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## Reexamining *Crawford*: Poll Worker Error as a Burden on Voters

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## REEXAMINING CRAWFORD: POLL WORKER ERROR AS A BURDEN ON VOTERS

Lauren Watts\*

*We've made more election reform in the last six years in this country than we had in the 230 years before it.*

—Paul S. DeGregorio, former chairman of the EAC<sup>1</sup>

*Abstract:* American elections are administered by poll workers—individuals who are recruited and trained by states and localities for the particular task of helping people vote on Election Day. Several layers of law govern poll workers, including federal constitutional law, federal statutory law, state constitutional law, state statutory law, and local law. Among these laws are voter photo identification laws, or voter ID laws. Nineteen states have passed voter ID laws in the last ten years. With some variation, these laws require a person to present photo identification before he or she is allowed to vote. In 2008, the United States Supreme Court upheld Indiana's voter identification law as constitutional against a facial challenge, holding that the law's burden on the right to vote was reasonable in light of states' interest in administering elections. In many states with a voter ID law, it is the responsibility of poll workers to check and verify a voter's identification before the voter may cast a regular ballot. Poll workers are charged with this critical task despite the fact that they are not professional election administration staff, often lack experience and training, and—as a result—may be prone to error. This Comment explores how complicated laws—such as voter ID laws—exacerbate poll worker error in election administration. It argues that courts should consider this error when faced with constitutional challenges to such laws. Specifically, courts should consider poll worker error as a burden on voters, and therefore should apply heightened constitutional scrutiny to state laws—such as voter ID laws—that exacerbate poll worker error.

### INTRODUCTION

Elections are large undertakings for those who administer them for three primary reasons. First, the sheer volume of individuals voting on a single day presents logistical challenges. Most Americans vote on the first Tuesday in November at a polling place close to the home where the voter is registered.<sup>2</sup> In the 2008 presidential election, nearly 134

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1. Jeanne Zaino, *The Unknown Threat: Improperly Trained Poll Workers Lead to Election Day Problems*, in 3 VOTING IN AMERICA: AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS 36, 37 (Morgan E. Felchner ed., 2008).

2. U.S. ELECTION ASSISTANCE COMM'N, 2012 ELECTION ADMINISTRATION AND VOTING SURVEY 8 (2013) [hereinafter 2012 EAC SURVEY], available at <http://www.eac.gov/assets/1/Page/990->

million people voted, and over 80 million of those voters cast their ballots on November 4 in a physical polling location.<sup>3</sup>

Second, a complicated network of state and federal law governs election administration. For example, the Federal Constitution protects the right to vote, and states may not overly restrict that right without good reason.<sup>4</sup> The U.S. Congress has enacted several laws, such as the Voting Rights Act of 1965<sup>5</sup> and the Help America Vote Act of 2002,<sup>6</sup> which govern this right. State and local laws also play a significant part in election administration by detailing how each voter votes. For example, those laws dictate the form of the ballot<sup>7</sup> and whether the voter votes on an electronic voting machine.<sup>8</sup> Federal, state, and local laws also govern the people who administer in-person voting. For example, election administrators may not apply election law in a way that violates a voter's constitutional right to vote,<sup>9</sup> and state and local election codes provide detailed guidance to day-of-election staff and volunteers.<sup>10</sup> Also, in the last decade, many states have enacted voter photo identification laws as part of their election codes.<sup>11</sup> These laws, often called "voter ID laws," require voters to show a specific form of photo identification prior to voting.<sup>12</sup>

Third, most of the people who administer elections are not professional staff. Rather, they are poll workers: individuals recruited by states and localities for the particular purpose of helping people vote on Election Day.<sup>13</sup> Indeed, states do not have professional election staff

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3. U.S. ELECTION ASSISTANCE COMM'N, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY 23 (2009) [hereinafter 2008 EAC SURVEY], available at <http://www.eac.gov/assets/1/Documents/2008%20Election%20Administration%20and%20Voting%20Survey%20EAVS%20Report.pdf>.

4. See *Bush v. Gore*, 531 U.S. 98, 104 (2000).

5. 42 U.S.C. §§ 1973–1973bb-1 (1965) (The Voting Rights Act of 1965 primarily prohibits states and local governments from passing laws that restricts their citizens' right to vote on the basis of race.).

6. 42 U.S.C. §§ 15301–15545 (2002).

7. See generally *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008).

8. See, e.g., IND. CODE § 3-11-7.5-1 (2013).

9. See generally *Taylor v. Howe*, 225 F.3d 993 (8th Cir. 2000).

10. See, e.g., WASH. REV. CODE § 29A (2005).

11. *Voter Identification Requirements: Table 1, State Requirements for Voter Identification*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 9, 2014).

12. See, e.g., IND. CODE § 3-11-8-25.1 (2013).

13. U.S. ELECTION ASSISTANCE COMM'N, 2010 ELECTION DAY SURVEY 12–13 (2010) [hereinafter 2010 EAC SURVEY], available at <http://www.eac.gov/assets/1/Documents/990->

sufficient to assist the many thousands of people that vote on Election Day, so they have no choice but to rely on poll workers for assistance.<sup>14</sup> On Election Day, poll workers are generally responsible for setting up and breaking down the polling location, verifying the identity of each voter, helping voters by providing a ballot or directing them towards the voting machine, and generally keeping the polling location running smoothly.<sup>15</sup>

Poll workers' Election Day responsibilities also include screening voters by checking poll lists and, when required, checking a voter's photo ID.<sup>16</sup> This is one of a poll worker's most important tasks on Election Day because poll workers may turn away a voter, or request that the voter cast a provisional ballot, if the poll worker is unable to locate the individual's name or confirm his or her identification.<sup>17</sup>

But even in important tasks such as this, poll workers are far from perfect in their administration of elections. Recent litigation highlights how complicated state voting laws increase errors in election administration. In *Hunter v. Hamilton County Board of Elections*<sup>18</sup> and *Northeast Ohio Coalition for Homeless (NEOCH) v. Husted*<sup>19</sup> the Sixth Circuit Court of Appeals documented extensive poll worker error in Ohio elections. In both cases, separate Sixth Circuit panels held that poll worker error substantially burdened Ohio citizens' right to vote.<sup>20</sup> In *NEOCH v. Husted* the Sixth Circuit attributed poll worker error to a complicated election administration scheme.<sup>21</sup> To remedy the repeated occurrence of poll worker error in executing this particular law, the panel invalidated the election administration laws on constitutional grounds.<sup>22</sup>

This Comment explores whether and how poll worker error burdens the right to vote. It asserts that poll worker error does burden the right to vote and argues that courts should consider this burden when evaluating

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14. See U.S. GEN. ACCOUNTABILITY OFFICE, GAO-02-3, REPORT TO CONGRESSIONAL REQUESTERS, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION 15-16 (2001) [hereinafter 2001 GAO REPORT].

15. 2010 EAC SURVEY, *supra* note 13, at 13.

16. See, e.g., IND. CODE § 3-11-8-25.1 (2013).

17. *Id.*

18. 635 F.3d 219 (6th Cir. 2011).

19. 696 F.3d 580 (6th Cir. 2012).

20. See *Husted*, 696 F.3d at 586; *Hunter*, 635 F.3d 219.

21. *Husted*, 696 F.3d at 586.

22. *Id.* at 598.

the constitutionality of voter ID laws. In Part I this Comment explores the sources of election law in the United States. In particular, it discusses voter ID laws and the Supreme Court's test for upholding such laws in the face of a constitutional challenge. Part II acquaints the reader with the American poll worker and discusses the importance of poll workers for election administration. Here, this Comment describes the recruitment, training, roles, and demographics of poll workers. It also describes how American elections depend on poll worker participation. Part III introduces the reader to an important problem in election law administration. Specifically, it discusses how voter identification laws—such as Indiana's law—create an election environment that is ripe for poll worker error. This Part also describes recent litigation regarding poll worker error. In Part IV this Comment proposes a solution to this problem. Namely, this Comment argues that, when considering the constitutionality of difficult-to-administer laws such as voter ID laws, courts should factor in the likelihood of poll worker error as a burden on voters. Doing so would give courts a more robust picture of how these laws actually impact voters and would enrich and contextualize the court's constitutional analysis.

## I. THE LEGAL FOUNDATIONS OF ELECTION LAW IN AMERICA

Election law in the United States has its roots in federal constitutional law, federal statutory law, state constitutional law, state statutory law, and local ordinances and rules. Election law is distinctive among major legal doctrines in that it is both intensely local and controlled by federal law and constitutional principles.<sup>23</sup> This can present a series of problems for those responsible for administering elections because they must abide by several layers of laws.

### A. *Federal Constitutional Law and Delegation to the States*

Article I, Section 4 of the U.S. Constitution gives initial responsibility for the mechanics of federal elections to the States by directing that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislatures thereof . . . .”<sup>24</sup> Article I, Section 4, however, also assigns Congress the

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23. MICHAEL DIMINIO ET AL., VOTING RIGHTS AND ELECTION LAW 1–2 (2010).

