

## NOTES

### APPEARANCE MATTERS: WHY THE STATE HAS AN INTEREST IN PREVENTING THE APPEARANCE OF VOTING FRAUD

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*This Note seeks to show that the state has an interest not only in preventing voting fraud, but also in preventing the appearance of voting fraud. Drawing an analogy to campaign finance law, this Note argues that if the state has an interest in preventing the appearance of corruption in election financing, then courts should also recognize such an interest in preventing the appearance of voting fraud in elections. The state has this interest in elections for the same reason it does in campaign finance law: Voters who perceive fraud may lose faith in the democratic process and consequently drop out of that process. Borrowing from the standard of proof courts have used in the campaign finance context, this Note analyzes popular opinion, media reports, and legislators' statements to determine that the appearance of voting fraud exists—and thus concludes that the state should be permitted to act on its interest in combating that appearance. Photo identification requirements have attracted particular controversy as a method of combating voting fraud. This Note analyzes photo identification requirements as an example of antifraud laws which might not be constitutional if the state's only interest were in preventing the actual fraud, but might be constitutionally permissible if the appearance-of-corruption interest is considered.*

#### INTRODUCTION\*\*

Americans lack confidence in their own electoral process.<sup>1</sup> Whether this lack of confidence is well founded or erroneously based

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\*\* Editors' Note: This Note went to print prior to the Supreme Court's April 28, 2008 decision in *Crawford v. Marion County Election Board*, which upheld Indiana's photo identification law. The Court's decision, discussed *infra* in the Postscript, suggests greater recognition of the state's interest in preventing the appearance of voting fraud and sets the stage for further litigation in which this Note's analysis will prove important.

<sup>1</sup> JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 11 (2004) (citing June 2004 Zogby poll finding that 17% of likely voters were not sure or did not believe that their votes would be counted accurately and Rasmussen Poll

on exaggerated anecdotes of fraud,<sup>2</sup> it is generally acknowledged to exist.<sup>3</sup> The Supreme Court has addressed this increasing crisis in public confidence in one particular aspect of the electoral process: the financing of elections. To wit, the Court upheld the Bipartisan Campaign Reform Act of 2002,<sup>4</sup> legislation that burdened free speech rights in order to counter both corruption and the appearance of corruption.<sup>5</sup> This Note suggests that the Supreme Court should recognize that the state also has an interest—possibly even a compelling interest<sup>6</sup>—in countering the appearance of corruption in another aspect of the electoral process: voting.<sup>7</sup>

The appearance-of-corruption state interest is able to overcome central constitutional rights in the campaign finance realm, and, as this Note seeks to demonstrate, could logically overcome central constitutional rights in the voting realm as well. Concerns over how far this doctrine can stretch are not addressed best by drawing what this Note contends is an artificial line between different parts of the electoral scheme. Instead, the courts could address such concerns about the doctrine by rethinking whether this nebulously proven state interest should be able to overcome individual rights in any context. This

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finding that only 57% of voters considered elections fair); *see also* Jimmy Carter & James A. Baker, III, *Letter from the Co-Chairs of COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM*, at ii (2005), *available at* [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf) (stating that Americans are losing faith in electoral process).

<sup>2</sup> *Compare* FUND, *supra* note 1, at 3 (arguing that American elections invite error and fraud), *with* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 635 (2007) (declaring that common stories of fraud often contain false or misleading information).

<sup>3</sup> Carter & Baker, *supra* note 1, at ii.

<sup>4</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified as amended primarily in scattered sections of 2 and 47 U.S.C.). This law is better known as the McCain-Feingold Law for its Senate sponsors, Senators John McCain and Russ Feingold.

<sup>5</sup> *McConnell v. FEC*, 540 U.S. 93, 95 (2003) (recognizing that law burdens free speech and free association, but finding that government interest outweighs burden). Corruption in campaign finance involves donors exercising improper influence over elected officials. *Id.*

<sup>6</sup> As explained below, the Supreme Court has been unclear in campaign finance cases as to whether the state's interest in preventing the appearance of corruption is compelling (i.e., enough to overcome strict scrutiny) or merely strong. *See infra* Part II.A. This Note analyzes both possibilities with respect to voting fraud. *See infra* Part IV.

<sup>7</sup> In this Note, actual corruption refers to voting fraud, such as voting by ineligible persons, preventing eligible voters from voting, or counting votes in a manner that distorts an accurate tally. There is, however, no generally agreed-upon definition. *See* U.S. ELECTIONS ASSISTANCE COMM'N, *ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY* 11–13 (2006) (finding no generally agreed-upon definition of voting fraud or voting intimidation, but using term “election crimes” to mean illegal, intentional acts or willful omissions “that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results”).

Note takes the doctrine as it is in campaign finance and concludes that the basic question at issue—whether preventing the appearance of corruption is a legitimate state interest—should be treated consistently throughout the electoral realm.

The 2005 Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker, concluded that states will need to pass new election legislation to increase public faith in the electoral process.<sup>8</sup> The Supreme Court has also recognized that actual voting fraud can cause people to lose faith in, and drop out of, the democratic process.<sup>9</sup>

Returning to the campaign finance context, the Supreme Court has acknowledged that the state has a strong—possibly compelling—interest in counteracting the perception that public officials' decisions are overly influenced by campaign contributions, i.e., a strong interest in preventing the appearance of corruption.<sup>10</sup> Thus, in order to prevent the perception that votes are being overwhelmed by money, regardless of whether that perception is true, the Court allows states to limit individual rights.<sup>11</sup>

The Supreme Court's analysis helps to address the increasingly important question of the constitutionality of photo identification laws.<sup>12</sup> The Baker-Carter Commission recommended, among other things, that states pass laws requiring voters to present photo identifi-

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<sup>8</sup> Carter & Baker, *supra* note 1, at ii.

<sup>9</sup> Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) (per curiam) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”).

<sup>10</sup> *McConnell*, 540 U.S. at 136 (stating that treatment of campaign finance regulation reflected “importance of the interests that underlie contribution limits—interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’” (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982))).

<sup>11</sup> *See id.* at 137 (arguing that contribution limits aid participation by ensuring popular perception of process as honest); *see also infra* note 83 and accompanying text (explaining Court’s lack of focus on evidence that system is not corrupt where appearance of corruption exists).

<sup>12</sup> This Note focuses on the example of photo identification because of the Supreme Court’s recent hearing of oral argument—and impending decision—on the topic. *See Crawford v. Marion County Election Bd.*, Nos. 07-21 & 07-25 (U.S. argued Jan. 9, 2008) (consolidating *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (No. 07-21), and *Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff’d sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 34 (2007) (No. 07-25)).

cation in order to cast a ballot.<sup>13</sup> Such laws are increasingly popular and prominent, with six states requiring photo identification for in-person voting<sup>14</sup> and fifteen states considering such a requirement.<sup>15</sup> In addition, the Supreme Court is currently considering the legitimacy of Indiana's photo identification law.<sup>16</sup>

Scholarly analysis on the constitutionality of photo identification laws, though limited, has focused on whether the state's interest in preventing *actual* fraud outweighs whatever burden such laws place on the right to vote.<sup>17</sup> This Note contends that such balancing is incomplete because it leaves out a state interest that could potentially tip the scales: preventing the *appearance* of voting fraud. I argue that when courts conduct such a balancing between the state's interest and individual rights, whether using strict scrutiny or something akin to rational basis review,<sup>18</sup> the state's interest in preventing the appearance of corrupt voting should also be considered a legitimate thumb on the scale.

In Part I of this Note, I review current voting rights doctrine, using the example of voter identification laws to illustrate why the already-acknowledged compelling state interest of preventing actual fraud might be insufficient to sustain laws targeting fraudulent voting. I then analyze Supreme Court decisions holding that the mere appearance of corruption is enough to allow legislatures to pass laws that limit First Amendment rights by limiting campaign contributions. In Part II, I argue that the Supreme Court's given justifications for the sufficiency of the state interest in preventing the appearance of campaign finance corruption—maintaining public belief that the system operates fairly, ensuring that all citizens feel they have a chance to

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<sup>13</sup> COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 18–21 (2005), available at [http://www.american.edu/ia/cfer/report/full\\_report.pdf](http://www.american.edu/ia/cfer/report/full_report.pdf).

<sup>14</sup> These states are Florida, Georgia, Hawaii, Indiana, Louisiana, and South Dakota. See Petition for Writ of Certiorari at 16–17 & n.8, *Crawford v. Marion County Election Bd.*, No. 07-21 (U.S. argued Jan. 9, 2008), 2007 WL 1957762, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-ACLUwritpetition.pdf> [hereinafter *Crawford Petition*]; Petition for Writ of Certiorari at 15–16 & n.10, *Ind. Dem. Party v. Rokita*, No. 07-25 (U.S. argued Jan. 9, 2008), 2007 WL 1957764, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/rokita-cert.pdf> [hereinafter *Ind. Dem. Party Petition*].

<sup>15</sup> *Crawford Petition*, *supra* note 14, at 17–18; *Ind. Dem. Party Petition*, *supra* note 14, at 16–17.

<sup>16</sup> See *supra* note 12.

<sup>17</sup> See generally Overton, *supra* note 2, at 634–35 (arguing that state's interest in passing photo identification law is outweighed by burden on voter rights).

<sup>18</sup> Depending on the severity of the burden, courts sometimes apply strict scrutiny to restrictions on voter access and sometimes apply a balancing-of-interests test more akin to rational basis review. See *infra* Part I.A.

influence government, and increasing participation—also apply to preventing the appearance of corruption in voting.

