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Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court

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GATEKEEPING VS. BALANCING IN THE CONSTITUTIONAL LAW OF ELECTIONS: METHODOLOGICAL UNCERTAINTY ON THE HIGH COURT

Christopher S. Elmendorf & Edward B. Foley*

ABSTRACT

This Essay examines the methodological upheaval created by the quartet of constitutional election law cases decided during October Term 2007. Prior to this Term, the ascendant analytic approach called for a threshold characterization of the burden on the plaintiff's rights, which characterization determined whether the court would apply strict scrutiny or lax, rational-basis-like review. The characterization was generally formal in nature. But in light of the Supreme Court's latest decisions, it is now open to a lower court adjudicating a First Amendment or Equal Protection challenge to an election law—absent a Supreme Court precedent squarely on point—(1) to engage in unmediated, all-things-considered balancing, focusing either on the overall reasonableness of the challenged law or on the reasonableness of exempting or otherwise accommodating the plaintiff or plaintiff-class; (2) to apply strict scrutiny after determining that the law (relative to some practicable alternative) has a large, demonstrable adverse impact on voting, political association, or the competitiveness of campaigns; (3) to apply strict scrutiny after identifying a facial attribute of the law itself that renders it suspect in the judge's eye; (4) to apply extremely deferential review because the law does not have attributes that the judge deems facially suspect and because the judge is leery of getting bogged down in empirical debates or indulging in the guess work of open-ended balancing; or (5) to reject the claim after positing that it raises questions about democratic fairness concerning which there is no discernable historical consensus. During October Term 2007, the Court vacillated among these approaches, while providing precious little guidance to lower courts about the circumstances that warrant one or another methodology. We suggest that the methodological pluralism in these decisions, coupled with a lack of explicit normative direction, may indicate that most Justices are approaching constitutional election law thinking less about doctrinal coherence or interpretive principle than about the instrumental consequences of their rulings for the system of government as a whole.

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INTRODUCTION

The Supreme Court has long thought that election law constitutes a distinctive constitutional domain, and that judge-made doctrine ought to account for the characteristics that distinguish this domain from others. There has, of course, been considerable evolution in what the Justices see as the domain's central distinguishing characteristics, and in what they understand to be the appropriate doctrinal response. In Justice Frankfurter's day, the dominant concern was the risk that judicial interventions with respect to the ground rules of political competition would come to be seen as partisan interventions, and that this would eviscerate the foundation of public support upon which judicial authority ultimately rests.¹ For Frankfurter and his allies, the appropriate response was to deem constitutional questions about the political process nonjusticiable except insofar as the text of the Constitution or an independent constitutional prohibition—one with more general applicability—makes avoidance untenable.²

The Warren Court famously rejected Frankfurter's solution to the public perceptions problem and ushered in a new era.³ The defining ideas were that the Constitution protects unenumerated political rights, and that laws burdening the exercise of such rights are presumptively unconstitutional and may be upheld only upon passing the exacting test of justification known as "strict scrutiny."⁴

¹ See, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946).

² See *id.*; see also *Baker v. Carr*, 369 U.S. 186, 266–330 (1962) (Frankfurter, J., dissenting).

³ See *Baker*, 369 U.S. at 208–37.

⁴ The new paradigm was crisply articulated in *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969).

The next transformation occurred in the early 1970s.⁵ The Court did not back-track from the idea of a fundamental right to vote or a correlative right of ballot access for candidates, but it significantly qualified the notion that state-created impediments to the exercise of these rights are presumptively unconstitutional.⁶ Whereas the fact or appearance of judicial partisanship was the animating concern in Frankfurter's era, and political injustice was the Warren Court's dominant worry, the new era—which we'll call the *Storer* era—was marked by an appreciation of the sheer pervasiveness of election regulation, much of which seemed *prima facie* justifiable.⁷ As the Court put it in *Storer v. Brown*, the case that gave official recognition to the new approach:

[A]s 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. . . . [T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," very much a matter of "considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." What the result of this process will be in any specific case may be very difficult to predict with great assurance.⁸

⁵ The transitional cases include *Storer v. Brown*, 415 U.S. 724 (1974); *O'Brien v. Skinner*, 414 U.S. 524 (1974); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Burns v. Fortson*, 410 U.S. 686 (1973); and *Marston v. Lewis*, 410 U.S. 679 (1973).

⁶ See, e.g., *Storer*, 415 U.S. at 729.

⁷ *Id.* at 730.

⁸ *Id.* (citations omitted).

Storer engendered two further questions. First, what falls within *Storer*'s domain? *Storer* and its companion case, *American Party of Texas v. White*,⁹ concerned access to the ballot by independent and third-party candidates. But *Storer*'s language implies that the balancing, "no litmus-paper" approach is properly employed in most any case that touches upon a pervasively regulated component of the electoral process.¹⁰ The second question was whether judicial analysis under *Storer* would remain entirely unstructured, with each claim rising or falling on the basis of the presiding judge's own assessment of whether the restriction at issue simply goes too far, or whether *Storer* is better read as an invitation for courts to develop a suite of gatekeeping precepts (presumptions of constitutionality or unconstitutionality) that are sensitive to both the presumed need for pervasive regulation of the electoral process and the presumed impropriety of judicial usurpation of responsibility for writing those regulations.

In the years since 1973, the Supreme Court has demonstrated that *Storer*'s domain is very broad indeed. Ranging far beyond ballot access for third-party and independent candidates, the Court has applied the *Storer* framework (as modified by subsequent decisions) to cases about major parties' freedom to structure their internal organization and candidate nomination procedures as they see fit,¹¹ to cases concerning administrative barriers to the casting of ballots,¹² to a ban on write-in voting,¹³ and to a case about whether a partially non-electoral mechanism by which the major parties nominate their candidates for certain offices is sufficiently open to upstart "challenger candidates."¹⁴ The Justices have also borrowed the *Storer* balancing framework

⁹ 415 U.S. 767 (1974).

¹⁰ See *Storer*, 415 U.S. at 730.

¹¹ See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008) (applying framework to the state's nominally nonpartisan "top 2" primary election, in which candidates are allowed to list their party preference on the ballot, but political parties have no commensurate right to list their candidate preferences); *Clingman v. Beaver*, 544 U.S. 581 (2005) (applying framework to state law banning political parties from inviting registered members of other political parties to participate in the inviting party's primary election); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (applying framework to state's "blanket primary," in which all voters participated in a single primary election to select both major parties' nominees); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (applying framework to state law that banned political parties from selecting as their ballot-qualified nominee a candidate who has agreed to appear on the ballot as another party's nominee); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (applying framework to state laws regulating organization and governance of political parties); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (applying framework to state law banning political parties from inviting registered independents to participate in the party's primary election).

¹² See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (applying framework to voter ID requirement); cf. *Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006) (suggesting in passing that the framework should be employed in constitutional challenges to voter ID requirements).

¹³ See *Burdick v. Takushi*, 504 U.S. 428 (1992).

¹⁴ See *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791 (2008).

when undertaking to say whether the state has gone too far in restricting financial contributions to political campaigns.¹⁵ About the only subfield of election law characterized by pervasive regulation that has not been assimilated into the *Storer* framework is the design of electoral districts. (As the Court has struggled to come up with a satisfactory test for separating permissible partisan gerrymanders from gerrymanders that go too far, no Justice has sought guidance from *Storer* and its progeny.)

What then of the second question posed above, concerning the structure of judicial analysis under *Storer*? Here the picture is more complicated—thanks in no small part to the Supreme Court’s decisions from this past Term. It will be helpful at the outset to distinguish three modes of analysis, which we will call “unmediated balancing,” “rule-content gatekeeping,” and “consequential gatekeeping.” A judge doing unmediated balancing simply makes an all-things-considered judgment call about (1) whether the challenged law is in fact reasonable given the interests it purportedly serves and the record before the court, or (2) whether the plaintiff’s request for an exemption or other accommodation is reasonable given the particular burdens on her exercise of political process rights and the state’s interest in including her within the law’s coverage. The gatekeeping alternatives, by contrast, involve threshold determinations and associated presumptions about constitutionality. A judge doing rule-content gatekeeping assigns a presumption of constitutionality or unconstitutionality to the challenged requirements based on some feature that can be ascertained from studying the legal requirements themselves, wholly apart from whatever consequences they may have. A judge doing consequential gatekeeping assigns the presumption based on record evidence of the requirements’ impact.¹⁶

Although *Storer*’s “no litmus-paper” rhetoric cuts in favor of unmediated balancing, it could be said until very recently that the weight of opinion on the Supreme Court was moving in the direction of rule-content gatekeeping.¹⁷ But this technique

¹⁵ See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 236–63 (2006) (Breyer, J., plurality opinion); cf. *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759 (2008), discussed *infra* Part II.D. For more on the assimilation of the *Storer* framework into campaign finance jurisprudence, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 357–61 (2007) [hereinafter Elmendorf, *Structuring*].

¹⁶ The gatekeeping approaches can be deployed with varying degrees of rigidity. To wit, the definition of the gate itself can be sharp or fuzzy (contrast a hypothetical requirement that voters not face “substantial” waiting times at the polls with a requirement that voters not be required to wait for more than sixty minutes at the polls); the level of scrutiny applied to laws on the “presumptively permissible” side of the gate can be “rubber stamp” rational basis or some still deferential but not wholly uncritical standard; and, conversely, the level of scrutiny applied to laws on the “presumptively impermissible” side of the gate may take the form of fatal-in-fact strict scrutiny, or a somewhat less demanding type of proportionality analysis that important, well tailored requirements can pass.