24. U.S. CONST. art. I, § 4, cl. 1; *see also* Foster v. Love, 522 U.S. 67, 69 (1997); Storer v. Brown, 415 U.S. 724, 730 (1974).

power to preempt state election law,<sup>25</sup> noting that “the Congress may at any time by Law make or alter such Regulations . . . .”<sup>26</sup> This distinctive brand of federalism creates an election law system that is decentralized,<sup>27</sup> but also influenced by overarching federal statutes. Furthermore, many of the federal statutes set general goals that require implementation by state and local laws and ordinances.<sup>28</sup>

In addition to Article I, Section 4, states’ power to regulate federal elections is restricted by each citizen’s right to vote. Though the right to vote is implicitly guaranteed by Article I, Section 2 and the Fourteenth Amendment,<sup>29</sup> this right is not immune from regulation by the states.<sup>30</sup> To this effect, the U.S. Supreme Court has noted that the right to vote in a particular manner is not an absolute right.<sup>31</sup> Indeed, the Constitution directs the states to regulate the conduct of elections, subject to congressional review.<sup>32</sup> The constitutional scheme governing election law envisions that states may pass laws that in some way implicate the right to vote. For this reason, the Supreme Court does not always apply strict scrutiny to laws that implicate the right to vote because, “if strict scrutiny were applied to each law that limited the exercise of that right, it would be impossible to write rules for the orderly administration of elections.”<sup>33</sup> Instead, the Court recognizes that a lesser standard is appropriate when considering the constitutional validity of at least some election laws.<sup>34</sup>

To ensure that states attempting to regulate federal and local elections are not hamstrung by strict scrutiny review, the Supreme Court

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25. For an interesting discussion on Congress’ power to preempt state election laws, an issue that is beyond the scope of this Comment, see *Arizona v. Inter Tribal Council of Ariz.*, \_\_\_U.S.\_\_\_, 133 S. Ct. 2247 (2013).

26. U.S. CONST. art. I, § 4, cl. 1.

27. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 951 (2005).

28. See, e.g., Help America Vote Act of 2002 § 302, 42 U.S.C. § 15482 (2012).

29. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (noting that “when the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental”); *United States v. Classic*, 313 U.S. 299 (1941) (holding that the right to vote is implicit in Article I, Section 2 of the U.S. Constitution).

30. See generally DIMINO ET AL., *supra* note 23, at 1–2.

31. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

32. U.S. CONST. art. I, § 4, cl. 1; 29 C.J.S *Elections* § 308 (2013).

33. DIMINO ET AL., *supra* note 23, at 1081. The Supreme Court generally applies strict scrutiny review to laws that implicate fundamental rights. See 16A Am. Jur. 2d *Constitutional Law* § 587 (2013).

34. DIMINIO ET AL., *supra* note 23, at 1081.

developed a sliding-scale review of state election laws.<sup>35</sup> This scale calibrates the standard of review to the law's burden on voters' First and Fourteenth Amendment Rights.<sup>36</sup> Accordingly,

[a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."<sup>37</sup>

The Court announced this test in *Anderson v. Celebrezze*<sup>38</sup> and further developed it in *Burdick v. Takushi*.<sup>39</sup> Thus, it is commonly referred to in election law as the *Anderson/Burdick* test.<sup>40</sup>

Under *Anderson/Burdick*, when a law's burden on voters' rights is severe, that law is only constitutional if it is narrowly tailored to advance a compelling state interest.<sup>41</sup> In contrast, when the imposition on voters' rights is reasonable and non-discriminatory, the law must only serve some identifiable state interest to pass constitutional muster.<sup>42</sup> For this reason, even reasonable, nondiscriminatory regulations presenting less-than-severe burdens on the right to vote will be evaluated on a continuum, with the most deferential scrutiny applying only to the most minimal burdens on voting.<sup>43</sup> Though states must pass election laws with deference to their citizens' right to vote, the Court affords the states more leeway to regulate the right to vote than most other fundamental rights.<sup>44</sup> Accordingly, how a court analyzes the burden a law places on citizens' right to vote is critical to the court's constitutional inquiry.<sup>45</sup>

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35. See generally *Burdick*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

36. See *Burdick*, 504 U.S. at 434.

37. *Id.* (citing *Anderson*, 460 U.S. at 789).

38. 460 U.S. 780 (1983).

39. 504 U.S. 428 (1992).

40. See, e.g., Joshua A. Douglas, *The Soundness of the Equal Protection Holding in the Ohio Early Voting Decision*, ELECTION LAW @ MORTIZ (Oct. 8, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9825>.

41. *Burdick*, 504 U.S. at 434.

42. *Id.*

43. *Id.*

44. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). See also *supra* notes 29–35 and accompanying text (describing why the Court grants the states more leeway to restrict the right to vote than other constitutional rights).

45. See, e.g., *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181 (2008).

*B. Federal Law in the Wake of Bush v. Gore*

As previously mentioned, Article I Section 4 of the Constitution assigns Congress the power to preempt state election laws that pertain to the “Times, Places and Manner”<sup>46</sup> of holding federal elections.<sup>47</sup> Congress regulates federal elections in the states through, inter alia, four laws—the Voting Rights Act of 1965 (VRA)<sup>48</sup> (held partially unconstitutional by *Shelby County, Alabama v. Holder*),<sup>49</sup> the Federal Election Campaign Act of 1971 (FECA)<sup>50</sup> (as amended in 2002 by the Bipartisan Campaign Reform Act, held partially unconstitutional by *Citizens United v. Federal Election Commission*),<sup>51</sup> the National Voter Registration Act of 1993,<sup>52</sup> and the Help America Vote Act of 2002.<sup>53</sup>

The contested presidential election in 2000 and the subsequent Supreme Court decision that awarded the presidency to George W. Bush exposed the many problems with U.S. election administration.<sup>54</sup> One scholar describes the shift in election law focus that followed *Bush v. Gore* in the following way: “[i]n the wake of the Florida debacle . . . Americans traded their telescopes for microscopes and more closely became aware of the tremendous variation in voting methods and election administration from state to state—even from county to county . . . .”<sup>55</sup> Recognizing the particular challenges of federal election administration, Congress enacted the Help America Vote Act

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46. U.S. CONST. art. I, § 4, cl. 1.

47. For a discussion on the scope of the Time, Place, and Manner Clause, see Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010). This Comment assumes the prevailing view that Congress was acting within its Elections Clause power when it passed the Help America Vote Act. See 29 C.J.S. Elections § 309 (2013).

48. 42 U.S.C. §§ 1973–1973bb-1 (1965).

49. \_\_U.S.\_\_, 133 S. Ct. 2612 (2013) (holding unconstitutional section 4 of the Voting Rights Act of 1965—the preclearance formula—which applied the VRA’s requirement that states obtain preclearance of changes in election laws to only certain states).

50. 2 U.S.C. §§ 431–442 (1971). FECA regulates campaign finance. Specifically, it requires disclosure for certain campaign contributions, and later amendments placed a legal limit on certain contributions.

51. 558 U.S. 310 (2010).

52. 42 U.S.C. §§ 1973gg–1973gg10 (1993). Otherwise known as the “motor-voter” Act, the National Voter Registration Act of 1993 requires states to provide citizens certain avenues for voter registration. Specifically, states must permit citizens to register to vote when they renew their driver’s licenses.

53. 42 U.S.C. §§ 15301–15545 (2002).

54. Grant Hayden, *The Solution: Help America Vote Act and Voting Now*, in 3 VOTING IN AMERICA: AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS 111 (Morgan E. Felchner ed., 2008).

55. *Id.*

(HAVA)—a bill designed to provide states the money and incentives to modernize and make more consistent election administration.<sup>56</sup> President Bush signed HAVA into law one week before the 2002-midterm elections.<sup>57</sup>

Congress's primary purpose in enacting HAVA was to provide states with incentives and funds to replace antiquated voting machines and otherwise modernize election administration.<sup>58</sup> Congress, through HAVA, also requires states to provide a provisional ballot for in-person voters who claim to be registered but whose names do not appear on the official registration list.<sup>59</sup>

Congress included the provisional ballot requirement in HAVA to address the persistent problem of voters being turned away at the polls because of imperfect voter lists.<sup>60</sup> HAVA requires most states<sup>61</sup> to provide provisional ballots to in-person voters who are not included as registered voters on the official list, but believe themselves to be registered and eligible to vote.<sup>62</sup> Many of the states that have recently passed in-person voter ID laws also provide that voters who do not present proper ID to poll workers, or whose name on their ID does not "conform" or "substantially conform" to the name listed in the voting rolls, must cast a provisional ballot in lieu of a traditional ballot.<sup>63</sup>

Thus, provisional ballots provide a certain "insurance" against poorly kept voter ID lists and poll worker error in locating names or checking IDs.<sup>64</sup> Nevertheless, this insurance is an "uncertain insurance" because provisional ballots are counted less frequently than traditional ballots,<sup>65</sup>

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56. Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–15545 (2002)).

57. See Daniel Tokaji, *The Help America Vote Act: An Overview*, ELECTION LAW @ MORITZ, <http://moritzlaw.osu.edu/electionlaw/ebook/part5/hava.html> (last visited Jan. 17, 2014).

58. See 42 U.S.C. §§ 15301–15545.

59. See *id.* § 15482; Zaino, *supra* note 1.

60. *Provisional Voting*, PROJECT VOTE, <http://projectvote.org/provisional-voting.html> (last visited Jan. 17, 2014).

61. States that have election-day registration are exempt from HAVA's provisional balloting requirement. See 42 U.S.C. § 15482(a).

62. See *id.*

63. *Voter Identification Requirements: Table 2, Details of Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 17, 2014).

64. Edward B. Foley, *Uncertain Insurance: The Ambiguities and Complexities of Provisional Ballots*, in 3 VOTING IN AMERICA: AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS 75 (Morgan E. Felchner ed., 2008).