Part III of this Note also examines whether the state could present sufficient evidence to show that enacting photo identification requirements could help prevent the appearance of corruption. Given the low level of evidence that the Supreme Court has previously required to show that the appearance of corruption exists in the context of campaign finance, it is likely that already existent polls, statements of legislators, and media accounts would produce enough evidence to show that the voting process appears corrupt to most citizens. Although it is not clear whether preventing the appearance of corruption is a compelling state interest, it is at least a legitimate interest that should be weighed on the state's side in voter fraud cases. The Note concludes in Part IV by showing how the Court might apply both state interests—preventing fraud and preventing the appearance of fraud—in determining the constitutionality of photo identification laws.<sup>19</sup>

## I

### VOTING RIGHTS DOCTRINE

#### A. *Current Voting Rights Doctrine*

##### 1. *Severity of Burden*

In *Burdick v. Takushi*,<sup>20</sup> the Supreme Court held that while voting is a fundamental right, due to its uniquely regulated nature courts need not apply strict scrutiny to all laws that somehow limit the right to vote.<sup>21</sup> Instead, courts should first determine whether the law severely infringes upon a person's right to vote or whether it merely provides for reasonable regulation of elections.<sup>22</sup> The reason for this inquiry is that the exercise of the fundamental right to vote, unlike the exercise of other fundamental rights (such as freedom of speech), nec-

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<sup>19</sup> This Note concerns what is doctrinally permissible and not what specific legislative action should be taken. It only attempts to demonstrate that under current doctrine, the State has an interest in preventing the appearance of corruption in voting and, therefore, has an interest in passing anti-fraud measures like photo identification requirements. The resulting question—whether states *should* choose to prevent the appearance of corruption in this way, given the possible negative effects on voter turnout—is beyond the scope of this Note.

<sup>20</sup> 504 U.S. 428 (1992) (upholding ban on write-in voting in Hawaii using new standard).

<sup>21</sup> *Id.* at 433–34.

<sup>22</sup> *See id.* at 434 (recognizing that rigor of inquiry into propriety of election laws depends on extent of burden on constitutional rights, with severe restrictions subject to narrow-tailoring requirement and reasonable, nondiscriminatory restrictions generally justified by Hawaii's important regulatory interests in this area).

essarily depends on government regulation. Were ballots not printed and votes not counted, the right would not be very useful at all.<sup>23</sup> Election regulations are thus necessarily restrictive—e.g., they specify the time and place at which one can vote, or decide which candidates can and cannot appear on the ballot—but courts could not practically subject every regulation that concerns the fundamental right to vote to strict scrutiny, lest our nation’s electoral framework become crippled by continuous litigation.<sup>24</sup>

## 2. *Scrutiny Depends on Severity of Burden*

A court will apply strict scrutiny only after it makes a threshold determination that an election law or regulation imposes a severe burden on the right to vote.<sup>25</sup> When the burden on the right to vote is severe, the court will require that the law be narrowly tailored to achieve a compelling state interest. If the law does not meet that standard, the court will find it to be an unconstitutional violation of the right to vote.<sup>26</sup>

If the court decides that the law imposes a reasonable, nondiscriminatory, nonsevere burden on the right to vote, it will apply a balancing test to make sure that the state’s interest in the regulation outweighs the burden it imposes.<sup>27</sup> At this stage of the inquiry, the state’s “important regulatory interests are generally sufficient to justify” the nonsevere burden, and the court will uphold the regulation.<sup>28</sup>

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<sup>23</sup> See *id.* at 433 (noting that elections require substantial government regulation to function).

<sup>24</sup> *Id.* The Court noted that because every election law and regulation invariably affects the right to vote in some manner, “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* The Court also stated that “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

<sup>25</sup> *Burdick*, 504 U.S. at 434. This standard has been questioned by some commentators. E.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 670–74 (1998) (arguing that *Burdick* standard accepts state interests without sufficient analysis).

<sup>26</sup> See *Burdick*, 504 U.S. at 434 (recognizing protection of right to vote by First and Fourteenth Amendments). Under strict scrutiny review, the Court typically requires both that the state have a compelling interest in enacting a law and that the law be narrowly tailored to achieving that interest. Yet in the campaign finance context, the Court sometimes interprets narrow tailoring deferentially. See *infra* notes 119, 150–56 and accompanying text.

<sup>27</sup> *Burdick*, 504 U.S. at 434.

<sup>28</sup> *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The *Burdick* Court upheld the regulation, finding that the slight burden was a “reasonable” way to further the state interest and that the state interest was sufficient. *Id.* at 439–40.

Under the *Burdick* standard, a court examining a voting requirement could apply either strict scrutiny or a lesser form of scrutiny that is close to rational basis review, depending on the earlier determination of how severely the law burdens the right to vote.<sup>29</sup>

### B. Current Doctrine in the Voter Identification Context

#### 1. Lower Federal Court Decisions and Crawford

Lower federal courts—specifically, the Court of Appeals for the Seventh Circuit and the U.S. District Court for the Northern District of Georgia—have applied voting rights doctrine to laws requiring voters to present photo identification. These courts have ruled that such laws do not impose a severe burden on the right to vote.<sup>30</sup> Having made such a determination, these courts have applied a lower level of scrutiny<sup>31</sup> and have ruled that the State’s interest in preventing voter fraud outweighs whatever nonsevere burden the law places on the exercise of the right to vote.<sup>32</sup> Given the Supreme Court’s ruling that the state has a compelling interest in preventing

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<sup>29</sup> An example of a slight burden of voting rights is a ban on write-in voting. *Id.* at 438. Since *Burdick*, the Supreme Court does not appear to have found any burdens to be severe, though in a concurrence, Justice Thomas listed regulations at issue in previous decisions that fit the severe-burden framework of *Burdick*. See *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 208–09 (1999) (Thomas, J., concurring). These severe burdens included a state law that required a political party to allow only registered party members to vote in its primary, even though the party wished to open its vote to independents as well. *Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 210–11 (1986).

<sup>30</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952–53 (7th Cir. 2007); *Common Cause/Ga. v. Billups (Common Cause III)*, 504 F. Supp. 2d 1333, 1337, 1382 (N.D. Ga. 2007).

<sup>31</sup> See *Crawford*, 472 F.3d at 952 (finding strict scrutiny inappropriate); *Common Cause III*, 504 F. Supp. 2d at 1381 (same).

<sup>32</sup> *Crawford*, 472 F.3d at 953–54; *Common Cause III*, 504 F. Supp. 2d at 1381–83. The district court in Georgia, in approving photo identification laws, reversed course from two previous decisions. In an earlier preliminary injunction decision, it had enjoined a 2005 version of the photo identification law after finding that the burden on the right to vote was “severe.” The court observed that regardless of which level of scrutiny was applied, the law would fail. *Common Cause/Ga. v. Billups (Common Cause I)*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005). The Georgia legislature reworked the law and passed a 2006 version of the law. However, the same court again held it unconstitutional in a preliminary injunction case. The court applied the “*Burdick* sliding scale standard” to this law despite eventually finding the burden “severe,” and again decided that the law would fail. *Common Cause/Ga. v. Billups (Common Cause II)*, 439 F. Supp. 2d 1294, 1343–52 (N.D. Ga. 2006). The court eventually upheld the 2006 version when plaintiffs sought a permanent injunction. *Common Cause III*, 504 F. Supp. 2d at 1382–83. The court’s initial decision to strike down the law—and the logic behind that decision—are important to show that some courts in such cases might not find the issue to be open-and-shut for the state; the state might need to demonstrate another, more persuasive interest.

voter fraud,<sup>33</sup> this evaluation vis-à-vis a nonsevere burden would seem, at a glance, to be an easy one.<sup>34</sup>

The Supreme Court has granted certiorari and heard oral argument concerning the Seventh Circuit's decision upholding Indiana's photo identification law in *Crawford v. Marion County Election Board*.<sup>35</sup> On appeal, the appellants argue that the Seventh Circuit incorrectly determined that the burden imposed on the right to vote was not severe.<sup>36</sup> If the Court were to agree and find the burden severe, then *Burdick* would dictate that the regulation must withstand strict scrutiny in order to be upheld.

The Seventh Circuit decided that strict scrutiny should not apply because the law did not severely infringe upon the right to vote.<sup>37</sup> Furthermore, Indiana's interest in preventing fraud outweighed the slight burden the law imposed on voters.<sup>38</sup> Writing for a divided panel, Judge Posner wrote that since most people already have photo IDs, the law would not burden very many people at all.<sup>39</sup> Posner also noted that whatever burden the law imposed was compensated by the benefit done to the right to vote, insofar as the law helped prevent voting fraud and resulting vote dilution:<sup>40</sup> Since fraud dilutes the votes of legitimate voters, and the law would help prevent dilution, "the right to vote [was] on both sides of the ledger," and any infringement on the right was minor.<sup>41</sup> Thus, the Seventh Circuit concluded that the law was only a minimal infringement upon the right to vote; per *Burdick*, it was consequently not subject to strict scrutiny.<sup>42</sup>

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<sup>33</sup> Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process." (quoting *Eu v. S.F. County Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989))).

<sup>34</sup> The issue of whether the state's interest in preventing voter fraud can overcome the *Burdick* balancing standard will be explored *infra* Part IV.A.

<sup>35</sup> See *supra* note 12 (detailing procedural history of *Crawford*).

<sup>36</sup> *Crawford* Petition, *supra* note 14, at 23–26; Ind. Dem. Party Petition, *supra* note 14, at 21–24.

<sup>37</sup> *Crawford*, 472 F.3d at 952–53.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 950. The court also noted that plaintiffs could not find a single person who claimed they would vote but for the law. *Id.* at 951–52.

<sup>40</sup> *Id.* at 952 (citing Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006), and Reynolds v. Sims, 377 U.S. 533, 555 (1964), for principle that preventing vote dilution protects right to vote).

<sup>41</sup> *Id.* at 952. The Seventh Circuit's opinion did not discuss the "non-discriminatory" part of the *Burdick* test. However, the district court's opinion in the case, which the Seventh Circuit accepted for arguments it did not address, see *Crawford*, 472 F.3d at 954, stated that the statistical evidence of disproportionate burdens on different portions of the population was not convincing and that, regardless, all voters still would have the opportunity to avail themselves of exceptions (like absentee balloting) that would not demand photo identification. Ind. Dem. Party v. Rokita, 458 F. Supp. 2d 775, 823–24 & 824 n.73 (S.D. Ind. 2006).