¹⁷ See generally Elmendorf, *Structuring*, *supra* note 15 (analyzing standards of review in electoral mechanics cases).

was resoundingly rejected in two major election law cases from October Term 2007—one adopting unmediated balancing;¹⁸ the other going in the direction of consequential gatekeeping.¹⁹ Then again, two more election law cases from that Term speak to the continuing attraction of rule-content gatekeeping.²⁰ In all four of these cases, the Justices purported to follow *Storer* and its progeny. In none did the Court offer a reasoned explanation for its varying methodological choices, nor have individual Justices acknowledged, let alone justified, their methodological flip-flopping from case to case. The upshot for lower court judges who confront a novel question of law in an election law case is that they may pick and choose among doctrinal strategies virtually at will. There are no orienting precepts from the Supreme Court to guide their decision.

Our objective in this Article is simply to show how the Court is vacillating among analytic approaches. Identification of the problem comes before explanation and then cure—lines of inquiry we intend to pursue in subsequent work. (This Article is one installment in a larger project designed to improve the quality of election law in the United States, particularly by reducing the taint of partisanship that has infected it in recent years.) After charting the puzzling path of the Court's decisions, we will conclude with a few thoughts on possible explanations and the challenges that lay ahead.

I. FROM UNMEDIATED BALANCING TO RULE-CONTENT GATEKEEPING: SIGNS OF CONVERGENCE

As we have noted, the *Storer* Court's rejection of "litmus-paper tests" and its call for "hard judgments," the result of which in "any specific case may be very difficult to predict with great assurance,"²¹ sounds like a prescription for unmediated balancing. Yet the decision in *Storer* is also plausibly read as establishing a consequential gatekeeping regime specific to signature requirements for ballot access by third-party and independent candidates.²² Signature requirements, the Court indicated, are generally permissible so long as "reasonably diligent" candidates are able to comply with them.²³ Going further, the *Storer* Court suggested that regulations which, in effect, require the candidate to gather signatures from five percent or less of the

¹⁸ See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), discussed *infra* Part II.C.

¹⁹ See *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008), discussed *infra* Part II.B.

²⁰ See *N.Y. State Bd. Of Elections v. López Torres*, 128 S. Ct. 791 (2008), discussed *infra* Part II.A.; *Davis*, 128 S. Ct. 2759 (2008), discussed *infra* Part II.D.

²¹ *Storer v. Brown*, 415 U.S. 724, 730 (1974).

²² This reading of *Storer* and subsequent ballot-access cases is advanced in Elmendorf, *Structuring*, *supra* note 15, at 345–53.

²³ *Storer*, 415 U.S. at 742.

“available pool” of eligible signatories are presumptively permissible, whereas requirements of ten percent or more are presumptively unconstitutional.²⁴

Although *Storer*’s progeny can be mined for examples of unmediated balancing (*Anderson v. Celebrezze*²⁵ is a good example), the gatekeeping model became ascendant in the 1990s and 2000s. *Burdick v. Takushi* was the pivotal decision.²⁶ Looking back at *Storer* and other decisions, the *Burdick* Court posited that judicial review in cases about the mechanics of the electoral process actually involves two standards of review: strict scrutiny for “severe” burdens on rights of political participation, and a laxer balancing standard for “reasonable, nondiscriminatory” restrictions.²⁷ The relaxed standard of review for non-severe burdens proved to be very lax indeed. Although the Court never used the magic words “rational basis” to describe it, the Court sustained every law it characterized as “non-severe” and used reasoning that has the speculative air of ordinary rational basis analysis.²⁸ Not surprisingly, some lower courts equated lower *Burdick* with the rational basis standard.²⁹

The Supreme Court in the *Burdick* era did not say much about the nature or purpose of the threshold inquiry. The ordinary reader of the English language might suppose that *Burdick*’s emphasis on burden *severity* required a functional/consequential analysis. This interpretation also jibes with the Court’s rhetoric in some 1970s-era cases.³⁰ In practice, however, the Court generally drew distinctions based on the formal content of the rule under consideration—and did so both pre- and post-*Burdick*, until October Term 2007.³¹

For a sense of the pre-2007 nature of gatekeeping categorization, consider the following examples:³²

- *Express Wealth-Related Conditions on Political Participation.* The Supreme Court has uniformly struck down express financial and property-ownership conditions on participation in elections for national, state, and

²⁴ *Id.* at 743–44.

²⁵ 460 U.S. 780 (1983).

²⁶ 504 U.S. 428 (1992).

²⁷ *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

²⁸ On the standard of review for non-severe burdens under *Burdick*, see Elmendorf, *Structuring*, *supra* note 15, at 330 n.66.

²⁹ See, e.g., *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (stating that the “defendants need only show that the enactment of the regulation had a rational basis,” given that the burden at issue is “slight”); *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) (“[T]he appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further . . .”).

³⁰ See, for example, the Court’s discussion of the supposedly exclusionary effects of the candidate filing fees struck down in *Bullock v. Carter*, 405 U.S. 134, 143–46 (1972), and *Lubin v. Panish*, 415 U.S. 709, 717–18 (1974).

³¹ See Elmendorf, *Structuring*, *supra* note 15, at 335–80.

³² The following examples are drawn from (and elaborated in more detail in) Elmendorf, *Structuring*, *supra* note 15.

general-purpose local governments.³³ It has never required an empirical showing that such restrictions operate to disadvantage poor people. The Court identifies the relevant threshold category on the basis of the text of the law alone.

- *“Direct” Regulation of the Organizational Structure of Political Parties.* In *Eu v. San Francisco County Democratic Central Committee*, the Court applied strict scrutiny to California’s regulations of the internal structure and governance of political parties.³⁴ The Court emphasized that the state’s requirements “directly implicate the associational rights of political parties and their members.”³⁵ The “direct” nature of the state’s restrictions on party self-organization was enough to trigger heightened scrutiny; the Court required no further showing that these laws actually hindered the parties’ ability to function effectively.
- *Opening of Party Primaries to Non-members.* In *California Democratic Party v. Jones*, the Court held that California severely burdened political parties’ associational rights by requiring that a party’s ballot-qualified nominee be selected through a blanket primary open to all voters (not just party members and party invitees).³⁶ The lower court had found the burden not severe, relying on record evidence of the requirement’s practical impact on the nomination process.³⁷ The Supreme Court downplayed record evidence and emphasized instead the purpose behind the blanket primary (nominating centrist candidates), and the fact that primary voters were not required *formally to affiliate* with a party by even so modest an act as opting to participate in the primary election of one party rather than another.³⁸
- *Fusion Bans.* In *Timmons v. Twin Cities Area New Party*, the Court upheld Minnesota’s ban on fusion candidacies (wherein the same candidate appears on the ballot as the nominee of two political parties).³⁹ A minor party challenged the ban. The Eighth Circuit, relying on historical evidence of the relative success of third parties in fusion-allowing and fusion-disallowing jurisdictions, held that the ban “severely” burdened third-party associational rights.⁴⁰ The Supreme Court disagreed, deeming

³³ See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (striking down the use of poll taxes in state elections).

³⁴ 489 U.S. 214, 222, 225–29 (1989).

³⁵ *Id.* at 229.

³⁶ 530 U.S. 567, 586 (2000).

³⁷ *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1297–1300 (E.D. Cal. 1997), *rev’d*, 530 U.S. 567 (2000).

³⁸ *Cal. Democratic Party*, 530 U.S. at 577, 584.

³⁹ 520 U.S. 351 (1997).

⁴⁰ *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 197–99 (8th Cir. 1996), *rev’d sub nom.* *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

the burden “not severe” because it did not regulate the plaintiff party’s internal affairs and because it applied equally to all political parties, leaving them on (formally) equal footing to compete for candidates.⁴¹ The Court treated evidence of the ban’s impact on third-party flourishing as essentially irrelevant to the burden inquiry.⁴²

- *State/Local Disparities in Signature Requirements for Ballot Access.* In *Norman v. Reed*, the Court applied strict scrutiny to a signature requirement for *local* elective office that was in excess of analogous requirements for *statewide* races—even though both fall below the five percent cutoff that *Storer* indicated was generally permissible.⁴³
- “*Outlier*” *Campaign Contribution Limits.* Justice Breyer’s plurality opinion in *Randall v. Sorrell*,⁴⁴ joined by Justices Roberts and Alito, suggests that the constitutionality of campaign contribution depends upon a weighing of (1) the burden of the law on constitutionally protected interests in “political association” and “political expression”;⁴⁵ (2) the risk of harm to “democratic accountability” (in the event that the contribution limits “prevent[] challengers from mounting effective campaigns against incumbent officeholders”);⁴⁶ and (3) the benefits of the law in “preventing corruption and the appearance of corruption.”⁴⁷ This is, of course, a classic prescription for unmediated balancing. But Justice Breyer further proposed that courts generally should defer to legislatures’ judgments about how to balance the values at stake.⁴⁸ An “independent” judicial inquiry into the “proportionality of the restrictions” would, however, be warranted whenever there are “danger signs, that . . . risks [to the democratic process] exist (both present in kind and likely serious in degree).”⁴⁹ In *Randall*, Breyer found such a danger sign in the fact that Vermont’s contribution limits were the lowest in the nation, and lower than any the Court had previously sustained.⁵⁰ Although Breyer’s “danger signs” approach leaves more play in the joints than some of the Court’s other gatekeeping tests (e.g., express monetary conditions on political participation), it also bears the hallmark of rule-content gatekeeping, at least as applied in *Randall*, because it involves classifying statutes on the basis of their text.

⁴¹ *Timmons*, 520 U.S. at 361–63.

⁴² *Id.* at 361–62.

⁴³ 502 U.S. 279, 295 (1992); see *Storer v. Brown*, 415 U.S. 724, 744 (1974).

⁴⁴ 548 U.S. 230 (2006).

⁴⁵ *Id.* at 241, 246 (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)).

⁴⁶ *Id.* at 248–49.

⁴⁷ *Id.* at 248.

⁴⁸ *Id.*

⁴⁹ *Id.* at 249.

⁵⁰ *Id.* at 249–51.