65. *Id.* States responding to the EAC survey in 2010 reported that about one in every seventy people voting in the 2010-midterm elections cast a provisional ballot and states reported counting in

and states often require provisional voters to take extra steps to prove they are indeed registered. For example, states responding to the Election Assistance Commission (EAC) Election Day Survey in 2010 reported that they counted 66.2% of provisional ballots in full.<sup>66</sup> Of the rejected provisional ballots, over 50% were rejected for reasons unrelated to whether the voters at issue were actually qualified to vote.<sup>67</sup> Furthermore, “states have adopted a wide variety of rules and procedures concerning the casting and counting of provisional ballots.”<sup>68</sup> In fact, many states require voters who cast a provisional ballot to later prove that they are in fact registered, often by traveling to the county board of elections and presenting certain paperwork.<sup>69</sup>

HAVA also requires that first-time voters who registered by mail show identification<sup>70</sup> at the polls before voting.<sup>71</sup> A voter who fails to do so may only cast a provisional ballot.<sup>72</sup>

To some extent, the congressional debate over HAVA’s voter ID requirement foreshadowed current partisan struggles in election administration. Congressional Democrats argued that the bill should be a vehicle to expand voter registration and improve the voting process for traditionally low-turnout constituencies like African Americans, college students, and the disabled.<sup>73</sup> Congressional Republicans fought to

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full 66.2% of those. 2010 EAC SURVEY, *supra* note 13, at 12. In 2012, one in every forty-one voters cast a provisional ballot, and states reported counting approximately 72.9 percent of provisional ballots cast. 2012 EAC SURVEY, *supra* note 2, at 13.

66. 2010 EAC SURVEY, *supra* note 13, at 11; *see also* David C. Kimball & Edward B. Foley, *Unsuccessful Provisional Voting in the 2008 General Election*, PEW CENTER ON THE STATES, PROVISIONAL BALLOT REPORT 1, 6 (2009), *available at* <http://www.pewstates.org/research/reports/provisional-ballots-85899419002> (discussing provisional balloting in the 2008 presidential election).

67. 2010 EAC SURVEY, *supra* note 13, at 12. The most common reasons for rejecting provisional ballots were: “voter not registered,” and “voter voting in the wrong precinct or jurisdiction.” *Id.* Proponents of the provisional balloting requirement will argue that states should count these ballots less frequently because they are more likely cast by ineligible voters. The EAC data show that, more often than not, states reject these ballots for reasons unrelated to voter qualifications. Furthermore, voters that cast a valid provisional ballot may not be able or willing to follow through with the extra steps of verifying the ballot, and are effectively disenfranchised.

68. Foley, *supra* note 64, at 79.

69. *See, e.g.*, IND. CODE. § 3-11-8-25.1 (2013).

70. Identification includes photo identification or a copy or a current utility bill, bank statement, government check, paycheck, or other government document that shows the voter’s name and address. 42 U.S.C. § 15483(b) (2012).

71. *Id.* § 15482(a).

72. *Id.*

73. Hayden, *supra* note 54, at 112 (noting that Democrats favored expanding the franchise and feared that the Republican-sponsored voter ID requirement would suppress the vote among racial minorities and the elderly).

include voter ID requirements for in-person voters—a provision many conservatives thought would cure what they perceived as widespread problems with voter fraud.<sup>74</sup> It is with this disagreement in mind that this Comment turns to election law regulation in the states.

*C. State Law with a Focus on Voter Photo Identification Laws*

As of this writing, nineteen states have passed laws requiring in-person voters to present photo identification in order to cast a regular ballot (popular nomenclature dubs these “voter ID laws”).<sup>75</sup> Eleven of these laws were in effect during the 2012 presidential election, and it is likely that several more will be in effect by the 2014 midterm elections.<sup>76</sup> Of the states that have voter ID laws likely to be in effect in 2014, nine permit voters who do not present proper identification at the polls to cast only provisional ballots.<sup>77</sup> Indiana’s voter ID law is typical of those nine. It provides, in relevant part:

(a) Except as provided in subsection (e), a voter who desires to vote an official ballot at an election shall provide proof of identification.

(b) Except as provided in subsection (e), before the voter proceeds to vote in the election, a precinct election officer shall ask the voter to provide proof of identification. One (1) of each of the precinct election officers nominated by each county chairman of a major political party of the county under IC 3-6-6-8 or IC 3-6-6-9 is entitled to ask the voter to provide proof of identification. The voter shall produce the proof of identification to each precinct officer requesting the proof of identification before being permitted to sign the poll list.

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74. *Id.*

75. *Voter Identification Requirements: Table 1, State Requirements for Voter Identification*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 17, 2014). The body of state election law is extensive. This Comment isolates voter identification laws to more closely explore how laws such as these impact day-of election administration.

76. *See Voter Identification Requirements: Recent Litigation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 17, 2014).

77. These states are Florida, Georgia, Indiana, Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, and Texas. *Voter Identification Requirements: Table 2, Details of Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 17, 2014). The remainder of voter ID states will permit individuals to cast a regular ballot provided that they sign an affidavit attesting to their eligibility. *Id.*

(c) If:

- (1) the voter is unable or declines to present the proof of identification; or
- (2) a member of the precinct election board determines that the proof of identification provided by the voter does not qualify as proof of identification under IC 3-5-2-40.5;

a member of the precinct election board shall challenge the voter as prescribed by this chapter.

(d) If the voter executes a challenged voter's affidavit under section 22.1 of this chapter, the voter may:

- (1) sign the poll list; and
- (2) receive a provisional ballot.<sup>78</sup>

To offer “proof of identification” the voter must provide a non-expired federal or state-issued photo identification document that shows his or her name where the name “conforms” to the name in the voter's registration record.<sup>79</sup> Poll workers may accept an expired ID provided that it expired after the date of the most recent general election.<sup>80</sup> Indiana offers free photo identification to qualified voters.<sup>81</sup>

Shortly after Indiana passed its voter ID law in 2005, the Indiana Democratic Party brought a facial<sup>82</sup> challenge against the law in federal court.<sup>83</sup> The plaintiffs sought both a permanent injunction that would halt enforcement of the law and a judgment declaring the law unconstitutional and in violation of the Voting Rights Act.<sup>84</sup> The district court granted the defendant's motion for summary judgment. It applied the *Anderson/Burdick* test<sup>85</sup> to find that the statute did not burden the right to vote in violation of the First and Fourteenth Amendments and was a reasonable election regulation under the “Time, Place and

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78. IND. CODE § 3-11-8-25.1 (2013).

79. IND. CODE § 3-5-2-40.5(a)(1)–(2) (2011).

80. IND. CODE § 3-5-2-40.5(a)(3) (2011).

81. IND. CODE § 9-24-16-10 (2013).

82. A facial challenge is a challenge to the law in every potential application. “[A] plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid’ . . .” Wash. State Grange v. Wash. State Republican Party., 552 U.S. 442, 450 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (alterations in original). By comparison, when a plaintiff brings an as applied challenge, she challenges the law only as the state actor has applied it to her. *See generally* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329–31 (2010). Thus, an as-applied challenge is narrower than a facial challenge in that, when successful, it invalidates only certain applications of the law. *Id.* at 331.

83. *See* *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

84. *Id.* at 782.

85. *See supra* notes 35–44 and accompanying text.

Manner” clause.<sup>86</sup> The Seventh Circuit affirmed in *Crawford v. Marion County Elections Board*,<sup>87</sup> noting that because the law was not an undue burden on the right to vote, a deferential standard of review was proper under the Supreme Court’s ruling in *Anderson v. Celebrezze*.<sup>88</sup> Applying such a deferential standard, the court held that the state’s interest in protecting against in-person voter fraud was sufficient to justify the law’s imposition on voters.<sup>89</sup>

The Supreme Court upheld the Seventh Circuit’s ruling, affirming that Indiana’s voter ID law does not impermissibly infringe on the right to vote, at least facially.<sup>90</sup> *Crawford v. Marion County Elections Board* is a three–three–three plurality with Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, announcing the judgment for the court; Justices Scalia,<sup>91</sup> Alito and Thomas concurring in the judgment; and Justices Souter, Ginsburg and Breyer in dissent.<sup>92</sup>

In his lead opinion Justice Stevens applied the *Anderson/Burdick* test to the Indiana law by evaluating the law’s burden on voters and weighing that burden against state interests.<sup>93</sup> Under this test, he concluded that Indiana described legitimate “precise interests” protected by the new law—preventing in-person voter fraud and promoting confidence in the electoral system—and the statute, applied broadly to all Indiana voters, imposed “only a limited burden on voters’ rights.”<sup>94</sup> Based on this reasoning the Court upheld the law as a permissible imposition on the right to vote.<sup>95</sup>

But Justice Stevens made clear that his reasoning in *Crawford* does

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86. *Rokita*, 458 F. Supp. 2d at 825–26.

87. *Crawford v. Marion Cnty. Elections Bd.*, 472 F.3d 949, 954 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008).

88. *Id.* at 951–52.

89. *Id.* at 953.

90. *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 202–04 (2008).

91. In his concurring opinion, Justice Scalia took a broader approach than the lead opinion, described below. *Id.* at 204 (Scalia, J. concurring). Rather than concede, as the lead opinion did, that the Indiana law imposes a heightened burden on some voters, Justice Scalia concluded that “petitioners’ premise is irrelevant and that the burden at issue is minimal and justified.” *Id.* Indeed, Justice Scalia determined that the Indiana law was not burdensome to voters as a whole because it did not “even represent a significant increase over the usual burdens of voting.” *Id.* at 209. For this reason, Justice Scalia concurred in Justice Stevens’ judgment that the law does not impermissibly violate the right to vote, but issued a broader opinion.

92. *See Crawford*, 553 U.S. at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

93. *Id.* at 203 (citing *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

94. *Id.* at 202.

