 2018), https://www.ajc.com/news/state—regional-govt—politics/early-voting-mail-surges-ahead-georgia-2018-election/qobhiGhDpMY8PP7p2BlvZP/?ecmp=norfu&utm_medium=social&utm_source=norfu_fb [<https://perma.cc/KV8U-NTCF>] (“Almost twice as many absentee ballots have been mailed to Georgia election officials so far compared to the same point before midterm elections in 2014.”).

votes, it will also be relevant for courts to consider “that ‘33 percent of voters 70 years and older voted absentee . . .’ and that ‘30 percent of voters with a disability . . . voted absentee,’” when determining the effect of disenfranchisement of otherwise eligible voters.¹⁷⁵ When states impose requirements that make it more difficult for potential voters to utilize the absentee voting process, it is likely those individuals will not attempt to use the process again, and some may not even attempt at all.¹⁷⁶

Because the legal justifications for applying the balancing test in *Crawford* to interpret traditional voting laws are similar to the arguments made for, and against, absentee voting laws, it is appropriate for lower courts to follow *Crawford* when assessing absentee voting requirements.¹⁷⁷ For example, many supporters of absentee voting argue that making it easier for voters to cast absentee ballots will “reduce the costs associated with elections” and in turn, “increase the number of people voting in elections.”¹⁷⁸ These arguments are consistent with the view that when it comes to election laws, the primary goal of state legislatures and the courts should be to facilitate participation in the electoral process. On the other hand, critics of absentee voting commonly argue that the ability to vote outside of polling places increases the “threat to the integrity of the ballot”¹⁷⁹ because “mail-in ballots are the most common source of electoral fraud.”¹⁸⁰

With the *Crawford* balancing test in mind, lower courts should shift the burden to the state, requiring it to provide actual evidence to support its interests, instead of imposing the burden on the individual claimant, whose constitutional right to vote is at stake. Because courts have the responsibility to balance the costs imposed on the voter with the interests of the state, this burden-shifting approach would help ensure that courts maintain an emphasis on protecting the right to suffrage above all else.

Assuming that voters are eligible to cast an absentee ballot,¹⁸¹ the fundamental right to vote should not depend on where an individual lives and how burdensome or easy the voting process is made under the applicable state laws.¹⁸² As discussed in Section III.B, a significant number of absentee ballots

175. U.S. ELECTION ASSISTANCE COMM’N, *supra* note 171, at 3.

176. Michael Wines, *As ID Laws Fall, Voters See New Barriers Rise*, N.Y. TIMES (Oct. 25, 2016), <https://www.nytimes.com/2016/10/26/us/elections/voter-id-laws.html> [<https://perma.cc/SR7H-W8Y7>] (explaining that election experts have found that “[i]n many if not most cases . . . potential voters give up after a single unsuccessful try. Some do not try at all”).

177. See Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1022–27 (2007) (illustrating the common arguments made for liberalizing absentee voting laws and the arguments made against it).

178. *Id.* at 1022.

179. *Id.* at 1025.

180. *Id.*

181. See *supra* note 24 and accompanying text.

182. See LAUREN HARMON ET AL., CTR. FOR AM. PROGRESS ACTION FUND, THE HEALTH OF STATE DEMOCRACIES 9 (2015) (“Yet the continued shift of voting rights battles to the states

are rejected by election officials simply because the voter failed to strictly comply with statutory requirements, usually by mistake.¹⁸³ The Iowa Supreme Court in *LULAC of Iowa* took an affirmative step in the right direction by ruling that the signature-match requirement by local election officials was unconstitutional.¹⁸⁴ The reasoning in that case was similar to the decision in *Bush v. Gore*, where the U.S. Supreme Court reversed Florida's decision on the grounds that the lack of uniform standards in the recount process gave local and state officials too much discretionary authority that was fundamentally unfair.¹⁸⁵ Similarly, when considering the state interests for imposing a signature-match requirement, such regulation does not justifiably prevent fraud in the voting process because election officials are just as likely to make mistakes in the matching process as the voters when matching their ballots.¹⁸⁶ Further, the federal district court judges in the Georgia and New Hampshire cases found that hundreds of absentee ballots had been thrown out due to signature-matching requirements, a sufficient number to show that the requirement led to the disenfranchisement of hundreds of voters.¹⁸⁷ Under the modified *Crawford's* balancing test, courts should invalidate statutory regulations relating to arbitrary signature-matching requirements when there is evidence that absentee ballots were thrown out solely because an election official made an arbitrary determination.