One must be careful not to overstate the convergence hypothesis. The Court never said that the threshold inquiry should focus on burden “character” rather than “magnitude,”⁵¹ and the Court never repudiated the functionalist rhetoric of several cases in the *Storer* line. Some Justices continued to call for functional approaches. For example, Justice O’Connor (joined by Justice Breyer) wrote a concurring opinion in 2005 in which she argued that judges should try to evaluate the practical, interactive effects of electoral regulations when gauging burden severity under *Burdick*.⁵²

Importantly, no Justice undertook to explain the *Burdick* threshold inquiry with reference to the “political question” concerns that animated the decision in *Vieth v. Jubelirer*, the partisan gerrymandering case.⁵³ In *Vieth*, Justice Scalia (writing for a four-Justice plurality) treated partisan gerrymandering claims as nonjusticiable for want of an adequately constraining legal standard.⁵⁴ Justice Kennedy’s concurrence left open the possibility of discovering a suitable standard in the future.⁵⁵ Even so, Justice Kennedy shared the plurality’s fear of permitting the judiciary to invalidate legislative maps based on nothing more than an impressionistic feeling that something untoward was afoot.⁵⁶ Both he and Scalia were quite frank in acknowledging that the high political stakes of partisan gerrymandering litigation raises the bar for what constitutes a “judicially manageable” standard, and that the manageability component of the political question doctrine is bound up with the courts’ maintenance of their reputation for political neutrality.⁵⁷

One can imagine an account of the *Burdick* threshold inquiry that melds Frankfurterian concerns for the fact or appearance of judicial partisanship (which live on in the partisan gerrymandering cases); the Warren Court’s commitment to judicially

⁵¹ The doctrine nominally requires consideration of burden, character, and magnitude. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))).

⁵² *Clingman v. Beaver*, 544 U.S. 581, 605–08 (2005).

⁵³ 541 U.S. 267 (2004).

⁵⁴ *Id.* at 281.

⁵⁵ Kennedy voted to dismiss the complaint for failure to state a claim rather than on justiciability grounds. *Id.* at 313 (Kennedy, J., concurring).

⁵⁶ *Id.* at 307.

⁵⁷ Scalia argued that an open-ended judicial inquiry into the partisan fairness of redistricting plans would not win “public acceptance,” and indeed would likely bring “partisan enmity . . . upon the courts.” *Id.* at 291, 301 (plurality opinion). Echoing Scalia, Kennedy wrote that judicial merits rulings absent “rules to limit and confine judicial intervention” would result in the courts “assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Id.* at 307 (Kennedy, J., concurring). For a thoughtful examination of the light that *Vieth* sheds on the “manageable standards” component of the political question doctrine, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1281–97 (2006).

enforceable rights of voting and political association; and the Burger Court's appreciation for the pervasively regulated character of the electoral process.⁵⁸ In this view, judges ought not to back out of the electoral arena altogether, as Frankfurter wanted, lest protections for the basic political rights that legitimize the exercise of state power be left to lawmakers who have incentives to jigger the rules of electoral competition to entrench their hold on power.⁵⁹ At the same time, judicial orders in election cases must be guided by very clear rules so that judges can rebut the accusation that they are playing favorites among candidates or political parties.⁶⁰ In addition, the guiding rules must be narrowly drawn, leaving most of the edifice of election regulation unscathed, so that the courts do not ossify election law or usurp the proper, constitutionally conferred roles of the state and national legislatures in regulating the electoral process.⁶¹ *Burdick* can be seen as an attempt to thread the needle, licensing a protective judicial role but requiring judges to identify a characteristic of the challenged requirement that renders it uniquely suspect and unlike run-of-the-mill election regulations before applying heightened scrutiny.⁶² In this light, *Vieth* can be seen as contributing to the apparent convergence toward vigilant gatekeeping as the Court's basic methodological instinct in all areas of election law, even if the Court did not fully articulate its reasons for this apparent convergence.

II. THE CONTRADICTORY TEACHINGS OF OCTOBER TERM 2007

Observers had cause to hope that this past Term would bring new clarity to the Court's election law jurisprudence. Justice Alito had replaced the ever-unpredictable O'Connor, and the Court was to hear three electoral mechanics cases, and a fourth case concerning campaign contribution limits. The Court's grants of certiorari evinced an eagerness to wrestle with new issues, such as constitutional challenges to voter ID requirements, which had just started to reach the circuit courts.⁶³ It was anticipated in some quarters that the Court would use the pending cases to give definitive guidance to the lower courts in advance of the 2008 elections.⁶⁴ That hope was not realized. About the only thing that the Term clarified was that there exists a remarkable

⁵⁸ For an elaboration of this idea, see Elmendorf, *Structuring*, *supra* note 15, at 327–34.

⁵⁹ *Id.* at 328.

⁶⁰ *See id.* at 334.

⁶¹ *Id.* at 328–29.

⁶² For an account of *Burdick* along these lines, see Elmendorf, *Structuring*, *supra* note 15.

⁶³ At the time of the certiorari grant in *Crawford*, the Seventh Circuit was the only circuit court to have reached the merits of a constitutional challenge to a photo-ID-for-voting requirement. *See Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008). Constitutional attacks on similar photo ID requirements were working their way through the state and lower federal courts in Georgia, Arizona, Michigan, and New Mexico.

⁶⁴ *See, e.g.*, Edward B. Foley, *Crawford v. Marion County Election Board: Voter ID, 5-4? If So, So What?*, 7 ELECTION L. J. 63 (2008).

diversity of analytic methods available to the judge who has been called upon to say whether a particular regulation of a pervasively regulated component of the electoral process goes too far. It remains for the Court to explain what circumstances justify the use of one or another of these analytic methods.

A. *New York Board of Elections v. López Torres*: A *Link to Vieth*?

The Court's decision in the first of the four cases, *New York Board of Elections v. López Torres*, provided important and indeed novel support for the hypothesis that the model of rule-content gatekeeping is ascendant.⁶⁵ *López Torres* presented a constitutional challenge to New York's peculiar hybrid regime of primary elections and nominating conventions for selecting major-party candidates for trial judgeships. The plaintiff argued (and the lower courts agreed) that New York's system was unconstitutional because it did not afford candidates disfavored by the party leadership a fair shot in competing for their party's nomination. The Supreme Court, per Justice Scalia, answered:

What constitutes a "fair shot" is a reasonable enough question for legislative judgment, which we will accept so long as it does not too much infringe upon the party's associational rights. But it is *hardly a manageable constitutional question for judges*—especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a "fair shot" at party nomination.⁶⁶

Accordingly, the Court ruled categorically that candidates cannot win this sort of constitutional challenge to state laws governing political party nomination procedures (a kind of claim distinguishable from those brought by a party itself on the ground that state law interferes with its operations).⁶⁷

The quoted passage is the first explicit, *Vieth*-like invocation of political question concerns to appear in a case involving, not political gerrymandering, but an issue of ballot access or any other subject governed by the *Storer-Burdick* framework.⁶⁸ To be sure, the fact that Justice Scalia, the Court's arch-formalist, authored both the *Vieth* plurality and *López Torres* goes a long way toward explaining why the two sound similar. But Scalia's disavowal of unstructured fairness inquiries in *López Torres* was

⁶⁵ 128 S. Ct. 791 (2008).

⁶⁶ *Id.* at 799 (emphasis added).

⁶⁷ *Id.* at 801. For an example of the latter, see *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁶⁸ See *supra* text accompanying note 65.

questioned by only one of his colleagues. (Justice Kennedy concurred in the judgment while suggesting that the plaintiff's fair-shot argument would have presented a serious constitutional question had New York not provided an easy way for independent candidates to gain access to the general election ballot.⁶⁹) As such, *López-Torres* lays another piece of the foundation for an opinion that would confirm the gatekeeping nature of the *Burdick* jurisprudence and, going further, that would direct the lower courts not to adjudicate constitutional questions about the fairness of the electoral process absent a very constraining legal standard.

B. Washington State Grange v. Washington State Republican Party: A New Dawn for Consequential Gatekeeping?

With the next case down the pike, *Washington State Grange v. Washington State Republican Party*, the Court took a big step back from rule-content gatekeeping—albeit without rejecting the gatekeeping model altogether.⁷⁰ At issue was a facial, pre-implementation challenge to Washington's "top two" regime of primary elections.⁷¹ Under this regime, all ballot-qualified candidates appear on a single primary ballot.⁷² All voters participate in the primary, without regard to their party affiliation.⁷³ The top two vote-getters in the primary move on to the general election.⁷⁴ Each candidate may designate his or her "party preference" on the ballot; political parties, however, are not entitled to state on the ballot whether they endorse the candidates who so affiliate with them.⁷⁵ The state Republican Party argued that this arrangement unconstitutionally burdened its associational rights.⁷⁶

The Party lost, and so did the model of rule-content gatekeeping. Justice Scalia, joined only by Justice Kennedy, penned a dissent arguing that the state's decision to give candidates an opportunity to affiliate with a political party on the ballot, without giving political parties a commensurate right to denote their acceptance or rejection of the candidate, constituted a "severe burden" on the parties' associational rights and must therefore face strict scrutiny.⁷⁷ Notice the essential hallmark of rule-content gatekeeping in Scalia's reasoning: readily observed attributes of the statute are being used to classify it as presumptively permissible or impermissible without regard to whether the statute actually has the effect of substantially burdening a privileged right or aspect of democratic performance.⁷⁸

⁶⁹ *López Torres*, 128 S. Ct. at 801–03 (Kennedy, J., concurring).

⁷⁰ 128 S. Ct. 1184 (2008).

⁷¹ *Id.* at 1189.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1187.

⁷⁵ *Id.* at 1189.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1197–1203 (Scalia, J., dissenting).