95. *Id.*

not preclude future as-applied challenges to voter ID laws.<sup>96</sup> In Part IV of the opinion, Justice Stevens emphasized the heavy burden of persuasion that litigants bear when they bring a facial challenge to an election law.<sup>97</sup> In doing so, he referenced a case the Court decided a few weeks prior, *Washington State Grange v. Washington State Republican Party*,<sup>98</sup> in which the Court noted that facial challenges to election administration laws are strongly disfavored.<sup>99</sup> In the end, Justice Stevens ruled that the plaintiffs did not shoulder the burden of a facial challenge because plaintiffs did not show that the law lacked any legitimate sweep.<sup>100</sup> However, Justice Stevens' holding applies to only facial challenges,<sup>101</sup> and does not preclude future as-applied challenges to voter ID laws.

The Supreme Court has not revisited *Crawford* in the five years since it rendered that divided opinion.<sup>102</sup> Thus, current Supreme Court jurisprudence holds voter ID laws as constitutional burdens on the right to vote.<sup>103</sup>

This Comment will return to state voter ID laws in Part III, where it will provide examples of problems that can emerge from voter ID laws, and in Part IV, where it will argue that courts should consider these problems when evaluating the constitutionality of voter identification laws.

#### D. Local Law

Just as states are key players in federal election administration, localities—including counties, cities, and towns—also play a significant role in implementing and overseeing federal elections.<sup>104</sup> Indeed, “though they all function within the framework of state statutes and

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96. *Id.* at 200.

97. *Id.*; see also *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

98. 552 U.S. 442 (2008).

99. *Id.* at 449–50.

100. *Crawford*, 553 U.S. at 202.

101. *Id.* at 202–03.

102. The Court has cited *Crawford* twice: in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), a First Amendment case regarding the Washington State Public Records Act, and in *District of Columbia v. Heller*, 554 U.S. 570 (2008), a Second Amendment case involving Washington D.C.'s handgun regulations.

103. See *Crawford*, 553 U.S. at 202.

104. Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 273 (2008).

regulations, many localities have great responsibility over how elections are conducted, including the voting equipment, ballot design and voter identification requirements.”<sup>105</sup> One of the most important of these responsibilities is the job of recruiting, training, and overseeing poll workers.<sup>106</sup>

The task of recruiting and training poll workers for day-of-election administration generally falls to local jurisdictions, with some oversight from state laws and regulations.<sup>107</sup> As a result, there can be great variation in how jurisdictions train, recruit, pay, evaluate, and retain the poll workers who serve voters on Election Day.<sup>108</sup>

State laws that divest training and compensation authority to local bodies exemplify this variation. For example, Florida law provides that each county elections supervisor shall conduct a poll worker training pursuant to a statewide training curriculum.<sup>109</sup> County election officials also determine compensation for Florida poll workers.<sup>110</sup> In Wisconsin, each city or county with more than 500,000 people must establish a board of election commissioners.<sup>111</sup> That board is charged with developing certification requirements for poll workers.<sup>112</sup> Additionally, the board must conduct poll worker trainings prior to the election, which all chief inspectors (but not necessarily all poll workers) must attend.<sup>113</sup> Similarly, in Nevada and Arizona the county or city clerk (Nevada) or county board of supervisors (Arizona) must conduct a class for those appointed to serve on Election Day.<sup>114</sup> In Nevada, state law mandates that the class, at minimum, cover the use of the mechanical voting system but otherwise leaves the curriculum up to the local body.<sup>115</sup> Likewise, in Indiana, the county elections board is required to host a training class for election officers, which poll workers may, but are not

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105. *Id.*

106. *Id.*

107. David C. Kimball, Brady Baybeck, Cassie Gross & Laura Wiedlocher, *Poll Workers and Election Administration: The View from Local Officials* 1 (2009) (paper presented at the annual meeting of the Midwest Political Science Association, Chicago), available at [http://www.umsl.edu/~kimballd/dk\\_bb\\_June09.pdf](http://www.umsl.edu/~kimballd/dk_bb_June09.pdf).

108. *See id.* (comparing recruitment and training strategies across large and small jurisdictions within and among several unnamed states).

109. FLA. STAT. § 102.014 (2006).

110. FLA. STAT. § 102.021 (2002).

111. WIS. STAT. § 7.20(1) (2013).

112. WIS. STAT. § 7.31 (1)–(2) (2007).

113. *Id.*

114. ARIZ. REV. STAT. § 16-532 (1994); NEV. REV. STAT. § 293B.270 (1987).

115. *See* NEV. REV. STAT. § 293B.270.

required to, attend.<sup>116</sup> While the exact content of the training is left to the county election board, the curriculum must at least include lessons on how to make polling stations accessible for disabled and elderly voters, and the intricacies of the voting systems used in the county.<sup>117</sup> Thus, while states are critical players in regulating election administration, local law more closely governs how poll workers are recruited, screened, trained and supervised.

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In sum, those who administer elections at the “ground level” operate under at least four different layers of law—federal constitutional law, federal statutory law, state statutory law, and local law. The Constitution grants states substantial leeway to regulate federal elections, even when those regulations burden citizens’ right to vote. States often pass that authority to localities, which develop and implement a wide variety of election administration laws within the state and federal statutory framework. This complicated structure, combined with the fact that those responsible for conducting elections are typically hired just for that day to facilitate voting, creates an election system that is ripe for error.

## II. POLL WORKERS: DEFINITION, DUTIES, AND IMPORTANCE

In the 2008 Presidential Election, 133.9 million Americans cast their ballots.<sup>118</sup> Over 110 million voted in person, either at a temporary polling location or an election office.<sup>119</sup> These in-person voters were assisted by nearly 900,000 poll workers<sup>120</sup> recruited by states and localities and trained for the particular task of helping people to vote on Election Day.<sup>121</sup> With limited federal oversight, states establish their own rules regarding the responsibilities and conduct of poll workers on and before Election Day.<sup>122</sup> This Part introduces the reader to the American poll worker by reviewing the typical demographics of poll workers, their responsibilities on Election Day, trends in poll worker

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116. IND. CODE § 3-6-6-40 (2007).

117. *Id.*

118. 2008 EAC SURVEY, *supra* note 3.

119. *Id.* at 32.

120. *Id.* at 66.

121. *Id.* at 68–69.

122. *See generally* U.S. ELECTION ASSISTANCE COMM’N, COMPENDIUM OF STATE POLL WORKER REQUIREMENTS (2d ed. 2007) [hereinafter 2007 EAC COMPENDIUM], available at <http://www.eac.gov/assets/1/Page/Poll%20Worker%20Requirements%20by%20State.pdf>.

training, states' recent difficulties in recruiting capable poll workers, and the importance of the poll worker for election law administration. It also discusses how *competent* poll workers are fundamental for properly functioning elections because, in addition to their other responsibilities, poll workers in many jurisdictions have "the final authority [to] interpret[] guidance in areas such as deciding who can vote and [to] determin[e] voter intent."<sup>123</sup> If these individuals are not properly trained, or are put in a position to use unauthorized discretion to determine voter eligibility, poll worker error may result in too many voters casting provisional ballots—or no ballots at all.<sup>124</sup> Such ineffective election administration can hurt voter confidence,<sup>125</sup> can interfere with an individual's right to vote, and can even impact the outcomes in close elections.<sup>126</sup>

#### A. *The Poll Worker: Definition and Numbers*

The Election Assistance Commission defines a poll worker as a "person or persons who verify the identity of a voter; assist the voter with signing the register, affidavits, or other documents required to cast a ballot; assist the voter by providing a ballot or setting up the voting machine; and may serve other functions as dictated by State law."<sup>127</sup>

In 2010, forty-nine states reported deploying nearly 770,000 poll workers for Election Day.<sup>128</sup> Despite the increase in voting by mail, either through a complete vote-by-mail system such as in Washington, or by no-fault absentee voting, such as in Montana, the vast majority of Americans still vote at polling places on Election Day.<sup>129</sup> Professional election staff members rarely serve individuals who vote in person on Election Day.<sup>130</sup> Rather, voters are served by citizen poll workers who

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123. R. Michael Alvarez & Thad E. Hall, *Controlling Democracy: The Principal-Agent Problems in Election Administration*, 34 THE POL'Y STUD. J. 491, 496 (2006).

124. See *Provisional Voting*, PROJECT VOTE, <http://projectvote.org/provisional-voting.html> (last visited Jan. 17, 2014) (discussing how poll workers sometimes fail to provide voters a provisional ballot).

125. See generally Lonna Rae Atkeson & Kyle L. Saunders, *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 POL. SCI. & POL. 655 (2007).

126. See, e.g., *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235–38 (6th Cir. 2011) (documenting the result of poll worker error in a Hamilton County, Ohio Juvenile Judicial election.)

127. 2010 EAC SURVEY, *supra* note 13, at 13.

128. *Id.*

129. Kimball et al., *supra* note 107, at 2; see also 2008 EAC SURVEY, *supra* note 3, at 9 (reporting that 22.2 million people voted by absentee ballot and 2.8 million people voted by other non-in-person means compared to the over 80 million people who cast in-person ballots).