<sup>42</sup> *Crawford*, 472 F.3d at 952.

However, the Seventh Circuit's conclusion that the law minimally burdens the right to vote might not hold on appeal. The decision, after all, acknowledged that the Indiana requirement "will deter some people from voting."<sup>43</sup> While every person has some avenue by which he or she can eventually vote,<sup>44</sup> the appellants claim that the law might "seriously and unreasonably burden[ ] the right of a particular voter to exercise his or her fundamental right to vote."<sup>45</sup> Even though the burden of requiring photo identification does not rise to the level of outright disenfranchisement, the appellants point to hints that not all burdens on the right to vote must do so in order to be found unconstitutional.<sup>46</sup>

## 2. *The Potential Inadequacy of the State Interest in Preventing Actual Fraud*

In considering *Crawford*, the Supreme Court must determine whether a photo identification law presents a severe or slight burden on the right to vote.<sup>47</sup> Yet because the Court has held that preventing voter fraud is a compelling state interest,<sup>48</sup> one might ask whether the burden (or the resulting level of scrutiny) truly matters. This question is important for determining whether the state would ever need to

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<sup>43</sup> *Id.* at 951.

<sup>44</sup> See *Crawford* Petition, *supra* note 14, at 4–6 (citing methods enabling all eligible voters to vote, including voting absentee with cause, obtaining identification, voting provisionally while swearing that indigence precludes one's ability to obtain identification, and, for elderly voters, voting in nursing home without identification); Ind. Dem. Party Petition, *supra* note 14, at 4–6 (same).

<sup>45</sup> *Crawford* Petition, *supra* note 14, at 25; Ind. Dem. Party Petition, *supra* note 14, at 24.

<sup>46</sup> Appellants cite *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983), which held that a law requiring independent presidential candidates to file their candidacies before major party candidates was unconstitutional because it placed "a particular burden" on rights of Ohio citizens unaffiliated with any party. *Crawford* Petition, *supra* note 14, at 23–24; Ind. Dem. Party Petition, *supra* note 14, at 22–23. *Anderson* predates *Burdick* but was cited as the controlling precedent for the shifting standards outlined in that decision. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[A]s the full Court agreed in *Anderson*, a more flexible standard applies." (internal citation omitted)).

<sup>47</sup> The fact that the law could deter some voters, who perhaps disproportionately would be minorities, raises the specter of the Voting Rights Act. However, all federal courts that have heard challenges to photo identification laws have agreed that plaintiffs have been unable to muster sufficient evidence to demonstrate a racial disparity in the ability to participate, a necessary part of a claim under Section II of the Voting Rights Act. *E.g.*, *Common Cause I*, 406 F. Supp. 2d 1326, 1375 (N.D. Ga. 2005); Ind. Dem. Party v. *Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006); see also *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (adopting district court analysis from *Rokita*). Professor Overton's article on the subject, which generally speaks against photo identification laws, calls for more statistical research in this area so that plaintiffs might be able to overcome their current lack of evidence on Section II claims. Overton, *supra* note 2, at 672.

<sup>48</sup> See *supra* note 33 and accompanying text.

show its interest in preventing the appearance of fraud: If preventing actual fraud would always be a sufficient state interest to overcome any burden, preventing its appearance would be a nonissue.

Such a formulation, however, overlooks the narrow-tailoring component of strict scrutiny. If the state's antifraud law is not narrowly tailored to preventing voter fraud—as compelling an interest as that might be—then the state would need another interest in order to justify such a law (whether a photo identification law or some other antifraud measure). This is where the state's interest in preventing the appearance of corruption might prove necessary to uphold the government regulation. For while the state does have a compelling interest in preventing voter fraud, the tailoring of photo identification laws might not be sufficiently narrow to fit that interest.

Let us assume for the sake of argument that a state does everything it can do to tailor a photo identification law as narrowly as possible to the interest of preventing in-person voter fraud—for instance, by providing ample opportunities for eligible voters in need of IDs to procure them.<sup>49</sup> Even then, if a court were to find that the law was not actually necessary, or even important, to the prevention of voter fraud, that law might not withstand strict scrutiny. The *Crawford* appellants note, for example, that Indiana has six statutes that make voter impersonation illegal in some way.<sup>50</sup> These laws, they argue, have deterred in-person voter fraud in Indiana so well that no one has ever been charged with violating them.<sup>51</sup> If existing laws are adequate—or, as here, purportedly perfect—at preventing voter fraud, then it is difficult to argue that any additional burden on the right to vote could be narrowly tailored to prevent such fraud.<sup>52</sup>

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<sup>49</sup> The analysis of narrow tailoring and the severity of the burden tends to be, in part, fact based: It turns on issues such as what steps one must go through to acquire a driver's license, how long the hours and lines at ID centers are, whether plaintiffs have found anyone who would not vote due to the requirement, and whether absentee voting without an ID is allowed. See *Crawford*, 472 F.3d at 950–52 (discussing steps needed to acquire driver's license and other similar concerns); *Common Cause I*, 406 F. Supp. 2d at 1342, 1362 (discussing hours and lines at ID centers). Unlike the state interests at stake, these fact-based arguments will change from statute to statute and thus, while interesting, are beyond the scope of this Note.

<sup>50</sup> *Crawford* Petition, *supra* note 14, at 20 n.13; Ind. Dem. Party Petition, *supra* note 14, at 19 n.15.

<sup>51</sup> *Crawford* Petition, *supra* note 14, at 21 (citing *Crawford*, 472 F.3d at 955 (Evans, J., dissenting)); Ind. Dem. Party Petition, *supra* note 14, at 20 (same).

<sup>52</sup> Of course, as Judge Posner noted, the lack of evidence that such fraud occurred in Indiana does not prove that it did not happen; voter fraud is notoriously difficult to detect, and many criminal laws are underenforced. *Crawford*, 472 F.3d at 953. While Judge Posner questioned the defendants' estimate that Indiana voter rolls "contained 1.3 million more names than . . . eligible voters," both parties' experts agreed that the state's rolls were "inflated." *Id.* Judge Posner also noted that several other states have had problems with

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The U.S. District Court for the Northern District of Georgia made similar points in twice striking down photo identification laws.<sup>53</sup> Given the lack of any evidence that anyone had committed in-person voting fraud in the state in at least the previous nine years,<sup>54</sup> the court found that the laws failed even to survive rational basis review. Though it determined the burden to be nonsevere, the court held that the antifraud law could not be reasonably related to the prevention of voter fraud without at least some evidence that in-person voter fraud had actually occurred.

Furthermore, there is very little empirical data on how much voting fraud occurs in American elections.<sup>55</sup> In fact, the limited study data that do exist indicate that the impact of voting fraud might be small.<sup>56</sup> While the state has a compelling interest in preventing voter fraud, an antifraud measure like photo identification requirements (which could make voting more difficult for a small number of voters) would seem overbroad if the targeted harm is actually quite small.

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in-person voter fraud, and that “those states do not appear to be on average more dishonest than Indiana.” *Id.* (internal quotation marks omitted). Furthermore, the statutes cited by the plaintiffs have minimal deterrent effect if it is unlikely that anyone would be caught. *See id.* (refuting claim that such statutes “should suffice to deter the crime” by attributing lack of prosecutions to “endemic underenforcement of minor criminal laws”).

<sup>53</sup> *Common Cause I*, 406 F. Supp. 2d at 1366; *Common Cause II*, 439 F. Supp. 2d 1294, 1345–51 (N.D. Ga. 2006).

<sup>54</sup> *Common Cause I*, 439 F. Supp. 2d at 1350 (citing testimony of Georgia Secretary of State that there had been no documented in-person voting fraud during her nine years in office).

<sup>55</sup> COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 18 (“There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur . . .”). However, the commission does conclude that “both [fraud and multiple voting] occur, and it could affect the outcome of a close election.” *Id.*

<sup>56</sup> *See* Overton, *supra* note 2, at 635, 654 (citing Ohio study that found infinitesimal rate of in-person fraud, but acknowledging lack of sufficient empirical studies). The members of the Federal Election Reform Commission disagreed on the existing magnitude of fraud but unanimously concluded there was “no doubt” it occurred. COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 18. While the magnitude may be in doubt, voter fraud can still swing a close election. Some believe that this happened in the Washington gubernatorial election in 2004, in which ineligible felons voted and votes were cast in the names of the dead; the election was decided by 129 votes. *See id.* at 4 (citing Washington election as example of fraud and voting irregularities). Also in 2004, Wisconsin officials discovered that at least 200 ineligible felons had voted and that at least 100 people had voted under fake names or addresses, voted twice, or cast votes in the names of the dead; Milwaukee’s vote count exceeded the number of votes cast by 4600. JAMES FINCH ET AL., PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD 1–4 (2005), available at <http://www.wispolitics.com/1006/electionfraud.pdf>. The Milwaukee investigators—including a Federal Bureau of Investigation Special Agent in Charge, the United States Attorney for the Eastern District of Wisconsin, the Milwaukee County District Attorney, and the Chief of the Milwaukee Police Department—summarize how hard it is to find voter fraud, analogizing that “it is hard to prove a bank embezzlement if the bank cannot tell how much money was there in the first place.” *Id.* at 2.

Photo identification would not be “necessary” to prevent voter fraud since existing laws adequately prevent it, and thus the state would have to continue to rely on less-intrusive steps (e.g., signature requirements) to advance its compelling interest. It was this lack of evidence of actual voting fraud at the ballot box—coupled with evidence that voting fraud could continue unabated in absentee balloting—that caused the Georgia district court to hold that Georgia’s photo identification law was not only inadequately tailored to prevent voter fraud but was also “likely . . . not rationally based on that interest.”<sup>57</sup>

### 3. *Proposal: Recognizing a State Interest in Preventing the Appearance of Fraud*

The previous Section showed how a court could find that a photo identification law (or any antifraud measure) severely burdens the right to vote, is not narrowly tailored to the state’s compelling interest in preventing voter fraud, and (consequently) fails to satisfy strict scrutiny. Moreover, a law posing less than a severe burden could also be struck down for failing to be sufficiently related to the state’s interest of preventing voter fraud.