⁷⁸ *Id.*

Justice Thomas, writing for a seven-Justice majority, answered the plaintiff's (and Scalia's) argument by saying, in effect, *show me the evidence*. If the Party were to *prove* that voters "will misinterpret the party-preference designation," and if the resulting confusion would burden severely the Party's efforts to define and communicate its identity to the public, the primary-election law would properly be subject to exacting judicial scrutiny.⁷⁹ But as the case came before the Court, the existence and degree of voter confusion was "sheer speculation," and so the Party's facial challenge had to be rejected if it was conceivable that the state would implement the top-two primary in a manner that did not generate "widespread voter confusion" about the meaning of the party-preference designations.⁸⁰ Chief Justice Roberts, joined by Justice Alito, added a concurring opinion to explain his view that plaintiffs need not "produce studies regarding voter perceptions."⁸¹ All that is needed, Roberts indicated, is enough concrete evidence concerning ballot design and the practice of party-preference designation to convince the Court that hypothetically reasonable voters will misinterpret party-preference designations as endorsements by a party.⁸² That Roberts had to write separately to make this point, and that he was joined only by Alito, suggests that the other five Justices in the majority were ready to contemplate (if not yet committed to) a legal standard that would require plaintiffs to come forward with social-scientific proof of "widespread voter confusion."⁸³

Justice Thomas's opinion in *Washington Grange* can be seen as a tentative first step toward consequential gatekeeping at step one of the *Burdick* analysis. Under this approach, the Court would articulate a conception of the good of voting, districting, and the like, and rely on social scientists to come up with ways of measuring the consequences of challenged enactments vis-à-vis the privileged democratic value.⁸⁴ (In *Washington Grange*, the privileged value was an informed electorate.) With a suitable metric in hand, the Court could set standards that the states would be required to meet on pain of having their election laws strictly scrutinized and reformed under court order. A state that falls short of the standard would be said to have "severely" burdened rights of political participation.⁸⁵

The nearest precedent for the Court's opinion in *Washington Grange* is *Storer* itself. There, the Court set forth a "reasonably diligent candidate" standard for evaluating ballot-access restrictions and allowed that "[p]ast experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have

⁷⁹ *Id.* at 1193–95 (majority opinion).

⁸⁰ *Id.* at 1193–94.

⁸¹ *Id.* at 1196–97 (Roberts, J., concurring).

⁸² *Id.*

⁸³ *Id.* at 1194 (majority opinion).

⁸⁴ The Court would also need to come up with a doctrinal rubric for defining a benchmark alternative to the challenged requirements because the consequences of a regulatory regime can only be measured vis-à-vis some regulatory alternative.

⁸⁵ *Washington Grange*, 128 S. Ct. at 1192, 1196.

qualified with some regularity and quite a different matter if they have not.”⁸⁶ But in the thirty-five years since *Storer*, the Court has not elaborated on the kind of outcome-based showing that could establish that a ballot-access regime is so restrictive as to be presumptively unconstitutional. And in other electoral mechanics cases, majority coalitions on the Court have been reluctant to tie scrutiny levels to the actual consequences of challenged requirements for voters, candidates, political parties, or the electoral system as a whole.⁸⁷

The Court’s unease about using performance standards to solve the “goes too far” problem is also revealed in its latest partisan gerrymandering case, *League of United Latin American Citizens v. Perry (LULAC)*.⁸⁸ As noted above, Kennedy, in *Vieth*, voiced doubt about ever finding a constraining standard by which to judge partisan excess in redistricting.⁸⁹ Leading political scientists Gary King, Bernard Grofman, Andrew Gelman, and Jonathan Katz tried to answer Kennedy’s concerns by filing an amicus brief in *LULAC* in which they explained how social scientists use a “symmetry standard” to measure the degree of partisan advantage built into a districting map.⁹⁰ A map is symmetrical insofar as each party would gain the same number of seats as a result of achieving the same percentage of statewide votes.⁹¹ For example, suppose that in a 100-member legislature the Democrats secure sixty seats from achieving only fifty-five percent of the statewide vote; while that might seem a sort of bias in favor of Democrats, it would not be if Republicans would also secure sixty seats if they achieved fifty-five percent of the votes. In this situation, although the map would give the statewide majority party a boost in securing control of the legislature, this boost would be equally available to both parties and the map is in this sense “symmetrical.” By contrast, a map would be asymmetrical in favor of the Democrats if winning a fifty-five percent statewide majority would give them 60 seats notwithstanding that a fifty-five/forty-five statewide margin for Republicans would earn the Republicans only fifty-eight seats.

⁸⁶ *Storer v. Brown*, 415 U.S. 724, 742 (1974).

⁸⁷ For example, in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), the Supreme Court issued rule-bound decisions that reversed lower court rulings that had focused on the practical consequences of the challenged requirements. See also *Randall v. Sorrell*, 548 U.S. 230 (2006), in which the plurality applied elevated scrutiny after finding “danger signs” (but little empirical evidence) of a serious threat to political competition. Justice Souter, dissenting in *Randall*, would have conditioned heightened scrutiny on a showing of actual and serious harm to political competition, not mere “danger signs.” See *id.* at 286–88.

⁸⁸ 548 U.S. 399 (2006).

⁸⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 306–17 (Kennedy, J., concurring).

⁹⁰ See Brief of Amici Curiae Professors Gary King, Bernard Grofman, Andrew Gelman, & Jonathan N. Katz, in Support of Neither Party, *LULAC*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439).

⁹¹ *Id.* at 4–5.

Justice Kennedy found the symmetry standard intriguing, even helpful, but he was not prepared to commit to it in *LULAC*.⁹² He did not see a basis, he said, “for deciding how much partisan dominance is too much.”⁹³ The act of picking a cutoff out of the blue evidently struck him as incongruent with the judicial role.⁹⁴ And given that four other Justices saw nothing in *LULAC* that led them to question *Vieth*’s provisional justiciability holding, Kennedy’s resistance to firm consequential gatekeeping amounts to resistance from the heart of the Court.⁹⁵

⁹² *LULAC*, 548 U.S. at 420.

⁹³ *Id.*

⁹⁴ Justice Stevens, in dissent, was prepared to say that any degree of asymmetry beyond ten percent would be “too much.” *See id.* at 467–68, 473 n.11 (Stevens, J., concurring in part and dissenting in part).

⁹⁵ One of the authors of this Article (Foley) has thought that the solution to Justice Kennedy’s conundrum is to combine the symmetry standard with a test that identifies when partisan gerrymandering thwarts the will of the majority. In *LULAC*, Kennedy said that “asymmetry alone is not a reliable measure of unconstitutional partisanship.” *Id.* at 420 (Kennedy, J., concurring). He said something similar in *Vieth* about evidence that one party is able to maintain a majority of seats in the legislature even without majority support from voters. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring). But even if either inquiry alone is insufficient, it is possible that both—together—provide an appropriate test to identify unconstitutional partisan gerrymanders. Indeed, combining both makes sense in terms of underlying constitutional principles: the evil to be avoided is when one party draws a map that enables it to retain power over the legislature even when it has lost majority support of the voters, but (asymmetrically) the other party would not be able to obtain majority control of the legislature with the exact same level of minority voter support.

Foley’s solution solves the “how much is too much” problem by positing that *any* asymmetry is presumptively unconstitutional if certain other qualitative conditions are met (e.g., the party favored by the gerrymander wins a majority of seats in the legislature with a minority of the popular vote, and the other party likely would not have won a majority of seats with the same vote share). This arguably is in some tension with the *Burdick* “severe/lesser burden” framework, which the Court has applied in most electoral mechanics cases (partisan gerrymandering excepted), because the *Burdick* framework generally tolerates burdens on constitutionally protected interests so long as the burden is not “severe.” Is there a severe representational injury if, for example, (1) a party that wins 49% of the popular vote ends up with 51% of the seats in the legislature, and (2) the other party most likely would have won only 49% of the seats if it had garnered a 49% share of the popular vote? For better or worse, the *Burdick* framework seems to invite “arbitrary” line drawing if implemented through firm performance standards. Of course, that quality is not necessarily something favorable about the *Burdick* approach.

It might be argued, however, that the purpose of the *Burdick* threshold inquiry is to avoid “excessive” judicial involvement in the political process, and that other approaches are permissible if they would usefully simplify, regularize, and limit judicial involvement. Foley’s partisan gerrymandering solution might be defended in this way, much like the Court’s decision in *Karcher v. Daggett*, 462 U.S. 725 (1983) (declining to recognize a safe harbor for malapportionment claims). Foley’s standard could also be narrowed in other ways, without numerical cutoffs. For example, plaintiffs might be required to show that the challenged asymmetric map not only frustrates majority rule, but also is inferior to the predecessor map in terms of traditional districting criteria.

C. Crawford v. Marion County Election Board: *The End of Gatekeeping?*

A few months after *Washington Grange*, the Supreme Court announced its decision in *Crawford v. Marion County Election Board*,⁹⁶ a facial challenge brought by the state Democratic Party against Indiana's novel photo ID requirement for voting. The law at issue was enacted on a straight party-line vote of the legislature and was derided by critics (including a Seventh Circuit judge) as a "not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."⁹⁷ A fractured Supreme Court rejected the plaintiffs' challenge but was unable to chart a clear path for voting administration cases going forward.