130. Kimball et al., *supra* note 107, at 2.

are hired for the day to administer state and federal elections.<sup>131</sup> Jurisdictions responding to the EAC's 2010 Election Administration and Voting Survey reported that on Election Day there were, on average, seven poll workers assigned to each polling place in the United States.<sup>132</sup> In a study on the 2008 election, David C. Kimball reported that each poll worker typically assisted between 70 and 88 voters on Election Day.<sup>133</sup>

Poll workers are necessary for effective administration of in-person elections in the United States.<sup>134</sup> Indeed, the EAC has noted that elections “cannot operate without the army of citizens who are willing to staff the polls every Election Day.”<sup>135</sup> The “all in one day” aspect of American elections makes the need for poll workers particularly acute.<sup>136</sup> In the 2010 midterm elections nearly 800,000 poll workers<sup>137</sup> served 57.1 million in-person voters.<sup>138</sup> Without these poll workers, it is unlikely that the election would have been administered properly.<sup>139</sup> The Government Accountability Office (GAO) has described America's reliance on poll workers in the following manner: “On the day of the election, election officials shared control of the election with an army of poll workers who staffed and oversaw the polls where votes were cast and ballots collected.”<sup>140</sup>

#### *B. Poll Workers' Day-of-Election Responsibilities*

Though poll workers' Election Day duties vary by jurisdiction, generally they are responsible for efficiently and effectively administering polling places on Election Day.<sup>141</sup> To this end, poll workers' responsibilities may include opening, setting up, closing, and shutting down polling sites; controlling access to sites and ensuring that unauthorized personnel do not enter polling places; managing lines; and

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131. *Id.*

132. 2010 EAC SURVEY, *supra* note 13, at 13.

133. Kimball et al., *supra* note 107, at 6.

134. U.S. ELECTION ASSISTANCE COMM'N, GUIDEBOOK ON SUCCESSFUL PRACTICES FOR POLL WORKER RECRUITMENT, TRAINING, AND RETENTION 7 (2007) [hereinafter EAC SUCCESSFUL PRACTICES], available at [http://www.eac.gov/election\\_management\\_resources/poll\\_worker\\_best\\_practices.aspx](http://www.eac.gov/election_management_resources/poll_worker_best_practices.aspx) (noting that, “elections depend on poll workers”).

135. *Id.*

136. Alvarez & Hall, *supra* note 123, at 495.

137. 2010 EAC SURVEY, *supra* note 13, at 71–72.

138. *Id.* at 8.

139. See 2001 GAO REPORT, *supra* note 14 at 15–16.

140. *Id.*

141. See generally Zaino, *supra* note 1, at 37.

issuing ballots.<sup>142</sup> Their tasks also include checking voters' names against those listed on the voting rolls, screening unlisted voters, and, in states with voter ID requirements, checking voters' photo identification.<sup>143</sup> Finally, poll workers administer provisional ballots to voters who are not listed on the rolls or do not present a proper form of ID, communicate with supervisors on the ground and at the Board of Elections, and sometimes tabulate and secure the ballots.<sup>144</sup>

These tasks are complex and can be difficult. In fact, one scholar suggests that in order to perform these tasks effectively, while ensuring that citizens' right to vote is protected, poll workers need extensive quasi-legal training.<sup>145</sup> Specifically, poll workers should be aware of the legal contours of the right to vote, know the state or jurisdictional law controlling provisional ballots, know the state voter identification law, be sensitive to voters with disabilities and aware of the state laws governing voter assistance, and be familiar enough with the voting machines so that they may fix problems on Election Day without substantial delay.<sup>146</sup>

Increasingly, local election officials need to recruit poll workers with unique skills to effectively staff the polls on Election Day.<sup>147</sup> For example, the growing population of naturalized citizens for whom English is a second language necessitates that many jurisdictions recruit and staff the polls with bilingual poll workers.<sup>148</sup> Also, as jurisdictions update antiquated polling machines with new voting technologies, they must recruit poll workers who are familiar with technology and have the skills to troubleshoot if the need arises.<sup>149</sup>

Jurisdictions have had particular difficulty meeting these requirements. For example, in 2011 and 2012 the U.S. Department of Justice (DOJ) Voting Rights Division brought four cases against jurisdictions for failing to comply with Section 203 of the Voting Rights Act, which requires that states staff the polls with at least bilingual poll

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142. *Id.* at 37–38.

143. See Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 5–6 (2009).

144. Zaino, *supra* note 1, at 38; see also Kimball et al., *supra* note 107, at 7.

145. Jocelyn Friedrichs Benson, *Voter Protection on Election Day: How the Government, Poll Workers, Political Parties, and Nonpartisan Advocates Can Work Together To Ensure Smooth Election Administration*, in AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 55 (Benjamin E. Griffiths ed., 2008).

146. *Id.*

147. EAC SUCCESSFUL PRACTICES, *supra* note 134, at 7.

148. *Id.* at 27–28.

149. *Id.* at 7.

workers.<sup>150</sup> In each case the DOJ admonished implicated jurisdictions for failing to hire a sufficient number of bilingual poll workers.<sup>151</sup>

Jurisdictions face similar difficulties recruiting technologically competent poll workers. For example, during the 2004 Democratic primary in San Diego, approximately 600 sites experienced delay due to poll worker error in operating electronic touch-screen voting systems.<sup>152</sup> Also, during the 2006 general election many poll workers in Marion County, Indiana were reportedly unable to operate the electronic voting machines used by those jurisdictions.<sup>153</sup> Similar issues were also reported in Cleveland and Pittsburgh.<sup>154</sup> Indeed, states with policies directed towards recruiting more technologically advanced poll workers have implemented those policies with varying levels of success.<sup>155</sup> Thus, although poll workers are responsible for increasingly difficult and technological tasks on Election Day, jurisdictions are often at a loss as to how to recruit individuals capable of performing these tasks.

In many cases, poll workers oversee elections without direct supervision by elected or appointed election officials.<sup>156</sup> This is because though many localities employ only a few professional election staff, they use hundreds of poll workers on Election Day.<sup>157</sup> With these ratios, it is impossible for professional election staff to oversee all poll workers' activity. For this reason, poll workers, and not professional election staff, often make final determinations with regards to important decisions like individual voter eligibility.<sup>158</sup> This responsibility "can affect the election outcomes or experience in a given precinct."<sup>159</sup>

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150. See, e.g., Complaint, United States v. Alameda Cnty., Cal., No. 3:11-CV-03262 (N.D. Cal. Jul. 1, 2011); Complaint, United States v. Orange Cnty., N.Y., No. 7:12-cv-03071-ER (S.D.N.Y. Apr. 18, 2012); Complaint United States v. Colfax Cnty., Neb., No. 8:12-CV-00084 (D. Neb. Feb. 27, 2012); Complaint United States v. Lorain Cnty., Ohio, No. 1:11-CV-02122 (N.D. Ohio Oct. 7, 2011).

151. EAC SUCCESSFUL PRACTICES, *supra* note 134, at 7.

152. Zaino, *supra* note 1, at 38.

153. *Id.*

154. *Id.*

155. *Id.* at 51.

156. Thad E. Hall et al., *The Human Dimension of Elections: How Poll Workers Shape Public Confidence in Elections*, 62 POL. RES. Q. 507, 508 (2009).

157. See 2012 EAC SURVEY, *supra* note 2, at 71 (reporting jurisdictions used, on average, 109 poll workers on Election Day); Alvarez & Hall, *supra* note 123, at 495–96.

158. See Thad Hall et al., *Poll Workers and the Vitality of Democracy: An Early Assessment*, 40 PS: POL. SCI. & POL. 647, 647 (2007).

159. *Id.*

C. *On Election Day, Poll Workers May Impact Whether and How People Vote*

Poll workers' responsibilities on Election Day include screening voters by checking poll lists and, when required, checking voter IDs.<sup>160</sup> This is perhaps the most important task with which a poll worker is charged on Election Day, because poll workers may require that the voter cast a provisional ballot—or prevent the voter from voting entirely—if the poll worker is unable to locate the individual's name or confirm his or her identification.<sup>161</sup>

Thus, whether and how a voter votes may depend on whether and how the poll worker allows them to vote.<sup>162</sup> In this way, poll workers have a tremendous amount of power in our voting system: not only are they indispensable to the voting process, but also their ability to do their job well impacts the franchise. In the worst-case scenario, poorly trained or disinterested poll workers can cast election results into doubt.<sup>163</sup>

Finally, incompetent or poorly trained poll workers can contribute to a proliferation of long lines on Election Day.<sup>164</sup> A poll worker that takes several minutes to process each in-person voter may cause long lines at his or her precinct table, particularly in large, crowded jurisdictions.<sup>165</sup> Long lines at polling locations can disenfranchise the potentially thousands of people who are unable to wait in order to cast a ballot.<sup>166</sup> President Obama recognized this problem in the 2013 State of the Union: “[w]hen any Americans—no matter where they live or what their party—are denied [the right to vote] simply because they can’t wait for five, six, seven hours just to cast their ballot, we are betraying our ideals.”<sup>167</sup>

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160. See Page & Pitts, *supra* note 143, at 5–6.

161. See generally 2001 GAO REPORT, *supra* note 14; IND. CODE § 3-11-8-25.1 (2013).

162. See Page & Pitts, *supra* note 143, at 4–5.

163. See generally Zaino, *supra* note 1.

164. Alexander S. Belenky & Richard C. Larson, *Waiting to Vote: Coping with Voter Queues in U.S. Federal Elections*, in 3 VOTING IN AMERICA: AMERICAN VOTING SYSTEMS IN FLUX: DEBACLES, DANGERS, AND BRAVE NEW DESIGNS 100, 101 (Morgan E. Felchner ed., 2008) (noting that “[e]lection queues form when the number of voting machines and support personnel are insufficient to handle voters swiftly entering the precinct.”).