For similar reasons discussed above, allowing election officials to reject absentee ballots solely on voter ID grounds also implicates a constitutional infringement on the fundamental right to vote under the modified *Crawford* balancing test. Unless the state is able to provide concrete evidence showing that a voter ID requirement directly safeguards against fraud and abuse, these laws should be declared unconstitutional because of the proven increased indirect costs voters face in having to obtain a valid ID and having to re-mail it on time.¹⁸⁸ Therefore, if the only reason the voter is unable to comply with the statutory requirements of casting an absentee ballot is failing to provide a copy of a valid ID, the state should either utilize an alternative method of verification or provide a functional process for voters to easily obtain an ID. This would ensure that otherwise valid ballots are counted and corrected in time before the election. Because not all eligible voters have the same ability to obtain an ID, courts should be more cognizant of the indirect costs imposed by voter ID laws. Such evidence that voter ID laws affect eligible

highlights that where one lives too often determines his or her ability to participate in this fundamental exercise in democracy.”).

183. Fessler, *supra* note 14.

184. See *supra* notes 110–14 and accompanying text.

185. See *supra* notes 78–81 and accompanying text.

186. See *supra* note 128 and accompanying text.

187. See *supra* notes 121–34 and accompanying text.

188. See *supra* notes 142–49 and accompanying text.

voters unequally would properly justify courts striking down these laws, which would in turn prevent the rejection of hundreds of absentee ballots.¹⁸⁹

On the contrary, based on the limited evidence showing that limitations on early voting will necessarily result in the disenfranchisement of otherwise eligible voters, the Iowa Supreme Court properly upheld the portion of the absentee voting law that reduced the timeframe from 40 to 29 days, even under the modified *Crawford* test. Without further evidence that a shortened timeframe will prevent voters from casting absentee ballots, courts should find that the state's interests outweigh the voter's burdens. Therefore, until courts are provided with more concrete research to show how voters are unduly burdened by early voting periods, they should remain more deferential toward state legislatures and continue to uphold early voting requirements without as much scrutiny.

V. CONCLUSION

As absentee voting becomes an accepted alternative method of casting a ballot, courts will be faced with new challenges to state restrictions on this method of voting. Although absentee voting has been treated as a privilege granted by the legislatures, judicial review will require courts to consider whether the fundamental right to vote is being infringed upon. Instead of applying strict compliance review, lower courts should follow the U.S. Supreme Court's balancing test set forth in *Crawford* to weigh the state's interests against the individual's interests. However, because the fundamental right to vote is at stake, the burden should be shifted to the state, rather than the voter, to provide sufficient justifications for any voting requirements that make it more burdensome for a voter to cast a ballot. If lower courts began focusing primarily on safeguarding the right to vote, the right to vote would finally be recognized as a fundamental right that deserves the utmost protection of the law.

189. Lee & Smith, *supra* note 149 (explaining the results of a 2012 analysis which “found that those who lack valid photo ID tended to be young people, those without college educations, Hispanics and the poor”); *see also* Melissa Brown, *Alabama Photo Voter ID Law Part of Increasing Trend in U.S.*, MONTGOMERY ADVERTISER, <https://www.montgomeryadvertiser.com/story/news/local/solutions-journalism/2018/10/30/alabama-photo-voter-id-law-one-more-than-dozen-united-states/1652341002> [<https://perma.cc/S9VG-Q49D>] (last updated Oct. 30, 2018, 8:34 AM) (describing how “older adults who are no longer driving, young adults who go to school in a different state or Americans with disabilities” constitute the majority of individuals who are affected by voter ID laws).