Crawford is nonetheless an extremely important case, for the Justices engaged one another for the first time in an overt debate over the nature of the *Burdick* analysis.⁹⁸ Justice Scalia, joined this time by Justices Thomas and Alito, continued to beat the drum for formalism. *Burdick* and subsequent cases, he wrote, "forged *Anderson's* amorphous 'flexible standard' into something resembling an administrable rule," with strict scrutiny applied to laws that "severely" burden political rights and very lax review extended to all other challenged requirements.⁹⁹ In gauging burden severity, he explained, a court ought not to make a "record-based" inquiry into the challenged requirement's practical consequences for individuals who wish to vote,¹⁰⁰ but should instead make an overall assessment of whether the requirement goes beyond "the merely inconvenient."¹⁰¹ Lest anyone mistake this as licensing fact-specific inquiries into the "convenience" of voting requirements, Justice Scalia also referenced an earlier opinion by Justice Thomas stating that "ordinary and widespread" requirements should not be deemed severe.¹⁰²

Strikingly, six Justices expressly rejected Scalia's two-tiered and formalist gloss on *Burdick*. Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, insisted that *Burdick* did not in any way alter the "no litmus test" balancing rubric of *Storer* and *Anderson*.¹⁰³ Much to our surprise, he read the seminal case of *Harper v. Virginia Board of Elections*¹⁰⁴ as standing not for the proposition that express monetary conditions on voting are per-se severe, but rather for the principle that "[h]owever slight [a] burden may appear . . . it must be justified by relevant and legitimate state

⁹⁶ 128 S. Ct. 1610 (2008).

⁹⁷ *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 128 S. Ct. 1610 (2008).

⁹⁸ *Id.* at 128 S. Ct. 1610, 1616 n.8, 1624, 1627–28.

⁹⁹ *Id.* at 1624 (Scalia, J., concurring) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

¹⁰⁰ *Id.* at 1627.

¹⁰¹ *Id.* at 1624–25.

¹⁰² *Id.* at 1624 (citing *Clingman v. Beaver*, 544 U.S. 581, 591, 593–97 (2005)).

¹⁰³ *Id.* at 1616 & n.8.

¹⁰⁴ 383 U.S. 663 (1966).

interests ‘sufficiently weighty to justify the limitation.’”¹⁰⁵ Justices Souter (joined by Justice Ginsburg) and Breyer dissented from the Court’s decision to uphold the Indiana photo ID requirement, but in doing so they stated their agreement with Stevens’s (rather than Scalia’s) formulation of the applicable legal standard.¹⁰⁶ In a small irony, Justice Breyer wrote that the balancing test applied to voting requirements was the same as the balancing test applied to campaign contribution restrictions,¹⁰⁷ yet he paid no heed to the gatekeeping principle he had enunciated just two years earlier in *Randall*—namely, that courts should defer to the legislature’s striking of the balance absent objective “danger signs” that the lawmakers got it badly wrong.¹⁰⁸

Time will tell whether *Crawford* ushers in a new era of unmediated balancing. To the extent that it does, the Justices who favor balancing-with-bite will have to resolve a question that divided them in *Crawford*: whether the balancing should be aggregative or granular in nature—i.e., whether the Court should consider the totality of the challenged requirement’s impacts or only its impact upon the plaintiff-voters, in the case at hand.¹⁰⁹ In *Crawford*, Justice Stevens, joined by Kennedy and

¹⁰⁵ *Crawford*, 128 S. Ct. at 1616 (citations omitted). *Contra* Elmendorf, *Structuring*, *supra* note 15, at 341–42 (treating *Harper* as a case involving burdens “severe in kind”). It might not be so surprising that Justice Stevens, were he writing a concurrence solely for himself, would take this view in favor of a no-threshold-whatsoever approach to *Burdick* balancing. See Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339 (2006). But insofar as Justice Stevens was given the assignment by the Chief Justice to write an opinion with the expectation that it would be joined by a majority or plurality of the Justices, it is indeed surprising that Justice Stevens would attempt such an aggressively revisionist account of *Burdick*. Alternatively, if Justice Stevens had announced at the Court’s conference on *Crawford* that he could not abide by a gatekeeping application of *Burdick*, then what becomes surprising is Chief Justice Roberts’s willingness to assign Justice Stevens the opinion.

¹⁰⁶ See *Crawford*, 128 S. Ct. at 1628 (Souter, J., dissenting) (“Given the legitimacy of interests on both sides, we have avoided pre-set levels of scrutiny [in electoral mechanics cases] in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue. And whatever the claim, the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State’s reasons for imposing those precise burdens.”); *id.* at 1643 (Breyer, J., dissenting) (“I would balance the voting-related interests that the statute affects, asking ‘whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).’” (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000))).

¹⁰⁷ See *id.* (citing campaign finance cases for the standard of review).

¹⁰⁸ See *Randall v. Sorrell*, 548 U.S. 230, 249 (2006).

¹⁰⁹ This distinction between aggregative and granular balancing bears some resemblance to the familiar distinction between facial and as-applied challenges. But these two distinctions need not be the same analytically. On one understanding, the facial/as-applied distinction is an aspect of standing law, concerning what plaintiff is entitled to challenge a law as being unconstitutional. The aggregative/granular distinction concerns how to evaluate whether a law is in whole or in part unconstitutional.

Roberts, suggested that burdens should be gauged from the point of view of particular affected voters.¹¹⁰ To the extent that a challenged requirement poses exceptional difficulties for a given plaintiff-voter, the state will be hard pressed to justify its failure to provide that voter with an exemption. Justices Souter and Breyer, by contrast, undertook a global assessment of the Indiana law, weighing the total number of adversely affected voters as well as the anticipated burden on each.¹¹¹ It is not clear from the Breyer and Souter opinions, however, whether they understood this sort of global analysis to be merely an option which plaintiffs may elect (e.g., by pursuing a facial rather than an as-applied challenge), or instead as the exclusive mode of balancing analysis under *Burdick*.

D. Davis v. Federal Election Commission: Facial Gatekeeping Returns, Sub Silentio?

The last of the election law cases decided during October Term 2007, *Davis v. Federal Election Commission*,¹¹² struck down the so-called “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act of 2002 (BCRA).¹¹³ Justice Alito authored the Court’s opinion, writing for a five-Justice majority.¹¹⁴ Ironically enough, his opinion exemplifies rule-content gatekeeping—but without an overt acknowledgement that this is what he was doing.

The Millionaire’s Amendment trebled the otherwise applicable campaign contribution limit for candidates who face substantially self-funded opponents, and exempted these candidates from the BCRA’s restrictions on coordinated party expenditures.¹¹⁵ It was challenged by Jack Davis, who had spent substantial sums of his own money on previous, failed campaigns for the House of Representatives and who stated his intent

¹¹⁰ See *Crawford*, 128 S. Ct. at 1620–23 (looking at particular voters or classes of voters for whom the ID requirement might represent a special burden).

¹¹¹ *Id.* at 1628 (Souter, J., dissenting) (“[T]he rigorosity of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights’ upon an assessment of the ‘character and magnitude of the asserted [threatened] injury’ and an estimate of the number of voters likely to be affected.” (emphasis added) (citations omitted)); *id.* at 1644–45 (Breyer, J., dissenting) (weighing the likely impact of the statute across all gamut of disproportionately affected voters). In that their analysis was global or aggregative in character, the opinions of Breyer and Souter have an important commonality with Scalia’s, though they rejected Scalia’s two-tiered reading of *Burdick* and his aversion to record-based burden assessment.

¹¹² 128 S. Ct. 2759 (2008).

¹¹³ The “Millionaire’s Amendment,” section 319(a) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 109, is codified at 2 U.S.C. § 441a-1(a) (2008).

¹¹⁴ *Davis*, 128 S. Ct. 2759.

¹¹⁵ 2 U.S.C. § 441a-1(a). For a straightforward explanation of the workings of the Amendment, see *Davis*, 128 S. Ct. at 2765–67.

to run again and spend more than \$1 million of personal funds on his next race.¹¹⁶ The Court determined that the Millionaire's Amendment "imposes a *substantial burden* on the exercise of the First Amendment right to use personal funds for campaign speech," and that the "provision [therefore] cannot stand unless it is 'justified by a compelling state interest.'"¹¹⁷ The echo of *Burdick*'s two-tiered, severe/lesser burden approach is more than faint.

What marks *Davis* as a rule-content gatekeeping case is the analysis that leads to the conclusion that the "burden" of the Millionaire's Amendment on First Amendment rights is "substantial."¹¹⁸ The principal explanatory paragraph is all makeweight.¹¹⁹ Alito declared that the Amendment "imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right."¹²⁰ Candidates who nonetheless choose to "make large personal expenditures" in support of their campaigns "shoulder a special and potentially significant burden. . . . [because] the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents"¹²¹ Notice what is missing here: any consideration of the extent to which the Millionaire's Amendment discriminates in favor of non-self-funding candidates. Nor is there any semblance of a *Washington Grange*-like requirement that the plaintiff-candidate *prove* that the challenged provisions of the BCRA, as implemented, practically and substantially interfere with his ability to get his message across by spending his own funds.

To make sense of Justice Alito's decision to apply strict scrutiny, one needs to look beyond the paragraphs of the opinion in which he characterizes the substantiality of the burden. The two most important lines are found elsewhere:

We have never upheld the constitutionality of a law that imposes *different contribution limits* for candidates who are competing against each other

Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the

¹¹⁶ *Davis*, 128 S. Ct. at 2763.

¹¹⁷ *Id.* at 2772 (emphasis added) (quoting *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 256 (1986)).

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 2771–72.

¹²⁰ *Id.* at 2771.

¹²¹ *Id.* at 2772.

power to choose the Members of the House of Representatives, Art. I, § 2, and it is a *dangerous business* for Congress to use the election laws to influence the voters' choices.¹²²

We think these passages signify that the decision to apply strict scrutiny in *Davis* really turned on the formal asymmetry of campaign contribution limits under the Millionaire's Amendment, not their practical consequences for effective speech by self-funders. The second passage adduces the reason that formal asymmetry triggers strict scrutiny: because it is a danger sign that lawmakers have gotten dangerously far into the business of "[l]eveling electoral opportunities."¹²³ The underlying concern is that lawmakers will seek to manipulate voters' choices in furtherance of lawmakers' electoral self-interest or partisan agendas, rather than to help voters effectuate their own political preferences. That a campaign finance law discriminates on its face against a class of candidates is some indication that the law was designed to serve the electoral or partisan interests of those who wrote it, rather than to combat corruption, to improve voters' access to information, or to advance some other permissible end.