165. See *id.* at 103.

166. See *id.* at 100 (noting examples of long lines on election day in 2004).

167. President Barack Obama, State of the Union Address (Feb. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

*D. Poll Worker Recruitment, Training, and Retention*

Poll workers are not full-time professional staff. Rather, they are hired to work only on Election Day (or in some cases before Election Day to staff early voting stations). Indeed, “[e]lections are a relatively unique administrative activity because the front-line workers do not undertake the job on a regular basis.”<sup>168</sup> The episodic nature of the poll worker’s job contributes to critical problems with training,<sup>169</sup> and, by extension, to problems with job performance and recruitment.<sup>170</sup>

Jurisdictions have experienced varying success with poll worker recruitment and many have reported difficulties in recent years. Of 4,517 jurisdictions that responded to the EAC’s 2008 inquiry about poll worker recruitment, over one third reported having a somewhat difficult or very difficult time recruiting poll workers.<sup>171</sup> These numbers were more promising in 2010, with about 30% of jurisdictions reporting a very difficult or somewhat difficult time recruiting poll workers.<sup>172</sup> Only 19% of reporting jurisdictions in 2010 had a somewhat easy or very easy time recruiting poll workers.<sup>173</sup> In another study focusing on the 2008 election, officials in most jurisdictions ranked finding poll workers of a certain party, finding poll workers for a certain area, finding enough poll workers for all polling places, and finding poll workers who can manage a team high among challenges in recruiting poll workers.<sup>174</sup>

Recruitment challenges can have a direct impact on the caliber of poll workers in a given jurisdiction. Indeed, “[a] small pool of poll workers makes it difficult for a [local election official] to screen poll workers adequately because they cannot afford to turn many poll workers away.”<sup>175</sup> Nevertheless, most jurisdictions make some efforts to either formally or informally screen poll workers.<sup>176</sup>

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168. Hall, *supra* note 158, at 647.

169. *Id.*

170. See 2010 EAC SURVEY, *supra* note 13, at 75–76 (documenting jurisdictions’ difficulties recruiting poll workers for the 2010 election).

171. 2008 EAC SURVEY, *supra* note 3, at 68–69.

172. 2010 EAC SURVEY, *supra* note 13, at 75–76.

173. *Id.*

174. Kimball, *supra* note 107, at 12. Election officials in large jurisdictions rated each of these at 2.8 or 2.7 on a scale of 1 (not at all difficult) to 4 (very difficult). *Id.* For the purposes of Professor Kimball’s study, large jurisdictions are those with more than 50,000 voters and small jurisdictions are those with fewer than 1,000 voters. *Id.* at 3. In 2004 about 64% of voters cast their ballot in a large jurisdiction. *Id.*

175. Alvarez & Hall, *supra* note 123, at 496.

176. In one study, 94% of large jurisdictions reported screening poll workers based on interaction during training. Kimball, *supra* note 107, at 11. Eighty-eight percent of those jurisdictions reported

Most states mandate some sort of training for poll workers, but the depth and frequency of training varies by jurisdiction.<sup>177</sup> A study conducted in the wake of the 2008 election reported that 36% of small and 80% of large jurisdictions require poll worker training before every election.<sup>178</sup> In most jurisdictions either local election staff or a local election official conducts the poll worker training; a state official rarely conducts the training.<sup>179</sup> Although most jurisdictions train poll workers, scholars and commentators almost universally suggest increased poll worker training as a solution to poll worker error and other election administration problems.<sup>180</sup>

Finally, while some states provide that their poll workers may work a half day on Election Day,<sup>181</sup> others require or recommend that their poll workers work from when the polls open until when the last voter has voted.<sup>182</sup> Often this can amount to a fifteen or sixteen hour day with few breaks.<sup>183</sup> For example, in Ohio, poll workers open the polls at 6:30 AM and are often present until the polls close at 7:30 PM.<sup>184</sup> In reality, many poll workers stay past 7:30 PM, until all voters have voted and the poll workers have completed their duties.<sup>185</sup> Similarly, Florida a poll worker must be present from 6:00 AM until at least 7:00 PM when the polls close or until each voter has voted and the poll worker has discharged her duties.<sup>186</sup> Again, in busy jurisdictions prone to long lines,<sup>187</sup> this

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using prior performance to screen poll workers and 62% used a telephone interview process to screen and select workers. *Id.* 35% of those jurisdictions reported requiring poll workers to pass a test after training. *Id.*

177. See generally 2007 EAC COMPENDIUM, *supra* note 122.

178. Kimball, *supra* note 107, at 14.

179. *Id.*

180. See, e.g., Benson, *supra* note 104, at 275–76; Hasen, *supra* note 27, at 953 (pointing out that problems arise from poll workers who typically receive very little training). Whether or not jurisdictions have the money, expertise, and personnel to more adequately train poll workers is outside the scope of this Comment.

181. Pennsylvania, Missouri, Maryland, and Texas permit poll workers to work less than a full day. See 2007 EAC COMPENDIUM, *supra* note 122.

182. For example, Florida requires poll workers to work a full day. *Id.* North Carolina requires election judges (a type of poll worker) to work an entire day. *Id.* at 112. In Ohio, it is the presumption that poll workers will work an entire day. See OHIO REV. CODE ANN. § 3501.28(F) (2012).

183. Zaino, *supra* note 1, at 41.

184. OHIO REV. CODE ANN. § 3501.32 (2012); 2007 EAC COMPENDIUM, *supra* note 122, at 117.

185. See OHIO REV. CODE ANN. § 3501.28(A)(2) (2012).

186. FLA. STAT. § 100.011(1) (2002); FLA. STAT. § 102.012(4) (2002).

187. See, e.g., Bob King, *2012 Election: Long Lines, Confusion in Florida*, POLITICO (Nov. 6, 2012, 7:01 PM), <http://www.politico.com/news/stories/1112/83401.html>.

fourteen-hour day can easily last sixteen or more hours. “The long hours can also leave many poll workers tired, over-stressed, and prone to make errors.”<sup>188</sup> Also, on top of this long day, poll worker pay may not match up to the demanding nature of the job.<sup>189</sup>

*E. Poll Workers May Have an Impact on Voter Confidence in Elections*

Since poll workers have such a visible role in election administration, their interactions with voters can impact the voters’ confidence in elections.<sup>190</sup> Indeed, one study shows that voters who have a positive experience with poll workers have more confidence that their vote will be counted.<sup>191</sup> In a different study, Ohio voters were asked to evaluate the performance of the poll workers they encountered on Election Day.<sup>192</sup> Nearly 50% of voters who rated their experience with poll workers as excellent answered “yes” when asked if they were very confident that the current election process produces fair outcomes.<sup>193</sup> By contrast, less than 30% of voters who rated their experience with poll workers anything other than “Excellent” were very confident in the fairness of the system.<sup>194</sup>

### III. COMPLEX ELECTION ADMINISTRATION LAWS CREATE A LANDSCAPE THAT IS RIPE FOR POLL WORKER ERROR

As the foregoing Part demonstrates, poll workers are essential to the proper functioning of American elections. In this Part, this Comment argues that complex election laws, such as voter ID laws, can be difficult to administer and can thus exacerbate poll worker error.

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188. Zaino, *supra* note 1, at 41.

189. Historically, poll workers were unpaid volunteers. *Id.* at 37. Currently, most jurisdictions pay poll workers a daily wage, but this wage varies substantially by jurisdiction and, some argue, is not sufficient to compensate workers for their difficult Election Day tasks. Kimball et al., *supra* note 107, at 7. One study conducted in the wake of the 2008 presidential election surveyed how 2919 jurisdictions (out of 10,370 total identified jurisdictions) compensated poll workers. *Id.* at 3, 7. This study reports that jurisdictions compensate poll workers at a per diem rate of between \$100 and \$164, depending on the task to which the poll worker is assigned and the size of the jurisdiction. *Id.* With duties on Election Day that often span between thirteen and sixteen hours, this pay range amounts to about \$8 to \$13 per hour.

190. *See generally* Atkeson & Saunders, *supra* note 125.

191. *Id.* at 658.

192. Hall et al., *supra* note 156, at 518.

193. *Id.*

194. *Id.*

A. *Voter ID Laws Give Poll Workers Discretion to Accept or Reject a Voter's ID—Discretion that May Lead to Error*

As discussed above, local election laws often make poll workers ultimately responsible for determining whether and how a voter may vote.<sup>195</sup> In large part, this reliance on poll workers is out of necessity: the all-in-one-day<sup>196</sup> aspect of the American election system creates a tremendous amount of work for professional election administrators. Those individuals must rely on poll workers to help them administer voting procedures on Election Day.<sup>197</sup> Indeed, people who vote in person do not typically encounter professional election administrators. Rather, they are assisted by poll workers: poll workers are responsible for directing voters to the proper precinct table, checking and confirming the voter's presence on the rolls, and—in voter ID states—confirming that the voter presents the proper identification.<sup>198</sup> If a poll worker does not direct the voter properly, fails to find the voter on the poll list, or does not accept the voter's identification, the voter may be required to cast a provisional ballot, or may not be permitted to cast a ballot at all.<sup>199</sup> In that way, “the nature of polling places on election day [sic] often provides poll workers with *de facto* discretion over who gets to exercise the franchise.”<sup>200</sup> This discretion creates ample opportunity for poll worker error.<sup>201</sup>

Indiana's voter ID law<sup>202</sup> provides one example of this discretion. A plain reading of the statute shows that, in some situations, poll workers must make a judgment call about whether a particular voter may vote a regular or provisional ballot. On Election Day in Indiana, election officers, who are essentially high-ranking poll workers,<sup>203</sup> are responsible for determining whether a voter presents proper

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195. See *supra* Part II.B.

196. “Most-in-one-day” may actually be a more accurate descriptor, as the increased prevalence of early voting has alleviated some pressures inherent in the all-in-one-day aspect of the American election system.

197. See *supra* Part II.

198. See *supra* Part II.B.

199. See *Provisional Voting*, PROJECT VOTE, <http://projectvote.org/provisional-voting.html> (last visited Jan. 17, 2014).

200. Page & Pitts, *supra* note 143, at 4–5.

201. *Id.* at 5.