The federal cases litigated so far indicate that the inquiry should end here.<sup>58</sup> No one credits the state with having an interest in antifraud statutes that target anything other than actual voting fraud.

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<sup>57</sup> *Common Cause I*, 406 F. Supp. 2d at 1366. See also *Common Cause II*, 439 F. Supp. 2d at 1350 (holding that statute was overbroad because it allowed absentee ballot fraud to continue while focusing on fraud that court believed could be stopped in other ways).

<sup>58</sup> No federal court decision deals precisely with the state’s interest in preventing the appearance of fraud. In the merits briefs to the Supreme Court in *Crawford*, both sides briefly raise this claim, with the American Civil Liberties Union and Indiana Democratic Party arguing that Indiana does not have a strong interest in preventing the appearance of voter fraud with a photo identification law. Brief for Petitioners at 53, *Crawford v. Marion County Election Bd.*, No. 07-21 (U.S. argued Jan. 9, 2008), 2007 WL 3276506, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BriefofpetitionersACLU11-5-07.pdf> [hereinafter *Crawford Brief*] (stating that law is not “supported by a strong interest in preventing ‘the eroding of the [sic] public confidence in the electoral process through the appearance of corruption.’” (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982))); Brief for Petitioners at 54, *Ind. Dem. Party v. Rokita*, No. 07-25 (U.S. argued Jan. 9, 2008), 2007 WL 3276507, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BriefofpetitionersIndianaDemocraticParty11-5-07.pdf> [hereinafter *Ind. Dem. Party Brief*] (“Even less persuasive is the State’s attempt to use public fears about voter impersonation to justify its alleged antifraud program.”). The respondent County, State, and Republican Party briefs argue that the State does have an interest in preventing the appearance of fraud. Brief of State Respondents at 53–55, *Crawford v. Marion County Election Bd.*, Nos. 07-21 & 07-25 (U.S. argued Jan. 9, 2008), 2007 WL 4232930, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BriefofStateRespondents12-4-07.pdf>; Brief of the Repub. Nat’l Comm. as Amicus Curiae Supporting Respondents at 14–15, 18–20, Nos. 07-21 & 07-25 (U.S. argued Jan. 9, 2008), 2007 WL 4340894, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-BriefamicuscuriaofRNC.pdf> (citing campaign finance cases).

I propose that the Supreme Court also recognize the existence of a state interest—possibly even a compelling one—in preventing the appearance of voting fraud. Consequently, states would be able to justify an antifraud law even without evidence that the law works to prevent, or is necessary to the prevention of, actual fraud.

This recognition would have two objective advantages over merely looking at the state's interest in preventing actual fraud (in addition to the obvious argumentative value it would provide to the state). First, it would more accurately reflect the reasons the state would actually want to prevent voter fraud: to prevent election results from being skewed, as well as to prevent people from losing faith in the democratic process and consequently ceasing to participate in it.<sup>59</sup> Second, by introducing a state interest beyond preventing actual voting fraud, the Court would avoid having to perform a blind balancing test between the state's interest in preventing voter fraud (when it is unclear how much fraud would be prevented)<sup>60</sup> and the voters' right to be free of burdens upon their franchise (when it is unclear how many people would actually be deterred from voting).<sup>61</sup>

In the next Part, I present the Supreme Court doctrine in an area of the electoral process—campaign finance regulation—in which the Court has determined that the state has a strong enough interest in preventing both corruption and the appearance of corruption to warrant infringement on individual liberty.<sup>62</sup> It is this second interest—preventing the appearance of corruption—that carried the day when campaign finance regulations withstood recent challenges. After showing why the Supreme Court has found preventing the appearance of corruption to be a sufficiently compelling state interest to overcome constitutionally protected rights in the campaign finance context, I will explain why these same reasons also should apply in the voting context.

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This Note provides the first scholarly treatment of whether such a claim ought to be recognized in federal court.

<sup>59</sup> See *infra* Part II.B.

<sup>60</sup> See *supra* note 47 (noting that existing empirical data on prevalence of voter fraud is insufficient to form conclusions).

<sup>61</sup> *Crawford*, 472 F.3d at 952–53 (pointing out that it was unclear how many people this would disenfranchise since plaintiffs had not found any who said they would not vote because of it).

<sup>62</sup> These speech and association rights fall under the First and Fourteenth Amendments when the regulation comes from the state, as the prohibition against government regulation of speech applies to individual states through the Fourteenth Amendment. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 383, 385 (2000); see also *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (clarifying that First and Fourteenth Amendments of U.S. Constitution protect individual's right to vote).

## II

## LESSONS FROM CAMPAIGN FINANCE LAW

For thirty years, the Supreme Court has recognized the state's interest in preventing the appearance of corruption in the financing of elections. In 1976, *Buckley v. Valeo*<sup>63</sup> first recognized that both preventing corruption and preventing the *appearance* of corruption are constitutionally sufficient grounds upon which to justify a law that restricts First Amendment rights.<sup>64</sup> More recently, in 2000, the Supreme Court upheld a campaign contribution restriction primarily because it would prevent the appearance of corruption.<sup>65</sup> In that decision, the Court laid out the sort of evidence that the government would need to present in order to prove that an appearance of corruption existed.<sup>66</sup> The Court reaffirmed *Buckley's* reasoning as to why preventing the appearance of corruption is of constitutional significance.<sup>67</sup> Then, in 2003, the Court upheld many provisions of the McCain-Feingold federal campaign finance reform laws on the grounds that they prevent corruption and the appearance of corruption.<sup>68</sup> The decision demonstrated that despite decades of criticism,<sup>69</sup> the constitutional framework laid out in *Buckley* is still good law.<sup>70</sup> The Court also reiterated and expanded upon the reasons articulated

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<sup>63</sup> 424 U.S. 1 (1976).

<sup>64</sup> *Id.* at 24–29.

<sup>65</sup> *Nixon*, 528 U.S. at 388–95.

<sup>66</sup> *Id.* at 391–95 (citing evidence including newspaper articles, one state legislator's opinions, and popular opinion). This Note discusses this evidence in Part III.A *infra*.

<sup>67</sup> *Id.* at 390.

<sup>68</sup> *McConnell v. FEC*, 540 U.S. 93, 154, 156, 167, 183–84 (2003) (joint opinion of Stevens and O'Connor, JJ.); *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended primarily in scattered sections of 2 and 47 U.S.C.).

<sup>69</sup> *See* Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1095 (2003) (stating that *Buckley* seems to be “almost universally reviled”).

<sup>70</sup> *McConnell*, 540 U.S. at 136–38. The question of whether or not the *Buckley*, *Nixon*, or *McConnell* precedents will long remain in force—given the changed composition of the Supreme Court since the *McConnell* decision, in which Justice O'Connor formed part of a 5–4 majority on several points—is a reasonable one. Chief Justice Roberts and Justice Alito first indicated their positions in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), in which Chief Justice Roberts voted to strike down a Vermont campaign finance law on the grounds that *Buckley* was good precedent and dictated such a result. *Id.* at 2485 (plurality opinion). Justice Alito was more constrained in his support for *Buckley*, stating in his concurrence that he would not overturn it because the defendants' suggestion that *Buckley* be revisited was presented only as “an afterthought” to their primary argument. *Id.* at 2500–01. Similarly, in 2007, Chief Justice Roberts and Justice Alito joined the Court's opinion that limited part of the *McConnell* analysis with regard to issue ads but declined to overrule *McConnell* as a whole, despite concurrences in which Justices Thomas, Scalia and Kennedy advocated doing so. *FEC v. Wis. Right to Life, Inc.* 127 S. Ct. 2652 (2007). These cases provide at least some indication that the Supreme Court will not jump at the opportunity to overturn the *Buckley* framework.

in *Buckley* to explain the government's strong interest in preventing the appearance of corruption.<sup>71</sup>

A. *The Level of Scrutiny Required Is Unclear*

The Court's decisions in these campaign finance cases employ a balancing test: They weigh the burden on First Amendment speech rights against the state interest in enacting the law. In these cases, the Court has found campaign finance restrictions to burden First Amendment rights. In *Buckley*, the restrictions involved both contribution limits, which were upheld, and expenditure limits, which were struck down.<sup>72</sup> Because expenditure limits have always been found unconstitutional,<sup>73</sup> recent decisions have focused on balancing campaign contributors' speech rights against the state's interest in preventing corruption, the appearance of corruption, or both.<sup>74</sup>

The Court has been vague about the exact level of scrutiny it applies to campaign finance laws, not expressly using the normal categories of rational basis review, intermediate scrutiny, and strict scrutiny. It applied "the closest scrutiny" to the law at question in *Buckley*, deciding that the state interest in limiting contributions outweighs the burden on free speech.<sup>75</sup> However, the Justices did not specify what level of state interest would be required to overcome this close (but not necessarily strict) level of scrutiny. In recent years, the Court has continued to be vague about the proper level of scrutiny to apply to campaign finance restrictions. In *McConnell*, it applied a "less rigorous" standard than strict scrutiny.<sup>76</sup> As in *Buckley*, the holding was that the interests advanced by the state—preventing corruption and the appearance thereof—were sufficient to outweigh the individual rights at stake.<sup>77</sup> Again, precisely how strong those inter-

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<sup>71</sup> *McConnell*, 540 U.S. at 136.

<sup>72</sup> *Buckley v. Valeo*, 424 U.S. 1, 14, 18–19, 24–26, 45 (1976) (per curiam) (finding that both contribution and expenditure limits touch upon "the most fundamental First Amendment activities" and government's interest in preventing corruption and appearance thereof is inadequate to justify expenditure limit's substantial restraints on speech, but that such interests are sufficient to outweigh associational speech right implicated by contribution limits).

<sup>73</sup> See, e.g., *Randall*, 126 S. Ct. at 2485 ("Well-established precedent makes clear that the expenditure limits violate the First Amendment.").