What muddies our facial gatekeeping reading of *Davis* is that Justice Alito did not reference Justice Breyer's "danger signs" analysis in *Randall*,¹²⁴ the Court's then-most-recent encounter with campaign contribution limits and the case in which the plurality, per Breyer (joined by Alito), said that heightened scrutiny of campaign contribution limits is justified if there are "danger signs" that the limits at issue are not reasonably tailored to advance important state interests. Nor did Justice Breyer join Alito's opinion in *Davis*, or concur separately to further elaborate the danger-signs model, or write a dissent identifying an error in Alito's implicit rule-content gatekeeping reasoning. Rather, Breyer joined Justice Stevens's dissent, an opinion which is insensitive to the structural, electoral competition values that Breyer had tried to protect using the danger-signs method in *Randall*.¹²⁵ *Davis* thus suggests a certain judicial discomfort with acknowledging what one of us has argued is the underlying logic of most of the *Burdick* jurisprudence—namely, that in characterizing burdens for level-of-scrutiny purposes, the Justices are really seeking to identify simple, generalizable indicators of the likelihood that the restriction at issue is or is not all-things-considered justified.¹²⁶

¹²² *Id.* at 2771, 2774 (emphasis added).

¹²³ *Id.*

¹²⁴ *Randall v. Sorrell*, 548 U.S. 230, 249 (2006).

¹²⁵ Stevens's dissent turns on the proposition that the Millionaire's Amendment is unproblematic because its "amplification [of the speech of the opponent of a self-funding candidate] in no way mutes the voice of the millionaire." *Davis*, 128 S. Ct. at 2780 (Stevens, J., dissenting). This is empirically questionable, and, perhaps more to the point, is insensitive to the risk that facially discriminatory regulations of campaign speech will be used to gravely hamstring political communication by candidates whom incumbent lawmakers disfavor. See Posting of Rick Pildes to Balkinization, <http://balkin.blogspot.com/2008/06/sympathy-for-millionaire-self.html> (June 26, 2008, 11:37 EST).

¹²⁶ See Elmendorf, *Structuring*, *supra* note 15, at 324–25.

E. Conclusions

As things stand today, the “law” that has emerged from *Storer* and *Burdick* is almost impossibly open-ended. Facing a constitutional challenge to an unfamiliar election law, a judge could choose to perform unmediated granular balancing (citing the *Crawford* plurality);¹²⁷ engage in unmediated aggregative balancing (citing *Storer*, *Anderson*, and the *Crawford* dissenters and concurrence);¹²⁸ dismiss the case because the plaintiffs failed to come forward with empirical proof of a substantial burden on rights or injury to a privileged democratic value (citing *Washington Grange*);¹²⁹ apply strict scrutiny after identifying a qualitative aspect of the law that, in the judge’s view, renders it highly suspect (citing *Davis, Jones, Eu, Lubin, and Harper*);¹³⁰ or dismiss the case after characterizing the plaintiffs’ attack as one that raises questions about political fairness, that are not judicially manageable (citing *López Torres and Vieth*).¹³¹ Except insofar as the law and claim at issue are close to being “on all fours” with one that a Supreme Court majority has resolved in a particular way¹³²—itself a rare thing in this domain—our judge will find little if anything in Supreme Court precedent to guide the choice among these approaches. The Court has provided no overarching account of why it proceeds in different ways in these cases, notwithstanding that each case purports to apply the same doctrinal framework.

Not only do the Supreme Court’s decisions leave judges with massive discretion to pick and choose among doctrinal approaches, they also offer precious little normative guidance about the goals that judges should pursue in disposing of the cases before them. As other scholars have explained at length, the Supreme Court has long disavowed having any “theory of democracy” upon which to rest its constitutional election law jurisprudence.¹³³ When defining political rights, the Court has often given justifications that are either declarative and question-begging,¹³⁴ or so abstract

¹²⁷ See *supra* Part II.C.

¹²⁸ See *supra* notes 98–108 and accompanying text.

¹²⁹ See *supra* Part II.B.

¹³⁰ See *supra* Part II.D, notes 30, 34–37, 104–06 and accompanying text.

¹³¹ See *supra* Part II.A.

¹³² For example, if the law concerns ballot notations and the claim is that the notation regime will infringe on a political party’s ability to define and communicate its message, then *Washington Grange* presumably governs.

¹³³ See, e.g., Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C.L. REV. 1411 (2002); Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

¹³⁴ Some quick examples:

In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court struck down the poll tax after declaring that “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax,” *id.* at 666, but this begs the question of whether payment of a poll tax is nonetheless a tenable proxy for knowledge & commitment, which assuredly does have a “relation to [normative] voting.” *Id.* at 670.

as to provide doubtful practical guidance to lower courts.¹³⁵ Conversely, the Court has often rejected constitutional challenges to the ground rules of political competition on the basis of state interests in “stability” and “order,” whose relationship to the challenged law is speculative at best.¹³⁶

All this leads to three questions. First, what accounts for the scattershot nature of the election law cases—the cycling among doctrinal approaches, and the lack of overarching normative direction? Second, does the scattershot nature of this body of law have adverse consequences beyond the lack of guidance for regulators and litigants? And if so, third, what can be done about it? These questions lie beyond the scope of this Article; they are grist for our future work. But before closing this piece, we will offer a few preliminary thoughts with an eye toward explanation.

III. UNDERSTANDING METHODOLOGICAL PLURALISM: SOME PRELIMINARY THOUGHTS

López Torres, *Washington Grange*, *Crawford*, and *Davis* nominally apply the same doctrinal framework, yet do so in extremely different ways.¹³⁷ What accounts for the unexplained plurality of approaches traveling under the same doctrinal flag?

In *Shaw v. Reno*, 509 U.S. 630 (1993), and subsequent cases, the Court struck down funny looking racial gerrymanders on the theory that such districts send a “message” to elected representatives that their “primary obligation is to represent only the members of [the racial group that predominates in the district], rather than their constituency as a whole.” *Id.* at 648. The Court provided no evidence for the empirically questionable proposition that the shape of an electoral district, or even the intent behind its creation, affects the likelihood that the elected representative will attend to the interests of political minorities within the district.

And in the seminal case of *Reynolds v. Sims*, the Court declared that “[t]o the extent that a citizen’s right to vote is debased [because he resides in a district with more voters than others], he is that much less a citizen.” 377 U.S. 533, 567 (1964). Again, the Court provided no evidence for this asserted dignitary harm, nor did it bother trying to answer Justice Stewart’s quip (dissenting in *Reynolds*’s companion case): “I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of those States is represented by two United States Senators.” *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 746 (1964) (Stewart, J., dissenting) (footnote omitted).

¹³⁵ Thus, in the canonical explanation of the “fundamental” status of the right to vote, the Court said only that the right was fundamental because it is ““preservative of other basic civil and political rights,”” and because “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.” *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (quoting *Reynolds*, 377 U.S. at 562). Justifications offered at this level of generality provide little guidance to lower courts charged with fleshing out the right in new factual settings.

¹³⁶ This argument is developed in Richard H. Pildes, *Constitutionalizing Democratic Politics, in A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 155 (Ronald Dworkin ed., 2002).

¹³⁷ See *supra* Part II.

One possibility is that it is merely the by-product of shifting judicial coalitions. On this view, judges have varying instincts about how certain cases should come out, and also varying preferences concerning the type of explanation that should be offered for a given result. Preferences over results determine how cases come out, and the assignment of the opinion determines the type of explanation produced. This certainly is a partial explanation—Justice Scalia’s penchant for formalism is no secret,¹³⁸ nor is Stevens’s predilection for open-ended balancing tests.¹³⁹ But it is probably not the whole story. Individual Justices have shifted their approach from case to case. Consider, for example, Breyer’s abandonment of his *Randall* dangers approach in *Crawford* and *Davis*;¹⁴⁰ Thomas and Alito’s switch from show-me-the-evidence in *Washington Grange* to joining Scalia’s denouncing of “record based” burden analysis in *Crawford*;¹⁴¹ Kennedy’s hop-scotching from fact-intensive balancing in *López Torres*, to Scalia’s formalism in *Washington Grange*, then back again to unmediated balancing in *Crawford* and roundabout to formal gatekeeping in *Davis*,¹⁴² and Souter’s willingness to strike down voting requirements on the basis of speculative harms in *Crawford*,¹⁴³ in contrast to the position he has taken in campaign-finance cases like *Randall*.¹⁴⁴ Moreover, the notion that the Justices simply “go along” with the analytic choices made by the author of the principal majority or dissenting opinion is hard to square with the proliferation of separate concurrences and dissents that one sees in these and other cases.

Another possibility is that the Court’s methodological pluralism is in large measure the by-product of an unspoken pragmatism in the Justices’ thinking about constitutional election law (though this may explain too much). On this view, the Justices’ primary objective in deciding constitutional election law cases is to ensure that the political process works tolerably well and is accepted by the public as legitimate—and that the courts’ interventions do not sap the judiciary’s reputation (in the public eye) for resolving political disputes in an even-handed manner. A judge possessed of this overarching sense of purpose could end up “flip flopping” among rule-content gatekeeping, consequential gatekeeping, and unmediated balancing, depending on the facts of the case before her and the empirical suppositions she brings to the bench. Consider *López Torres*. This was the first case to come before the Court in which a plaintiff challenged non-electoral facets of a major-party nomination procedure.¹⁴⁵ The Justices were presumably aware that, at the national level at least, the two major

¹³⁸ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹³⁹ See Siegel, *supra* note 105.

¹⁴⁰ See *supra* notes 107–08, and accompanying text.

¹⁴¹ See *supra* notes 79, 81, 105 and accompanying text.