202. This Comment uses Indiana's law as an example.

203. See IND. CODE. § 3-6-6-8 (2013) (“The county chairman of the major political party whose candidate for the office of secretary of state received the highest vote in the county at the last election may nominate a voter for the office of inspector.”).

identification.<sup>204</sup> A voter's identification is only proper if the name on the identification "conforms" to that listed in the voting rolls.<sup>205</sup> If a voter does not present proper identification, that voter must vote using a provisional ballot rather than a regular ballot.<sup>206</sup> This is significant because Indiana jurisdictions count provisional ballots much less frequently than they do regular ballots.<sup>207</sup>

Despite these high stakes, whether a voter's name "conforms" to the name listed in the poll books can be unclear, and is subject to the poll worker's judgment. Indiana poll worker training materials acknowledge this ambiguity.<sup>208</sup> In those materials, the state suggests variations of "Robert John Crew" that a poll worker may accept under the "conforms" standard.<sup>209</sup> Even this instruction leaves many unanswered questions. For example, the training materials teach that a poll worker may accept an identification card that lists a voter's nickname or middle initial, rather than a full name.<sup>210</sup> But the training materials do not instruct poll workers on how to interpret an ID that presents an unusual nickname, misspelling, or changed last name, any of which could be common occurrences.<sup>211</sup> Thus, even with detailed training materials, whether a voter's ID card conforms to his or her name as listed in the poll books can be up to the poll worker's judgment.

Also, it is impossible to know how individual poll workers will enact this standard during the stresses of Election Day. Poll workers may make mistakes, overlook acceptable alternatives, or cut corners because they are tired, feel rushed, or forget the standard. The potential for these mistakes persists despite poll worker training. Also, jurisdictions—even within Indiana—vary dramatically with regard to the intensity and content of poll worker training.<sup>212</sup> Finally, Indiana charges poll workers with resolving questions that may arise when a voter does not present a proper form of identification, or the name on his or her ID does not

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204. IND. CODE § 3-11-8-25.1 (West. 2013).

205. IND. CODE § 3-5-2-40.5 (2011).

206. IND. CODE § 3-11-8-25.1(d) (West. 2013).

207. See 2010 EAC SURVEY, *supra* note 13, at 11.

208. POLL WORKER TRAINING PRESENTATION, INDIANA (2012) (on file with author).

209. See *id.* (noting that Robert J. Crew, Robert Crew, J.Crew, John Crew would all satisfy the standard, and emphasizing that "[c]onform does *NOT* mean it needs to match identically").

210. Page & Pitts, *supra* note 143, at 16; POLL WORKER TRAINING PRESENTATION, *supra* note 208.

211. See Page & Pitts, *supra* note 143, at 19 n.96; Tom Dart, *Texas Voter ID Law Makes it Harder for Women to Vote, Democrats Claim*, THE GUARDIAN ONLINE (Oct. 29, 2013, 12:57 PM), <http://www.theguardian.com/world/2013/oct/29/texas-voter-id-law-women-vote>.

212. See *supra* Part II.C.

match precisely the name listed in the poll book.<sup>213</sup> Thus, even though the standard may be ambiguous, poll workers will be the final arbitrators of the franchise for some voters.<sup>214</sup>

Poll worker discretion does not lead invariably to error, but by requiring poll workers to interpret election laws on the fly, states increase the likelihood that poll workers will interpret those laws inconsistently or erroneously, or ignore them altogether. For example, a poll worker under pressure to quickly match a voter's ID with a name listed in the polls may require an exact match, or something close to an exact match, even when such a match is not required.<sup>215</sup> Stephen Ansolabehere recognized this problem in his 2006 empirical analysis of voter ID laws, noting that, "In practice, poll workers have considerable discretion in the application of ID rules: they might ignore the rule altogether, or they might ask for identification even when the law does not require it or they are forbidden from doing so."<sup>216</sup>

*B. Voter ID Laws Are Subject to Rushed Challenge, Making Them Even More Difficult for Poll Workers to Learn and Implement*

Poll workers may have added difficulty learning and implementing voter ID laws because those laws may be subject to challenge—and thus change—close to an election. Recent history has shown that when a state adopts a voter ID law, the law's constitutionality is likely to be challenged in court. For example, the U.S. DOJ sued to enjoin North Carolina from enforcing its new voter ID law, invoking Section 2 of the Voting Rights Act.<sup>217</sup> The DOJ filed its suit less than three months after North Carolina passed its new law,<sup>218</sup> but the lawsuit is likely to last until the 2014 midterm elections. The DOJ has also sued to enjoin the

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213. IND. CODE § 3-10-1-7.2 (2013). In Indiana, a member of the precinct election board is ultimately responsible for screening the voter's identification. *Id.* For the purposes of this Comment, an Indiana precinct election official is a type of poll worker. Specifically, a precinct election official is appointed for the sole purpose of serving voters on Election Day. *See* 2010 EAC SURVEY, *supra* note 13, at 13 (defining poll workers).

214. *See* IND. CODE § 3-6-6-30 (2013).

215. *See generally* Page & Pitts, *supra* note 143, at 34.

216. Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613, 621 (2008) (citing Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1233 (2005)). But Professor Ansolabehere also concluded from his study that very few people were disenfranchised because of voter ID requirements, noting finally that "[v]oter identification is the controversy that isn't." *Id.* at 624, 626.

217. Complaint at 1, *United States v. North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

218. *Id.*

enforcement of Texas' voter ID law, SB 14, arguing that that law violates Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.<sup>219</sup> Before the 2012 general election, a state judge in Wisconsin ruled that state's voter ID law unconstitutional.<sup>220</sup> Finally, voters in Kansas have challenged the Kansas' voter ID law in state court.<sup>221</sup>

Parties often litigate these challenges during election season, meaning that the status of a particular voter ID law can be in flux on or near to Election Day.<sup>222</sup> This uncertainty causes confusion among poll workers, creating a potential for error. For example, a state court judge in Pennsylvania temporarily enjoined the implementation of that state's voter ID law on October 2, 2012, less than one month before Election Day.<sup>223</sup> As several commentators predicted, the stay caused confusion among poll workers, many of whom erroneously required voters to show identification in order to vote.<sup>224</sup> This confusion was compounded by the judge's order, which permitted the state to continue educating voters about the need for identification at the polls even though voters did not need an ID to vote in the then-impending election.<sup>225</sup> The media reported similar instances of confusion regarding the status of voter ID laws causing poll worker error in Iowa and Texas on Election Day in 2012.<sup>226</sup>

### C. *In General, Laws that Are Difficult to Administer May Exacerbate Poll Worker Error*

Although no case has explicitly stated that voter ID laws cause poll worker error, other cases involving similarly difficult-to-administer laws suggest that voter ID laws create situations ripe for poll worker error. The Ohio provisional balloting cases, discussed *infra*, provide a prime

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219. Complaint at 1, *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013).

220. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586, (Wis. Cir. Ct. Mar. 12, 2012) (trial court order).

221. See *Voter Identification Requirements, Recent Litigation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Litigation> (last visited Nov. 10, 2013).

222. See, e.g., *supra* notes 217–21 and accompanying text.

223. See Dan Froomkin, *Pennsylvania Voter ID Law Ruling: Judge Halts Enforcement of Law for Election*, HUFFINGTON POST (last updated Oct. 2, 2012, 10:40 AM), [http://www.huffingtonpost.com/2012/10/02/pennsylvania-voter-id-ruling\\_n\\_1919187.html](http://www.huffingtonpost.com/2012/10/02/pennsylvania-voter-id-ruling_n_1919187.html).

224. See, e.g., Jessica Parks, *Pa.'s New Voter ID Law Causes Confusion, Voters Say*, PHILADELPHIA INQUIRER ONLINE (Nov. 7, 2012), [http://articles.philly.com/2012-11-07/news/34974527\\_1\\_voter-id-law-poll-workers-general-election](http://articles.philly.com/2012-11-07/news/34974527_1_voter-id-law-poll-workers-general-election).

225. See Froomkin, *supra* note 223.

226. See *infra* notes 279–85 and accompanying text.

example.

*Hunter v. Hamilton County Board of Elections*<sup>227</sup> and *NEOCH v. Husted*<sup>228</sup> both deal with Ohio provisional balloting requirements. They arose in part because Ohio municipalities began to use multi-precinct voting locations, or single locations that serve as polling places for people from several different precincts, to serve general election voters.<sup>229</sup> Ohio law required that, “[i]n such locations, voters must go to the correct ‘precinct’—i.e., table—within the location to cast a valid ballot.”<sup>230</sup> This practice, combined with a state law that automatically disqualified provisional ballots cast in the wrong precinct but the right location, lead to the disenfranchisement of potentially thousands of voters in 2008 and 2010.<sup>231</sup> Ohio relied on poll workers to guide voters to the proper precinct table in multi-precinct polling locations. Because of the confusing nature of these polling sites, many poll workers were unable to accurately complete this task.<sup>232</sup>

Like the Ohio multi-precinct voting location practice, voter ID laws can be difficult for poll workers to administer. This difficulty is compounded, as it was for Ohio poll workers, by the stresses of Election Day, which may include long lines, frustrated voters, and long days for poll workers.<sup>233</sup> It is not unreasonable to suggest that poll worker error associated with the administration of voter ID laws could cause widespread disenfranchisement, similar to that caused by poll worker error in Ohio in 2008 and 2010.

*D. Recent Cases and Scholarship Document Poll Worker Error and Demonstrate that Poll Worker Error Impacts State and Federal Elections*

*I. Hunter v. Hamilton County Board of Elections*

*Hunter v. Hamilton County Board of Elections*<sup>234</sup> provides a recent example of how poll worker error impacts elections. *Hunter* was post-election litigation that arose out of a judicial election in Hamilton

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227. 635 F.3d 219 (6th Cir. 2011).