<sup>74</sup> *Id.* (stating that Vermont contribution limits "impose[d] burden[ ] upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) were disproportionately severe"); *McConnell*, 540 U.S. at 136–37 (upholding federal campaign contribution limits).

<sup>75</sup> *Buckley*, 424 U.S. at 24–25, 29 (holding that contribution limit burdened First Amendment right of association for political speech, but finding state interest sufficiently weighty to justify limitation).

<sup>76</sup> *McConnell*, 540 U.S. at 138 n.40.

<sup>77</sup> *Id.* at 143, 145.

ests were—compelling or something less—was a question left unanswered.

While the Court has been consistently vague as to *what level* of state interest will suffice to outweigh burdens on free speech rights, it has been much clearer as to *why* the state has a strong interest in preventing the appearance of corruption. The state has an interest in preserving public confidence in the democratic system of government and, derivatively, in preventing people from dropping out of the system.<sup>78</sup>

### B. *Parallels to Voting*

As detailed above, the *Buckley* Court determined that the state has a strong—and possibly compelling—interest in preventing both corruption and the appearance of corruption in the financing of elections. The next question is whether the state’s interest in preventing the appearance of a corrupt voting system is sufficiently similar to justify giving the state an equally strong interest in preventing it.

The most important parallel between the state’s interest in preventing the appearance of corruption in each of these two contexts is the underlying goal: the preservation of public faith in democratic government. In the campaign finance corruption setting, the Court explained that the state’s interest is so strong because “the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”<sup>79</sup> Thirty years later, the Court reemphasized this interest and went further, noting that the state’s interest in limiting the appearance of corruption “directly implicate[s] ‘the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.’”<sup>80</sup>

The Court concluded that ridding the system of the appearance of corruption would not only maintain public faith in the system of democratic government but also, by maintaining faith, would encourage individual citizens to participate in that system. The majority explicitly stated that protecting the integrity of the process “tangibly benefit[s] public participation in political debate.”<sup>81</sup> This makes sense; a voter who perceived a system to be awash with corruption would be more likely to drop out of it.

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<sup>78</sup> See *id.* at 136–38 (laying out reasons for state interest).

<sup>79</sup> *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (quoting *U.S. Civ. Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>80</sup> *McConnell*, 540 U.S. at 136–37 (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

<sup>81</sup> *McConnell*, 540 U.S. at 137.

The Supreme Court has already recognized that the state has essentially the same interest in maintaining public confidence in voting. In rejecting a request for preliminary injunction of a statute requiring that voters present (nonphoto) identification, the Court stated that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voting fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”<sup>82</sup> From this statement, it is apparent that the State has an interest not only in preventing voter fraud for its own sake, but also in ensuring that citizens do not worry that their legitimate votes will be overwhelmed by fraudulent ones. This, too, makes sense: The democratic interests that the state may protect by combating *actual* voting fraud—voter confidence and participation—are the same interests that would be hurt by the *appearance* of voting fraud.

Furthermore, such democratic interests are hurt by the appearance of voting fraud whether or not fraud actually occurs—a fact that the Court has recognized in the campaign finance context.<sup>83</sup> In such cases, the Court has held that the appearance of corruption can exist independently of actual corruption and that preventing each is a distinct state interest.<sup>84</sup> Likewise, in the voting context the state’s

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<sup>82</sup> *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam). Justice Stevens filed a separate concurring opinion. *Id.* at 8 (Stevens, J., concurring).

<sup>83</sup> While the *Nixon* Court grouped Missouri’s interest in preventing the appearance of voter fraud with its interest in preventing actual voter fraud, it effectively recognized that preventing actual and apparent campaign finance corruption are different interests. The *Nixon* plaintiffs attempted to demonstrate, using studies showing that contributions do not alter the votes of officeholders, that the State did not have a sufficient interest to justify passing campaign finance laws. 528 U.S. at 394. However, the Court rebuffed this argument, pointing to “the absence of any reason to think that public perception has been influenced by the studies [plaintiffs] cited.” *Id.* at 395. Furthermore, the Court noted a risk of *both* “actual corruption of our political system” and “a corresponding suspicion among voters.” *Id.*

<sup>84</sup> This line of reasoning also provides a response to those who say that the whole appearance-of-corruption doctrine is a proxy for getting at real corruption because real corruption is too hard to prove. *See, e.g.*, Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121 (2004) (“Reliance on combating the appearance or perception of impropriety serves as a fallback state interest in the likely event that one cannot make the difficult showing that campaign contributions have actually influenced a representative’s vote or official conduct.”). The “proxy” argument would also lead to the conclusion that, since the state does not *really* have a strong interest in preventing the appearance of corruption in campaign finance, the state lacks a strong interest in preventing the appearance of corruption in voting. The Court seemed to preclude such an argument when it dismissed the survey data in *Nixon*, suggesting that the state had a legitimate and separate interest in preventing the appearance of corruption. *See supra* note 83.

interest in preventing the appearance of voting fraud is distinct from its interest in preventing actual voting fraud, since each is independently capable of producing harm. In both the voting and financing contexts, the Supreme Court has recognized the harm that comes from the perception of fraud or corruption—people losing faith in the democratic system and no longer participating in it<sup>85</sup>—and that this harm is distinct from the harm caused by actual fraud or corruption.<sup>86</sup> The independent harm caused by the perception of voting fraud, even if no fraud actually occurs, is another reason it makes sense to draw parallels between this realm and the realm of campaign financing and to apply the principles learned from one to the other.

The Supreme Court is not alone in observing that voting fraud can sap voter confidence. The Baker-Carter Commission stated that “the perception of possible fraud contributes to low confidence in the system,” regardless of the amount of fraud that actually occurs.<sup>87</sup> Indeed, the Commission went further, stating that the mere absence of safeguards without additional evidence of fraud can lead to this decreased confidence since “[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”<sup>88</sup> The Commission further noted that a photo identification requirement could “enhance confidence” since it would “deter, detect, or eliminate several potential avenues of fraud.”<sup>89</sup> John Fund draws a link between polls indicating a lack of voter faith in the system and the fact that the United States ranked 139th out of 163 democratic countries in voter turnout as of 2004.<sup>90</sup>

A final parallel between the financing and voting contexts is that in both instances, the state needs laws that go beyond punishing bad acts to prevent the very perception that such acts are taking place. The Court upheld federal campaign contribution limits in *Buckley* because, while statutes were already in force, they only dealt with the

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<sup>85</sup> *McConnell*, 540 U.S. at 136–37 (recognizing that state’s interest in preventing appearance of corruption was due to its interest in preventing loss of faith in system and decline in participation); *Purcell*, 127 S. Ct. at 7 (recognizing that Arizona’s interest in preventing actual voter fraud was partially due to interest in preventing people from perceiving system as corrupt, losing faith, and ending their participation).

<sup>86</sup> The harm of actual corruption in both voting and financing is the overturning, whether direct or indirect, of democratic results. *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) (“To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”).

<sup>87</sup> COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 18.

<sup>88</sup> *Id.* at 18.

<sup>89</sup> *Id.* at 18–19.

<sup>90</sup> FUND, *supra* note 1, at 2.

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most blatant and obvious types of bribery.<sup>91</sup> The contribution limits at issue in *Buckley* complemented the bribery and disclosure statutes, serving as a “necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions.”<sup>92</sup> Similarly, although laws exist that punish the act of voter fraud, the populace still harbors doubts about corruption in the voting system,<sup>93</sup> and states consider it necessary to pass prophylactic measures against voter fraud.<sup>94</sup> Additional laws, such as photo identification requirements, might be necessary to prevent voters from perceiving fraud even if laws punishing the act of voter fraud are already in place.

In sum, the state interest in preventing the appearance of corruption in voting is sufficiently similar to the state interest in preventing the appearance of corrupt campaign financing for a court to conclude that if the state has an interest in preventing the latter, it must also have an interest in preventing the former. It is a short logical leap—one the Court has already made in campaign finance—to distinguish the state’s interest in preventing actual fraud from its interest in preventing apparent fraud. Distinguishing these state interests leads to the conclusion that both interests are independently weighty. The next question, then, is whether significant evidence exists to prove the appearance of corruption in any given case; logically, the state cannot act on its interest in preventing such an appearance unless the system appears corrupt in the first place.<sup>95</sup>

### III

#### EVIDENCE DEMONSTRATES APPEARANCE OF CORRUPTION IN VOTING

The previous Part argued that combating the appearance of fraud, which is considered a legitimate state interest in the campaign finance context, should likewise be considered legitimate in the context of voting fraud. This Part seeks to demonstrate that the appearance of fraud currently exists in the voting context.

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<sup>91</sup> *Buckley*, 424 U.S. at 27–28.

<sup>92</sup> *Id.* at 28.

<sup>93</sup> See *infra* Part III.C; see also *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (stating that existing laws that did not require identification were probably not sufficient to catch or deter voter fraud).

<sup>94</sup> See *supra* text accompanying notes 14–15.

<sup>95</sup> See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390–91 (2000) (noting that there must be evidence to prove state interest).

### A. *The Standard of Proof*

To determine what level of evidence the Court would require to prove that the appearance of corruption exists in voting, it is helpful to observe what the Court has considered adequate in the campaign finance context.

The Supreme Court, in *Nixon v. Shrink Missouri Government PAC*,<sup>96</sup> held that the evidentiary threshold for proving the appearance of corruption was low, despite heightened judicial scrutiny.<sup>97</sup> *Nixon* concerned a Missouri law that set limits for contributions to state office candidates ranging from \$250 to \$1000 (depending on the state office sought).<sup>98</sup> Missouri voters had approved a ballot initiative imposing even stricter contribution limits that had been struck down by the Court of Appeals for the Eighth Circuit before the legislature's bill came before the Supreme Court.<sup>99</sup> In discussing the applicable standard, the Court noted that the evidence needed "will vary up or down with the novelty and plausibility of the justification raised."<sup>100</sup> Because there is a longstanding, general suspicion of corruption surrounding large donations, and a history of such corruption, the "quantum of empirical evidence" required to prove such suspicion is low.<sup>101</sup>

The State was able to meet this low burden with a variety of evidence. The Court cited an affidavit from a state senator stating that large contributions have "the real potential to buy votes."<sup>102</sup> In other words, the senator perceived the possibility of corruption. The Court also cited the existence of newspaper accounts "supporting inferences of impropriety."<sup>103</sup> While the Court mentioned two possible quid pro quo arrangements in these newspaper accounts, mere inferences of impropriety (as opposed to proven impropriety) would also constitute perceived corruption rather than actual corruption.<sup>104</sup> The Court also cited a single example of a state official who pleaded guilty to using state funds to benefit campaign contributors.<sup>105</sup> Finally, the Court relied on the fact that 74% of Missouri voters had passed an original,

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<sup>96</sup> 528 U.S. 377.