¹⁴² See *supra* notes 69, 77, 109–110 and accompanying text.

¹⁴³ See *supra* note 111 and accompanying text.

¹⁴⁴ See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 231 (2000) (Souter, J., dissenting).

¹⁴⁵ *N.Y. State Bd. of Elections v. López Torres*, 128 S. Ct. 791, 795 (2008).

parties had been continually reworking their nomination procedures—sometimes by tinkering, sometimes dramatically. The rules governing major party conventions have not been “sticky” in the face of popular clamoring for change. The Justices were also aware of the huge range of candidate nomination procedures that the parties have used in recent memory.¹⁴⁶ Under the circumstances, the Justices may have quite reasonably concluded that it simply was not a good use of their time to undertake to develop a new jurisprudence concerning what is an adequately open convention. And the easiest way to forestall federal court intervention in this area is to pronounce that no standard exists by which courts may vindicate such claims.

Turn now to *Washington Grange*.¹⁴⁷ One way of understanding the division between the majority and the dissenters is in terms of the appropriate judicial response to a ballot initiative that attempts to sidestep a recent judicial decision. That the voters of Washington quickly re-enacted a near cousin of the “blanket primary” that the Supreme Court had held unconstitutional in *Jones* should give pause to any judge who takes seriously the idea that constitutional election law should be in service to democracy, and mindful of public opinion.¹⁴⁸ One way of accommodating the voters’ quick response is to say, in effect, let’s not rush to judgment. Let’s wait and see whether the new regime really has the bad effects we fear. If it does, we can undertake to reform it in due course. And if it does not, so much the better—we will have let the people of Washington be the authors of their own democracy (and saved ourselves from a locally discrediting push against the tides of popular opinion).

That said, Scalia’s dissenting opinion in *Washington Grange* can also be understood as an instrumental, calculated response to popular re-enactment of a regime similar to one the Court had held unconstitutional.¹⁴⁹ Scalia’s approach—allow the voters to have a “top 2” primary with candidate party-preference designations on the ballot (the regime the voters had just enacted) *provided* that the parties are also given a position on the ballot to denote their acceptance or rejection of the candidates—avoids a drawn-out conflict between the federal courts and the state’s voters. It lays down a clear path for proponents of the “top 2” model, one that gives them most of

¹⁴⁶ Scalia alluded to this. *See id.* at 799 (“[T]raditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a ‘fair shot’ at party nomination.”).

¹⁴⁷ *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008).

¹⁴⁸ The Supreme Court’s decision in *Jones* struck down California’s recently enacted blanket primary, which was modeled on Washington’s much older blanket primary. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). Washington’s system was challenged soon thereafter, and was struck down in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004). Then in 2004, the voters of Washington adopted the “top 2” model that was at issue in *Washington Grange*. *Washington Grange*, 128 S. Ct. at 1188–89.

¹⁴⁹ *Washington Grange*, 128 S. Ct. at 1197 (Scalia, J., dissenting). We acknowledge that one problem with the “pragmatism” explanation for the Court’s methodological ambivalence is that it explains too much.

what they wanted while also ensuring that the parties have access to the ballot to communicate their message.

Moreover, one wonders why Scalia's approach did not attract more votes, particularly given the practice of rule-content gatekeeping in much of the pre-2007 *Burdick* jurisprudence.¹⁵⁰ One possibility is that in the present era of intense combat over the ground rules of electoral competition, some Justices are reluctant to sign on to an opinion that may be read as authorizing judges simply to *declare* that this or that election law *must* have a particular feature (or else face strict scrutiny). Even though the feature insisted on by Scalia was hardly out of the blue in light of *Jones*, the underlying power to so insist might be thought too grave to entrust to the lower courts. (Then again, the gatekeeping rules, once established, should constrain judicial discretion.)¹⁵¹

What about *Crawford*? At first glance, this is a puzzling case. Like other recently enacted ID requirements for voting, the Indiana law at issue was the subject of intense partisan conflict.¹⁵² One might think that this would counsel in favor of a particularly rigid form of gatekeeping—either formalistic or consequential—as in the partisan gerrymandering cases. Yet Justices Kennedy and Breyer, who espoused gatekeeping in the gerrymandering cases, opted for unstructured balancing in *Crawford*.¹⁵³ Hints of an explanation for this may be found in *Kramer v. Union Free School District No. 15*,¹⁵⁴ the canonical Warren Court precedent explaining the “fundamental” status of the right to vote.¹⁵⁵ The right is fundamental, the Court said, because “the legitimacy of representative government” depends on it.¹⁵⁶ A judge who perceives that the very legitimacy of the state requires that burdens on the exercise of a favored right be substantially justified may be willing to take greater institutional risks to protect this right than others. Unmediated balancing (rather than strict scrutiny) may seem like the most practicable means for adequately protecting the right vis-à-vis cumbersome administrative barriers to its exercise, given (1) the need for pervasive state regulation to protect the integrity of the voting process, coupled with (2) the incredible diversity of techniques that have been used historically to keep “disfavored” citizens from voting.¹⁵⁷ Furthermore, if a judge believes, as Kennedy apparently does, that it is

¹⁵⁰ See *supra* notes 30–31 and accompanying text.

¹⁵¹ There is also notable irony in Scalia's enthusiasm for rule-content gatekeeping in *Washington Grange*, given his vehement opposition to so-called “prophylactic rules” in other contexts. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 450–57 (2000) (Scalia, J., dissenting) (concluding that the Court's establishment of a prophylactic rule against forced confessions in *Miranda v. United States*, 384 U.S. 436 (1966), was “an illegitimate exercise of raw judicial power” (citations omitted)).

¹⁵² See Robert Barnes, *Partisan Fissures Over Voter ID; Justices to Hear Challenges to Law*, WASH. POST, Dec. 25, 2007, at A1.

¹⁵³ See *supra* Part II.C.

¹⁵⁴ 395 U.S. 621 (1969).

¹⁵⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁵⁶ *Kramer*, 395 U.S. at 626.

¹⁵⁷ See generally ALEXANDER KEYSAR, *THE RIGHT TO VOTE* (2000).

important for the judiciary to be able to intervene post-election to thwart vote-counting shenanigans,¹⁵⁸ a flexible doctrine concerning the right to cast a ballot and have it counted will be all the more appealing.¹⁵⁹

Other aspects of *Crawford* also speak to the pragmatic nature of the Justices' thinking in election law cases. Consider Justice Scalia's rejection of the granular mode of burden analysis prescribed in Justice Stevens's lead opinion.¹⁶⁰ After canvassing the case law going back to *Storer* to show that the Court had, until *Crawford*, assessed the burden of election laws from an aggregative perspective, Scalia remarked: "Even if I thought that *stare decisis* did not foreclose adopting an individual-focused approach, I would reject it as an original matter."¹⁶¹ Notably, by "as an original matter" he did not mean "on originalist grounds." Scalia further explained:

This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.¹⁶²

This is curious, to say the least, because it is a bedrock principle for Justice Scalia that the job of the federal courts is to protect the rights of individual litigants, not to vindicate more general "public interests."¹⁶³ In keeping with this, Scalia has in other

¹⁵⁸ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁵⁹ A consequential gatekeeping approach could accommodate both the assumed need for extensive regulation of the franchise while also giving the courts the ability to respond to many varieties of voter-thwarting regulations. See Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643 (2008). It would not, however, allow the courts to respond *promptly* to perceived abuses (before the data are clear)—as may be necessary to stop eleventh-hour and post-election manipulation of the voting process.

¹⁶⁰ *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624–27 (2008) (Scalia, J., concurring).

¹⁶¹ *Id.* at 1626.

¹⁶² *Id.*

¹⁶³ See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

contexts railed against the Court's adoption of aggregative legal standards.¹⁶⁴ But when it comes to voting, he evidently thinks that the need for clear rules known in advance of the election warrants a different approach.¹⁶⁵

¹⁶⁴ Justice Scalia has emerged as "the primary champion of a broad reading" of *United States v. Salerno*, 481 U.S. 739 (1987), "in the individual rights context." David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 57 (2006) (citing *Chicago v. Morales*, 527 U.S. 41, 81–83 (1999) (Scalia, J., dissenting)). *Salerno* is a seminal case restricting the availability of facial challenges; some members of the Court, in contrast to Scalia, have taken the position that facial invalidation is an appropriate remedy whenever a statute is unconstitutional in a significant number of its applications. *Id.* at 54–55.

¹⁶⁵ Vikram Amar has argued that Justice Scalia's opinion in *Crawford* is not *sui generis* vis-à-vis the rest of Scalia's jurisprudence, but rather coheres with Scalia's seminal opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that generally applicable laws that burden the exercise of religion do not violate the free exercise clause unless intended to have that effect. Vikram David Amar, *What the Supreme Court's Recent Decision Upholding Indiana's Voter ID Law Tells Us About the Court, Beyond the Area of Election Law*, FINDLAW'S WRIT, May 8, 2008, <http://writ.news.findlaw.com/amar/20080508.html>. In both cases, Amar observes, Scalia rejected constitutional interpretations that would entitle individuals to an exemption from otherwise benign laws on the ground that the laws have the incidental effect of substantially burdening the plaintiff's exercise of a constitutional right. *Id.* This much is certainly true, and Scalia does cite *Smith* in seeking to portray his *Crawford* opinion as consistent with the main stem of equal protection jurisprudence.