<sup>97</sup> *Id.* at 390–91.

<sup>98</sup> *Id.* at 382.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 391.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 393. Missouri does not preserve legislative history, but State Senator Wayne Goode, who was co-chair of the state legislature's Interim Joint Committee on Campaign Finance Reform when the bill was passed, submitted the affidavit. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 393–94.

harsher campaign finance initiative, even though that law was struck down by the Eighth Circuit.<sup>106</sup> The majority considered that initiative to be evidence that Missouri citizens believed that campaign finance reform was necessary to fight both corruption and the appearance thereof.<sup>107</sup> On the whole, the *Nixon* Court concluded that the case did not present a “close call” as to whether the State had met its evidentiary burden.<sup>108</sup>

It is clear from *Nixon* that the state need not present much evidence in order to prove that the appearance of corruption exists. The Court relied on the testimony of one state senator, a voter initiative, journalistic accounts, and the guilty plea of a single state official, all of which might seem to amount to very little proof. The senator’s testimony may have been little more than a reflection of uninformed public opinion; the journalistic reports did not result in the filing of criminal charges; the vote might have demonstrated popular opinion on corruption but might only have demonstrated that campaign contributions are unpopular; and the guilty plea may actually have undermined the necessity of such a law by suggesting that other criminal statutes are sufficient to handle corruption. In effect, the Court trusted Missouri’s asserted need to fight the appearance of corruption. One commentary concluded that after *Nixon*, “the evidence required to show [corruption or the appearance thereof] may only need to pass the laugh test.”<sup>109</sup>

### B. The Evidence

#### 1. Polling Data Indicate that the Electoral System Appears Generally Problematic to Americans

Surveys suggest that a large number of people believe that requiring photo identification for voting would limit fraud on Election Day. In 2004, 89% of those who voted for President Bush and 75% of those who voted for Senator Kerry believed that people should have to show photo ID before voting.<sup>110</sup> Additionally, 75% of self-described liberals supported such measures.<sup>111</sup> A 2006 survey showed

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<sup>106</sup> *Id.* at 394.

<sup>107</sup> *Id.* As noted by Persily and Lammie, the 74% vote for the proposition does not prove that 74% of people felt the law necessary to prevent corruption or the appearance thereof. People might have voted for any number of constitutionally insufficient reasons as well, such as increasing equality or silencing negative advertisements. Persily & Lammie, *supra* note 84, at 132.

<sup>108</sup> *Nixon*, 528 U.S. at 393.

<sup>109</sup> Persily & Lammie, *supra* note 84, at 131.

<sup>110</sup> FUND, *supra* note 1, at 136.

<sup>111</sup> *Id.* There was criticism of some of the claims made in John Fund’s book. See, e.g., *John Fund’s Book on Voter Fraud Is Fraud*, MEDIA MATTERS FOR AM., Oct. 31, 2004,

that support for photo identification laws remained high across racial, ideological, and party lines.<sup>112</sup> It showed that 77% of overall respondents supported photo identification requirements, with support from 67% of Democrats, 78% of Hispanic voters, 77% of white voters, and 70% of black voters.<sup>113</sup> A majority of every ideological group supported ID requirements, with even 51% of voters who identified themselves as very liberal supporting the measures.<sup>114</sup>

This does not conclusively demonstrate that any specific percentage of the electorate thinks that the system appears corrupt.<sup>115</sup> One could argue, as the dissent in the Seventh Circuit did, that Republicans might support photo ID requirements because they believe that photo identification requirements will deter people more inclined to vote for Democratic candidates.<sup>116</sup> However, it is reasonable to infer that Democrats, minorities, and self-described liberals—who, by frequent anecdotes and commonly held belief, typically think that such a requirement would hurt their preferred candidates<sup>117</sup>—would support a photo identification requirement only if they felt that the electoral system was corrupt and that such laws were one way to limit such corruption.

While not completely precise, this polling information does show that the system appears generally problematic to a great number of American voters. But the data that the court found persuasive in the campaign finance cases supported little more than an inference that the system of financing elections appears generally problematic to many people.<sup>118</sup> The Court's deference suggests a willingness to allow legislatures to determine how to fix the problem of a campaign finance system that people perceive as corrupt, despite a lack of evi-

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<http://mediamatters.org/items/200411010001> (chronicling list of disputed claims in Fund's book). However, even this list of disputes does not impugn Fund's polling data.

<sup>112</sup> Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements* tbl.1 (Coop. Cong. Election Study, Working Paper No. 07-01, 2007), available at [http://web.mit.edu/polisci/portl/cces/material/NYU\\_Identification1.pdf](http://web.mit.edu/polisci/portl/cces/material/NYU_Identification1.pdf).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* Additionally, 61% of liberals, 74% of moderates, 95% of conservatives, and 95% of very conservative responders supported voter identification. *Id.*

<sup>115</sup> Attributing motives to people who support these measures creates the same problem observed by Persily & Lammie in their examination of the *Nixon* case. See Persily & Lammie, *supra* note 84, at 132 (“Of course, support for a campaign finance reform proposal does not necessarily mean the public perceives corruption or that the interest behind the law is constitutionally legitimate . . .”).

<sup>116</sup> *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

<sup>117</sup> *Id.* at 951 (majority opinion) (stating that voter photo ID law would discourage turnout by economically disadvantaged voters “more likely to vote for Democratic than Republican candidates”).

<sup>118</sup> See *supra* note 107 and accompanying text.

dence that lawmakers have made effective choices in how to limit that appearance.<sup>119</sup> If such deference is afforded to the appearance of corruption in campaign finance, the same presumption should be afforded to legislatures seeking to combat the appearance of fraud in elections.<sup>120</sup>

## 2. *News Accounts of Corruption Make the System Appear More Corrupt*

Newspaper accounts were one of the key sources of evidence accepted by the *Nixon* Court to support the inference of corrupt campaign financing. Likewise, newspaper accounts chronicling possibly corrupt practices demonstrate an appearance of corruption in voting. For example, after the 2004 elections, the *Chicago Tribune* reported that 181,000 dead people were on the rolls of six battleground states.<sup>121</sup> Throughout the fall of 2004, newspapers reported that voting rolls were padded with fictional characters, pets, noncitizens, and the deceased.<sup>122</sup> Padded voting rolls lead to opportunities for in-

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<sup>119</sup> See Persily & Lammie, *supra* note 84, at 122 (stating that polls indicate that public perception of corruption in campaign financing fluctuates independently of any campaign finance reforms). The Court has allowed legislatures to pass campaign finance reforms to fight the appearance of corruption. In *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003), the Court upheld contribution limits on the basis that they prevent the appearance of corruption; instead of citing evidence that contribution limits would be effective in doing so, the Court relied on Congress’s opinion that they would. That reliance “shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.”) *Id.* at 95.

<sup>120</sup> However, the *Crawford* appellants point to *Randall v. Sorrell* to justify a harder look at how closely tailored the law was to prevent the appearance of corruption. *Crawford* Brief, *supra* note 58, at 49 (citing *Randall v. Sorrell*, 126 S. Ct. 2479, 2494 (2006) (plurality opinion)); Ind. Dem. Party Brief, *supra* note 58, at 54 (citing *Randall*, 126 S. Ct. at 2492–93 (plurality opinion)). *Randall*’s reasoning does not seem dispositive, since the Court’s reasons for finding the law unconstitutional did not concern its effectiveness or lack thereof in fighting the appearance of corruption. Rather, the Court found that the law set contribution limits too low. 126 S. Ct. at 2491–93 (noting Vermont’s limits were lowest contribution limits of any state and lower than any that had been upheld). This counterargument does prove that the state’s interest in preventing the appearance of corruption in the election system, though strong and possibly compelling, is insufficient to justify any law the state might imagine. However, it does not impugn the state’s interest in preventing the appearance of corruption.

<sup>121</sup> Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHI. TRIB., Dec. 4, 2004, at 13. For an overview of the controversy surrounding the 2004 elections, see generally ANDREW GUMBEL, *STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA* 1–6 (2005).

<sup>122</sup> GUMBEL, *supra* note 121, at 2. Also, in the run-up to the 2004 elections, the *New York Daily News* reported that almost 46,000 people were registered to vote in both New York and Florida. Russ Buettner, *Exposed: Scandal of Double Voters*, N.Y. DAILY NEWS, Aug. 22, 2004, at 4.

person voting fraud. As Judge Posner noted, this sort of fraud—one person voting in the stead of a deceased or fictional voter on the voting rolls—can really only be prevented by requiring photo identification.<sup>123</sup>

A newspaper reader could easily read these stories, come to the same conclusion as Judge Posner, and decide that the system is hopelessly corrupt. This seems to be at least in part what Justice Souter had in mind when, in the *Nixon* majority opinion, he discussed how newspaper accounts of campaign contributions can support inferences of impropriety.<sup>124</sup> He wrote that the public would read newspaper stories and infer that the system was corrupt as a whole, even though the events described might not quite rise to the level of corruption.<sup>125</sup> There is no reason why such a response should not also be expected of readers encountering news accounts of voting fraud and the opportunities to commit it.

### 3. *The System Appears Corrupt to Politicians*

Many state legislators view the voting process as either corrupt or susceptible to corruption. For example, Indiana's state legislature passed its photo identification law in response to reports of in-person voting fraud in six states, including Washington and Wisconsin.<sup>126</sup> In the 2004 Washington gubernatorial race—a race decided by 129 votes—the superintendent of King County (which includes Seattle) reported that votes were cast in the names of dead people.<sup>127</sup> In Wisconsin, investigators found over one hundred incidents of people voting twice, voting in the names of dead people, or using false names

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<sup>123</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007).

<sup>124</sup> See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393–95 (2000) (citing Missouri newspaper articles and voters' likely reaction).

<sup>125</sup> See *id.* at 394–95 (“[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”); see also *supra* note 83. Justice Souter did not cleanly distinguish whether these newspaper articles supported the appearance of corruption or the existence of actual corruption. If they supported both, then their influence on readers' perceptions of corruption is how they would demonstrate the appearance of corruption.

<sup>126</sup> See *Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006) (noting state's citation of recent incidents of fraud to support its claim that voter identification law was necessary).

<sup>127</sup> COMM'N ON FED. ELECTION REFORM, *supra* note 13, at 4. The Republican Party in Washington State also charged that at least nine dead people were credited with voting, in addition to ten people voting twice. Chris McGann, *State GOP Gets Specific About Election Charges*, SEATTLE POST-INTELLIGENCER, Jan. 19, 2005, at A1. This was in addition to other irregularities, including thousands of votes that could not be matched to people casting a ballot. *Id.*

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or addresses in the 2004 elections.<sup>128</sup> Indiana also noted that there were many more registered voters in Indiana than there were people eligible to vote living in the state.<sup>129</sup> Regardless of whether these incidents occurred as the Indiana state legislature suspected or whether they were rumors blown out of proportion,<sup>130</sup> they surely contributed to the appearance of corruption.

In a National Public Radio interview less than two weeks before the 2004 elections, former President Carter offered his perception of the level of corruption in the American voting system.<sup>131</sup> Carter was asked what would happen if his international election-monitoring team, which supervised many elections in developing nations, supervised the United States election. Not only would his team regard the voting system as an egregious failure, he responded, but the team would never agree to monitor such a flawed system in the first place: “The American political system wouldn’t measure up to any sort of international standard . . . .”<sup>132</sup>

*C. Is the Evidence of Perceived Corruption in Voting as Widespread as in Campaign Finance?*

In the realm of campaign finance, the Court was willing to accept popular sentiment, newspaper accounts, citizen-driven legislation, and politicians’ statements as evidence that there existed a perceived problem of corruption.<sup>133</sup>

In the voting realm, similar evidence exists. People see the possibility of a problem (voting fraud) and support a possible solution to that problem (photo identification requirements). In Indiana, for example, politicians passing a voter identification law considered

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<sup>128</sup> COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 4.

<sup>129</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (reporting finding of defendant’s expert estimating that 1.3 million more voters were on rolls than there were eligible voters in state; court thought that number was likely too high, but still concluded that rolls were undoubtedly bloated).

<sup>130</sup> *Cf. Overton, supra* note 2, at 645 (“Anecdotes about voter fraud are also misleading and fail to indicate the frequency of the alleged fraud.”).

<sup>131</sup> Interview by Terri Gross with Jimmy Carter, *Fresh Air* (NPR radio broadcast Oct. 21, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4120400> [hereinafter Carter Interview].

<sup>132</sup> *Id.*; see also GUMBEL, *supra* note 121, at 1–2 (citing Carter’s remarks to introduce discussion of appearance of corruption in 2004 presidential election). Former President Carter’s stated reasons for these failings did not relate to photo identification, but rather to other electoral controversies like unequal access to media, partisan election officials, socio-economic disparities in vote accuracy, and the fact that some voting machines cannot perform recounts. Carter Interview, *supra* note 131. The exact reasons he gives are not as important as his general comments, which contribute more evidence to the state’s case that the system appears corrupt.

<sup>133</sup> See *supra* Part III.A.

apparent corrupt practices in other states and the potential for corruption in their own.<sup>134</sup> There are ample newspaper stories and statements from politicians that could allow people to infer that the voting system is corrupt.<sup>135</sup> This is exactly the sort of evidence that the Supreme Court considered sufficient to prove that the campaign finance system appeared corrupt. Therefore, the necessary precondition for a state to act on its interest in preventing the appearance of corruption in voting—that such an appearance actually exists—should also be satisfied.

#### IV

#### APPLYING APPEARANCE OF CORRUPTION AS A STATE INTEREST

In the preceding Parts, this Note has sought to establish two central points. First, preventing the appearance of corruption in elections is a state interest, just as it is in the campaign finance realm. Second, states have sufficient evidence to prove that elections appear to be corrupt, therefore permitting state legislatures to take steps to fix this problem. This Part, using *Crawford* as an example, seeks to show how this state interest would be applied by a court if an antifraud measure were challenged. Recall that the test from *Burdick v. Takushi* can result in two different outcomes: a severe burden on the right to vote, which leads to strict judicial scrutiny, or a lesser burden on the right to vote, which leads to a balancing of interests. Thus, this Part applies the proposal of recognizing the state's interest in preventing the appearance of voting fraud to both possible strands of the test.

##### *A. If the Burden Is Found To Be Less Than Severe, The State's Interest Is Sufficient*

If the Supreme Court rejects the appellant's argument in *Crawford* and finds the burden on voting rights posed by a photo identification requirement (or any other voter regulation) to be non-severe, then the state must show that its interests in regulating the vote outweigh "the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."<sup>136</sup> When applied using *Burdick* scrutiny, this

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<sup>134</sup> See *supra* Part III.B.3.

<sup>135</sup> See *supra* Part III.B.2.

<sup>136</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

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standard requires that the regulation be a “reasonable, nondiscriminatory” way to achieve the state interests.<sup>137</sup>

A court would take the interests asserted by the state—here, both preventing fraud and preventing the appearance of fraud—and balance them against the burden on the right to vote, which was predetermined to be nonsevere. As explained above, a court might be unconvinced that the state’s interest in preventing fraud is sufficient to burden voters’ rights without more evidence that fraud is actually occurring.<sup>138</sup> In such a case, the court could deem it unnecessary to burden people in order to prevent harm that might not be happening.

This is where the appearance of voting fraud would be a critical argument for the state. Given the evidence that voters believe the system is fraudulent,<sup>139</sup> the government has an interest in regulating the system,<sup>140</sup> even in the absence of actual fraud, to maintain American democracy against a disastrous lack of faith.<sup>141</sup> Once the state invokes that interest, by analogizing it to the campaign finance realm, the state would not even need to prove that the law *effectively* prevented the appearance of fraud, so long as it was reasonably targeted at the problem.<sup>142</sup>

*B. If the Burden Is Found To Be Severe,  
The State’s Interest Is Compelling*

If a court accepts the argument that a voting regulation severely burdens the right to vote, then the state must show that the regulation is narrowly tailored to serve a compelling state interest. This scrutiny is hard to overcome using only an interest in preventing actual fraud, since the lack of evidence that voting fraud actually occurs creates difficulty in finding that the law is narrowly tailored to preventing that problem.<sup>143</sup>

Moving to the context of preventing the appearance of fraud, the question of whether the state’s interest in preventing the appearance

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<sup>137</sup> *Id.* (quoting *Anderson*, 460 U.S. at 789).

<sup>138</sup> *See supra* notes 53–57 and accompanying text.

<sup>139</sup> *See supra* Part III.B.

<sup>140</sup> Note that such a regulation could take the form of either photo identification laws or some other antifraud measure.

<sup>141</sup> *See Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam) (declaring it reasonable for Congress to conclude that appearance of corruption erodes confidence in American system).

<sup>142</sup> Courts give states great leeway to exercise their interest in preventing the appearance of corruption. *See supra* note 119 and accompanying text (stating that means with which Congress has chosen to fight corruption in campaign finance have been treated with deference and upheld despite apparent ineffectiveness).

<sup>143</sup> *See Overton, supra* note 2, at 635 (noting lack of evidence of voter fraud).

of campaign finance corruption is compelling remains unanswered. The decision in *Buckley* suggests that it is compelling, since it was a “sufficiently important interest” to overcome “the closest scrutiny,”<sup>144</sup> and the means chosen “focuse[d] precisely on the problem.”<sup>145</sup> *McConnell* left the question open, noting only that the appearance of corruption was an interest that needed to overcome something “less rigorous” than strict scrutiny.<sup>146</sup> Neither case precluded a finding that preventing the appearance of corruption is a compelling state interest, but neither explicitly held it to be so.

However, the Supreme Court has apparently clarified this issue in the context of voting fraud, leaning toward recognizing the prevention of the appearance of fraud as a compelling state interest. In *Purcell v. Gonzalez*,<sup>147</sup> the Court found that Arizona had a compelling interest in preventing voter fraud not only to prevent votes from being tallied inaccurately, but also to prevent the *democratic harm it caused*—namely, lack of faith in democracy.<sup>148</sup> This is the same harm that the appearance of corrupt financing was said to have caused. If the state has a compelling interest in preventing voter fraud because it causes people to lose faith in the process and stop participating, and the appearance of such fraud has the exact same effect, then logically the state should have an equally compelling interest in preventing the appearance of voting fraud.<sup>149</sup>

### C. Court Defers to the Legislature on the Means To Fight the Appearance of Corruption

Once it is established that the state has a sufficient interest in preventing the appearance of fraud, then a court must still decide whether the law enacted by the legislature passes constitutional muster, either under a balancing test or strict scrutiny. Based on the campaign finance context, it is apparent that a great deal of deference is given to legislatures’ decisions regarding how to combat the problem.<sup>150</sup> The chosen solution need not be photo identification

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<sup>144</sup> *Buckley*, 424 U.S. at 25 (internal quotation marks omitted).

<sup>145</sup> *Id.* at 28. The Court’s conclusions here seem analogous to the steps in a basic strict scrutiny analysis. See also *supra* note 144.

<sup>146</sup> *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003) (interpreting “closely drawn” scrutiny of *Buckley* as requiring less than strict scrutiny).

<sup>147</sup> 127 S. Ct. 5 (2006).