But *Crawford* is not really analogous to *Smith*, in important respects. *Crawford*, unlike *Smith*, involved a law that by its terms was directed to (and interposed a barrier to) the exercise of the constitutionally protected right at issue. And in this context, Scalia did not reject the proposition that benignly intended "burdens" on the exercise of voting rights can violate the Constitution. *Cf. Smith*, 494 U.S. at 878 (emphasizing that the law there at issue was "not specifically directed at" the plaintiff's religious practice). What we find surprising in his *Crawford* opinion is not that Scalia accepted the idea that "burdens alone" (without discriminatory intent) on the right to vote can give rise to strict scrutiny, at least when the burdens result from a law facially directed at voting, but that he would condition heightened scrutiny on a showing of society-wide rather than individualized burdens. This is analogous to requiring a plaintiff-parishioner challenging a zoning ordinance expressly directed at churches to prove that the ordinance not only substantially burdens the plaintiff's exercise of religion (for example, by preventing his congregation from building a church on land that they own in the jurisdiction), but rather that the ordinance substantially interferes with the practice of religion generally throughout the jurisdiction (which it might not do if most major denominations already have houses of worship in the jurisdiction). Also analogous would be requiring a woman who seeks an exemption from a law that expressly bans certain abortion techniques to show that it substantially impedes access to an abortion for many women, rather than that it severely burdens her exercise of the abortion right. *Cf. Gonzales v. Carhart*, 127 S. Ct. 1610, 1638 (2007) (stating that "preenforcement, as-applied challenges" are available "to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the [abortion] procedure prohibited by the Act must be used").

Incidentally, Scalia's *Crawford* opinion represents a complete about-face from his sentiments at oral argument, which in our view better reflect his generally individualistic

Justice Stevens's *Crawford* opinion can also be understood as an exercise in pragmatism, though Stevens, Kennedy, and Roberts evidently saw the risks and rewards of their approach somewhat differently than did Scalia. For one, their approach enabled a "lead opinion" signed by the conservative Chief Justice (Roberts), the Court's most senior liberal (Stevens), and the Court's swing vote (Kennedy). That these three Justices spoke with one voice may be seen as an effort to make amends for the partisan taint of *Bush v. Gore*,¹⁶⁶ and to signal to the American people that constitutional election law is not just partisan politics in another guise.¹⁶⁷ The substance of their approach—setting a very high bar for facial challenges, while inviting as-applied claims by individual plaintiffs who seek an exemption or other accommodation can also be defended on pragmatic grounds. Though it may yet engender much litigation as Scalia warned, this model does discourage courts from second-guessing the overall reasonableness of controversial legislative enactments (reducing the risk of judicial conflict with the party-in-government), and it may help to lower the stakes of voting rights litigation (which, one might hope, will in turn reduce the likelihood that judges' partisan preferences will influence their decisions).

Before concluding, let us revisit *Davis v. Federal Election Commission*, the last member of the election law quartet from October Term 2007.¹⁶⁸ Here, the Court's conservative majority was of one mind in applying strict scrutiny to an asymmetric campaign contribution limit, seemingly because it was asymmetric.¹⁶⁹ *Washington Grange* notwithstanding, neither Thomas, Alito, nor Roberts took the position that a candidate in Jack Davis's shoes could win a constitutional challenge to the Millionaire's Amendment only by *proving* that the fund-raising advantage that the BCRA conveyed on his opponent severely impeded his ability to convey his message to the electorate.¹⁷⁰

Why not require the plaintiff-candidate to prove that his opponent's BCRA-enabled spending resulted in "widespread voter confusion" about the plaintiff-candidate's message? A pragmatic judge might reason that proving such an effect is simply too difficult—there are too many imponderables. One who undertook to identify this effect would have to make value-laden judgment calls about what the plaintiff-candidate's "true" (and no doubt multi-dimensional) message is, and about how to measure and quantify "misperceptions." She would also have to figure out whether the misperceptions result from spending by the candidate's opponent, and then isolate the amount

jurisprudential instincts. See Transcript of Oral Argument at 34–39, *Crawford*, 128 S. Ct. 1610 (Nos. 07-21, 07-25). (Note especially Scalia's suggestion at oral argument that if "one half of one percent" of the electorate finds the ID requirement substantially burdensome, those voters would "have a cause of action to say you can't apply it to me." *Id.* at 35.)

¹⁶⁶ *Barnes*, *supra* note 152.

¹⁶⁷ Edward B. Foley, *Crawford and the Amicus Court: Further Support for a Non-Partisan Advisory Tribunal*, ELECTION LAW @ MORITZ, Apr. 29, 2008, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=413>.

¹⁶⁸ 128 S. Ct. 2759 (2008).

¹⁶⁹ *Id.* at 2765–75.

¹⁷⁰ *Id.*

of spending attributable to the Millionaire's Amendment and its corresponding impact on voter misperceptions of the plaintiff-candidate. This is a vastly more complicated undertaking than surveying voters to learn whether they (mistakenly) believe that the "party preference designation" on the Washington state ballot represents an endorsement of the candidate by the party, or whether they (correctly) believe that it is simply a statement by the candidate of the party that she or he prefers. Given the difficulty of identifying and isolating the consequences of the Millionaire's Amendment, the prudent course for a judge concerned about incumbency-protecting regulation of campaign finance may be to apply strict scrutiny to *any* campaign finance restriction that does not apply symmetrically to both of the candidates in a race. To be sure, by tying strict scrutiny to a qualitative feature of the law, the Court creates some space for adventuresome interventions by lower courts that deem other qualitative features suspect. But the conservative Justices might well consider this a welcome development in the campaign finance context, even if some (by the looks of *Washington Grange*) still remain reluctant to license the construction of new rule-content gatekeeping tests in the party-rights context.¹⁷¹

CONCLUSION

In the early 1970s, the Supreme Court faced up to the pervasively regulated character of the electoral process and announced that the mere fact that a state law burdens the exercise of political rights does not give rise to a presumption of unconstitutionality.¹⁷² The *Storer* Court prescribed a cautious approach, calling on lower courts to balance interests and make "hard judgments" about whether the requirements at issue in any given case go too far.¹⁷³ Over the next thirty-plus years, however, the Supreme Court often proceeded, not by fact-intensive balancing on a case-by-case basis, but by drawing facial distinctions among election regulations and then applying strict scrutiny or lax, rational-basis-like review.¹⁷⁴

October Term 2007 unsettled this body of law. Even as the Court confirmed the *Storer-Burdick* framework's very broad reach—it now seems to cover essentially all aspects of the electoral process except for the design of electoral districts—the Court dispatched any notion that the framework has a unifying methodology.¹⁷⁵ Absent a Supreme Court precedent squarely on point, it is now open to a lower court working within this framework (1) to engage in unmediated, all-things-considered balancing, focusing either on the overall reasonableness of the challenged law or on the reasonableness of exempting or otherwise accommodating the plaintiff or plaintiff-class;

¹⁷¹ See *supra* notes 79–83 and accompanying text.

¹⁷² See *Storer v. Brown*, 415 U.S. 724, 730 (1974).

¹⁷³ *Id.*

¹⁷⁴ The two-tiered character of judicial review in *Storer*'s domain first received official recognition in *Burdick v. Takushi*, 504 U.S. 428 (1992). See also *supra* Part I.

¹⁷⁵ See *supra* Part II.

(2) to apply strict scrutiny after determining that the law (relative to some practicable alternative) has a large, demonstrable adverse impact on voting, political association, or the competitiveness of campaigns; (3) to apply strict scrutiny after identifying a facial attribute of the law itself that renders it suspect in the judge's eye; (4) to apply extremely deferential review because the law does not have attributes that the judge deems facially suspect and because the judge is leery of getting bogged down in empirical debates or indulging in the guess work of open-ended balancing; or (5) to reject the plaintiff's claim after positing that it raises questions about democratic fairness concerning which there is no discernable historical consensus.¹⁷⁶

Our tentative view is that this methodological pluralism, coupled with a lack of explicit normative direction, tends to suggest that most Justices (even Scalia) approach constitutional election law thinking less about doctrinal coherence or interpretive principle than about the implications of their rulings for the system of government as a whole. The Justices sense that constitutional adjudication has an important role to play in legitimating the ground rules of electoral competition, notwithstanding that the text of the Constitution and conventional historical sources do very little to define the scope of political rights. But the Justices also continue to hear Frankfurter's admonition against entanglement in partisan conflict, and *Storer's* caution against inferring a presumption of unconstitutionality simply because a political right has been burdened by an election law. How these competing considerations shake out varies from Justice to Justice and context to context, depending not only on the individual Justice's confidence in the likelihood that other judges will apply open-ended balancing tests in a sensible, nonpartisan fashion, but also upon, *inter alia*, the Justice's sense of the importance of the issue before the court; of the existence (or lack thereof) of plausible qualitative criteria for classifying the requirement as presumptively constitutional or unconstitutional; of the likelihood that plaintiffs would be able to adduce and judges to assimilate relevant empirical evidence should the court opt instead for consequential gatekeeping; and of the need to accommodate popular sentiments (particularly if the law at issue was enacted by referendum and responds to a previous constitutional ruling).¹⁷⁷

Insofar as constitutional election law consists of intricate pragmatic judgments meant to encourage public acceptance of both the electoral process and the Court's own supervisory role, it is fair to ask whether this endeavor should be carried out—or even whether it can be carried out—by ordinary Article III courts acting on judicial hunches. These questions seem to us especially pressing in light of *Crawford*, the Court's first voting administration case since *Bush v. Gore* and one whose subject (like that in *Bush*) was an intensely partisan battle.¹⁷⁸ Surely the Justices did not want to appear as if they each were voting in *Crawford* according to their own political

¹⁷⁶ See generally *supra* Part II.

¹⁷⁷ See *supra* Part II.

¹⁷⁸ See Barnes, *supra* note 152.

preferences, rather than as required by constitutional dictates they are bound to uphold. Yet the highly fragmented outcome in *Crawford*, and the intense methodological disagreement that accompanied it, only exacerbated the perception that the Court is literally lawless—without any law for it to follow—when deciding election cases.

The ship needs a new compass, and we need to better understand why—despite its own episodic recognition of this need—the Court has been unable to procure one for itself. In this essay, we have taken some initial steps in an effort to understand the Court's uncertain bearings.