<sup>148</sup> *Id.* at 7. The analogy to campaign finance still helps to show that this doctrine was not invented out of whole cloth but has existed for over thirty years.

<sup>149</sup> Even if a court did not accept this logical extension of *Purcell*, the state would still be closer to surpassing the necessary threshold for finding a compelling interest with this weighty interest on its side than it would be without it.

<sup>150</sup> See *supra* note 119 and accompanying text.

laws—although this appears to be the timeliest example, and one that enjoys some support in polling data<sup>151</sup>—since the Court tends to defer to any plausible means, even if ineffective, that the state devises to prevent the appearance of corruption.<sup>152</sup>

In extending the appearance-of-corruption doctrine from the financing context to the voting context, it will not matter if the means chosen are demonstrably effective. Professor Overton recognized the potential relationship between perception of fraud and voter turnout, but felt that these could not be given decisive weight until some sort of empirical data indicated that voting fraud (rather than other reasons) was actually responsible for lower voter confidence and participation.<sup>153</sup> He then cited findings that more restrictive campaign finance laws do little or nothing to actually improve public confidence in the system.<sup>154</sup> However, he did not continue the analysis: Despite evidence that laws seeking to limit the appearance of corruption in election financing have not been effective in doing so, the Supreme Court still allows states to restrict freedom of speech based on the idea that such laws might potentially succeed.<sup>155</sup> The Court has generally deferred to legislative judgment and has allowed legislatures both to interpret popular opinion and to try to shape it in the campaign finance realm.<sup>156</sup>

This next doctrinal step responds to much of Professor Overton's cost-benefit critique of photo identification laws. He emphasizes that better data on how much fraud actually occurs and on how difficult it is to secure photo identification will show how significant, respectively, the state's interest and the burden on the right to vote are.<sup>157</sup> Overton argues from existing data that, in all likelihood, the burden on the right to vote outweighs the state's interest *even without* the application of strict scrutiny,<sup>158</sup> as the Georgia federal court found in *Common Cause I*<sup>159</sup> and *II*.<sup>160</sup>

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<sup>151</sup> See *supra* Part III.B.1.

<sup>152</sup> See *supra* note 119 and accompanying text.

<sup>153</sup> Overton, *supra* note 2, at 665 n.165. Other reasons that people might lack faith in the voting process include "manipulation of voting rules by politicians that suppresses voter turnout." *Id.* at 666 n.165.

<sup>154</sup> *Id.* (citing Persily & Lammie, *supra* note 84, at 119–20).

<sup>155</sup> See *supra* note 119 and accompanying text (discussing how Supreme Court has not required evidence of campaign finance laws' effectiveness in preventing appearance of corruption).

<sup>156</sup> *Id.*

<sup>157</sup> Overton, *supra* note 2, at 665.

<sup>158</sup> *Id.* at 654, 658 (noting that 6–10% of voting age Americans lack state-issued photo identification, in contrast to infinitesimal rate of fraud (0.000044%) found in Ohio study).

<sup>159</sup> *Common Cause I*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005).

<sup>160</sup> *Common Cause II*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006).

Professor Overton's point is powerful if the state's only interest in enacting photo identification laws is preventing fraud. However, if courts also consider the state's interest in preventing the appearance of fraud, then the analysis changes. The data he cites become largely irrelevant as the level of fraud actually occurring and the effectiveness of laws in preventing fraud become moot. Further, if the Court defers to legislatures' decisions on how to combat the appearance of fraud most effectively, then the data on the effectiveness of laws at fighting the appearance of fraud would not really matter either.<sup>161</sup> In order to balance the state's interests accurately against the burden on the right to vote, the *Burdick* test would still require data on how many people—who otherwise would have voted—would not do so because of such laws.<sup>162</sup> However, the state's interest in preventing the appearance of voting fraud is already adequately demonstrable, given the existing evidence.<sup>163</sup>

#### CONCLUSION

To many observers, both experts and laymen, the American election system appears corrupt. This appearance of corruption has destructive effects independent of any actual corruption, as it can lead to reduced participation and destroy public faith in the system of representative government. The Supreme Court has acknowledged that the appearance of corruption in the election system can have that effect even if there is no actual corresponding corruption. In one aspect of the election system—campaign finance—the Court recognizes the effects that the appearance of corruption creates and allows the government to limit First Amendment rights in response. This Note identifies the inherent similarities between the appearance of corruption in campaign finance and the appearance of corruption in voting and argues that if the Court recognizes the state's interest in preventing the appearance of corruption in one, it should do so in the other as well. As long as courts continue to apply the *Burdick* framework to voting laws, thus weighing the state's interest in its law against the burden on the right to vote that the law imposes, courts should

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<sup>161</sup> See *supra* note 119 and accompanying text.

<sup>162</sup> The fact that there are some laws that could place enough of a burden on the right to vote that not even a strong state interest could save it does not preclude the argument that the state has a strong interest in preventing the appearance of fraud.

<sup>163</sup> Overton's point remains a powerful one as to whether states should pass these laws or whether the possible pernicious effects on turnout—particularly among some portions of the population—should cause them not to do so. Overton, *supra* note 2, at 634 (stating his concerns with photo identification laws).

factor in the state's interest in preventing the appearance of corruption as well as its interest in preventing actual corruption.

#### POSTSCRIPT

On April 28, 2008, the Supreme Court handed down its decision in *Crawford v. Marion County Election Board*.<sup>164</sup> Justice Stevens wrote for the Court in a lead opinion joined by Chief Justice Roberts and Justice Kennedy.<sup>165</sup> The Court found that Indiana's law requiring voters to present photo identification before voting is justified by the State's interest in deterring and detecting voter fraud, particularly in light of Indiana's inflated voter rolls, and by the State's interest in protecting public confidence in elections.<sup>166</sup> Justice Scalia, writing for Justices Thomas and Alito, concurred in the judgment and argued that any special burdens imposed on particular individuals are irrelevant, as the nondiscriminatory law imposes a uniform, nonsevere burden that merely happens to affect voters differentially.<sup>167</sup> In dissent, Justice Souter acknowledged Indiana's interest in upholding voter confidence.<sup>168</sup> However, he argued that the State failed to demonstrate that such an interest is actually served by the law, and claimed that the law actually hurts voter confidence.<sup>169</sup> Justice Breyer, writing alone, filed a separate dissenting opinion.<sup>170</sup>

By invoking voter confidence, the lead opinion suggests that the Court has moved closer to recognizing that the state has an interest in preventing the appearance of voter fraud, similar to its interest in preventing the appearance of campaign finance corruption. Yet because promoting public confidence and preventing the appearance of corruption are distinct—although closely related—interests, *Crawford* leaves room for a clearer recognition of the appearance-of-corruption interest. This Note demonstrates that recognition of both interests stands on firm doctrinal ground. The Court has long held that the state has an interest in preventing the appearance of corruption in campaign financing—an interest inherently similar to the state interest in preventing the appearance of voting fraud.<sup>171</sup> This Note helps show that preventing the appearance of voting fraud is not a

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<sup>164</sup> Nos. 07-21 & 07-25, slip op. (U.S. Apr. 28, 2008), <http://www.supremecourtus.gov/opinions/07pdf/07-21.pdf>.

<sup>165</sup> *Id.* (opinion of Stevens, J.).

<sup>166</sup> *Id.*, slip op. at 5–8.

<sup>167</sup> *Id.*, slip op. at 1–4 (Scalia, J., concurring in the judgment).

<sup>168</sup> *Id.*, slip op. at 28 (Souter, J., dissenting).

<sup>169</sup> *Id.*, slip op. at 28–29.

<sup>170</sup> *Id.* (Breyer, J., dissenting).

<sup>171</sup> *See supra* Part II.

new interest, but rather the logical extension of a longstanding state interest into a different part of the electoral realm.

Future challenges to photo identification laws are likely.<sup>172</sup> As *Crawford* was a facial challenge, the fact that the law had a “plainly legitimate sweep” was sufficient for the Court to uphold it.<sup>173</sup> However, the Court left the door open for voters to argue that in particular cases, the burden falls so heavily as to outweigh the state’s interest.<sup>174</sup>

Because “as-applied” challenges are likely to follow *Crawford*, the analogy between campaign finance and voting—and the doctrinal underpinnings it reveals—will continue to prove useful. For example, this analogy helps counter Justice Souter’s evidentiary criticism.<sup>175</sup> Part III of this Note identifies the proper standard of proof for demonstrating the state interest in preventing the appearance of voting fraud and justifies a deferential approach to how the state advances that interest. The state can show the voting system appears corrupt by producing as much evidence as it has previously used to show that the campaign finance system appears corrupt.<sup>176</sup> This Note thus supports the lead opinion’s deference to the legislature by demonstrating how and why the Court has deferred to similar legislative determinations regarding the appearance of corruption in the campaign finance context.<sup>177</sup> In short, the doctrinal underpinnings of the state interest in preventing the appearance of voter fraud are sure to remain relevant and helpful as citizens raise as-applied challenges to antifraud laws in Indiana and elsewhere.

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<sup>172</sup> Rick Hasen, *Initial Thoughts on the Supreme Court’s Opinion in Crawford, the Indiana Voter Identification Case*, Election Law Blog, Apr. 28, 2008, <http://electionlawblog.org/archives/010701.html> (observing that decision “encourage[s] further litigation, because it relegates challenges to laws imposing onerous burdens on a small group of voters to ‘as applied’ challenges, but those challenges will be difficult to win”).

<sup>173</sup> *Crawford*, Nos. 07-21 & 07-25, slip op. at 19 (opinion of Stevens, J.).

<sup>174</sup> *See id.* (“When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.” (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992))).

<sup>175</sup> *See supra* text accompanying note 169.

<sup>176</sup> *See supra* Part III.

<sup>177</sup> *See supra* note 119 and accompanying text; *cf. Crawford*, Nos. 07-21 & 07-25, slip op. at 13 (opinion of Stevens, J.) (requiring little evidence that public confidence was low or that Indiana’s law would aid it).