228. 696 F.3d 580 (6th Cir. 2012).

229. *Id.* at 223.

230. *Id.*

231. *Husted*, 696 F.3d at 583, 597.

232. *Id.* at 594.

233. *See supra* Part II.C.

234. 635 F.3d 219 (6th Cir. 2011).

County, Ohio. When the County Board of Elections (Board) released its vote totals for the judicial election—vote totals that included properly cast provisional ballots—candidate Williams led candidate (and plaintiff) Hunter by 23 votes.<sup>235</sup> The 23-vote margin entitled Ms. Hunter to an automatic recount.<sup>236</sup> The recount, however, would not have included provisional ballots that the Board had already rejected.<sup>237</sup> Seeking the inclusion of those ballots, Ms. Hunter sued the Board in the Southern District of Ohio, requesting that the court require the Board to count certain provisional ballots.<sup>238</sup> Specifically, the plaintiff “alleg[ed] that the Board ha[d] created a practice of investigating whether invalid provisional ballots were miscast as a result of poll-worker error and, if they were, counting the ballots. She alleg[ed] that the Board refused to apply this practice to approximately 849 . . . provisional ballots miscast in the wrong precinct,” also likely miscast because of poll worker error.<sup>239</sup> Such differential treatment, according to the plaintiff, was a constitutional violation.<sup>240</sup>

The district court granted Ms. Hunter’s request for a preliminary injunction and ordered “Defendants to investigate whether provisional ballots cast in the correct polling location but wrong precinct were improperly cast because of poll worker error.”<sup>241</sup> Specifically, the district court determined that the Board’s failure to treat all provisional ballots the same likely violated the Equal Protection Clause as elucidated by the Supreme Court in *Bush v. Gore*,<sup>242</sup> and that Ms. Hunter shouldered her burden with regard to the other preliminary injunction equitable factors.<sup>243</sup> The Sixth Circuit affirmed and remanded to the district court to oversee the Board’s evaluation of the 849 contested provisional ballots.<sup>244</sup>

On remand the district court described the November 2, 2010 Election Day process in detail.<sup>245</sup> In this description, it documented several

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235. *Id.* at 222.

236. *Hunter v. Hamilton Cnty. Bd. of Elections*, No. 1:10CV820, 2010 WL 4878957, at \*1 (S.D. Ohio Nov. 22, 2010).

237. *Id.*

238. *Id.* at \*5.

239. *Hunter*, 635 F.3d at 222 (footnote omitted).

240. *See id.*

241. *Hunter*, 2010 WL 4878957, at \*1.

242. *Id.* at \*3 (citing *Bush v. Gore*, 531 U.S. 98, 104 (2000)).

243. *Id.* at 4–6; *see also* FED. R. CIV. P. 65.

244. *Hunter*, 635 F.3d at 247.

245. *See generally* *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d. 795 (S.D. Ohio 2012).

examples of poll worker error.<sup>246</sup> The court described how one poll worker misdirected a voter to the wrong precinct, where the voter cast a provisional ballot.<sup>247</sup> As a result of the poll worker's error, this voter's provisional ballot was likely miscast and thus included among the 849 contested ballots at issue in the *Hunter* litigation.<sup>248</sup> Additionally, one poll worker who testified at the district court hearing was unable to identify whether a voter's house number was even or odd, although that determination was essential to directing the voter to the proper precinct.<sup>249</sup>

This and other examples of poll worker error led the district court to conclude that "many poll workers did not follow the steps for processing provisional voters as described in the [poll worker] Comprehensive Manual . . . ."<sup>250</sup> It also found that "many poll workers failed to follow proper procedures after giving the provisional ballot envelope to the voter,"<sup>251</sup> many poll workers failed to direct voters to the proper precinct for a number of reasons,<sup>252</sup> "many poll workers failed to warn voters that a ballot would not be counted if cast in the wrong precinct,"<sup>253</sup> and some poll workers simply ignored procedures governing provisional balloting.<sup>254</sup> After hearing extensive testimony from voters and poll workers, the district court determined that many, if not all, of the voters who cast ballots in the wrong precinct but at the right polling location did so because of poll worker error.<sup>255</sup> The exclusion of these ballots, the court determined, violated the voters' Fourteenth Amendment rights.<sup>256</sup>

Based on this finding, the district court enjoined the board from "rejecting otherwise valid provisional ballots . . . cast in the correct polling location but the wrong precinct due to demonstrated poll-worker error."<sup>257</sup> As a result, the board reevaluated the 849 previously rejected ballots, counting those that would have been valid but for being cast in

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246. *Id.* at 818.

247. *Id.*

248. *Id.*

249. *Id.* at 819–20.

250. *Id.* at 818.

251. *Id.* at 820.

252. *Id.* at 818–20.

253. *Id.* at 820.

254. *Id.* at 821.

255. *Id.* at 822–23, 834.

256. *Id.* at 834.

257. *Id.*

the wrong precinct.<sup>258</sup> The ballots in that race proved decisive. On April 27, 2012, seventeen months after Election Day, the Hamilton County board of elections announced that Tracie Hunter won the election, and would be seated as Juvenile Judge.<sup>259</sup>

## 2. NEOCH v. Husted

The Sixth Circuit also addressed issues of poll worker error in *NEOCH v. Husted*, when it considered a facial challenge to Ohio's wrong-precinct, right-location statute.<sup>260</sup> In *Husted*, the plaintiffs argued that the Ohio law automatically disqualifying provisional ballots cast in the wrong precinct but at the right polling location unconstitutionally burdened Ohio voters' right to vote because many of those ballots were miscast due to poll worker error.<sup>261</sup> The plaintiffs requested that the court enjoin the state from applying Ohio code section 3505.183(B)(4)(a)(ii) in any upcoming election.<sup>262</sup>

The district court applied the *Anderson/Burdick*<sup>263</sup> test to the statute, finding that the practice of disqualifying all right-place/wrong-precinct provisional ballots significantly burdened the rights of Ohio voters, and that the state's identified interests did not outweigh that burden.<sup>264</sup> The district court based this finding on its earlier finding in *Hunter* that poll worker error was almost always the cause of right-place/wrong-precinct ballots.<sup>265</sup> Accordingly, the district court granted the plaintiffs request for a preliminary injunction, ordering that "Defendant Secretary of State shall issue a Directive requiring that Ohio's county boards of elections may not reject any provisional ballots cast by lawfully-registered voters in the November 2012 general election . . . [because] . . . the voter cast his or her provisional ballot in the wrong precinct . . .,"<sup>266</sup> unless the poll worker certifies that he or she informed the voter of repercussions of voting a provisional ballot in the wrong precinct, and the voter still

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258. *Id.*

259. *Winner Declared in Race for Hamilton County Juvenile Judge*, WCPO CINCINNATI (Apr. 27, 2012), [http://www.wcpo.com/dpp/news/local\\_news/winner-declared-in-race-for-hamilton-county-juvenile-judge](http://www.wcpo.com/dpp/news/local_news/winner-declared-in-race-for-hamilton-county-juvenile-judge).

260. 696 F.3d 580 (6th Cir. 2012).

261. *Id.* at 586.

262. *Serv. Emps. Int'l Union, Local 1 v. Husted*, 887 F. Supp. 2d 761, 766 (S.D. Ohio 2012).

263. *See supra* Part I.A.

264. *Serv. Emps. Int'l Union, Local 1*, 887 F. Supp. 2d at 788.

265. *Id.* at 782 (citing *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 243 (6th Cir. 2011)).

266. *Id.* at 798.

insisted.<sup>267</sup>

The Sixth Circuit affirmed, agreeing with the district court that, in the previous several elections, thousands of Ohio voters voted in the wrong precinct, but at the correct polling location, because of poll worker error.<sup>268</sup> Despite knowing that voters cast such right-place/wrong-precinct ballots almost exclusively because of poll worker error, the state declined to count the ballots pursuant to a strict application of Ohio code section 3505.183(B)(4)(a)(ii).<sup>269</sup> This practice likely violated Ohio voters' right to vote under the Sixth Circuit's application of the *Anderson/Burdick* test.<sup>270</sup> Thus, because the state "failed to present evidence to the district court that other factors besides poll-worker error caused wrong precinct-ballots"<sup>271</sup> and the state's interest in administering elections through precincts does not outweigh this burden on voters, "Ohio's disenfranchisement of voters for voting in the wrong polling location because of poll worker error likely violated the Equal Protection Clause."<sup>272</sup> Accordingly, the Sixth Circuit affirmed the district court's finding that poll workers' administration of the state's provisional balloting law, combined with Ohio's strict application of section 3505.183(B)(4)(a)(ii), violated Ohio voters' right to vote.<sup>273</sup>

### 3. *Other Examples of Poll Worker Error*

Courts have documented poll worker error in additional circumstances relating to complex election administration laws. For example, witnesses in a 2004 federal case in Michigan reported that poll workers struggled to apply the state's new provisional balloting requirement.<sup>274</sup> Also, according to one witness, "hundreds of prospective voters were denied a vote in the August 2004 primary election because poll workers directed individuals to incorrect polling stations . . . ."<sup>275</sup>

Poll worker error caused similar problems in the 2008 Minnesota U.S. Senate election, in which Senator Al Franken ousted incumbent Norm

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267. *Id.*

268. *NEOCH v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

269. *Id.* at 583.

270. *Id.* at 592–97.

271. *Id.* at 594.

272. Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1868 (2013).

273. *Husted*, 696 F.3d at 597.

274. *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 418–19 (E.D. Mich. 2004).

275. *Id.* at 418.

Coleman by a narrow margin after a lengthy recount and litigation.<sup>276</sup> During the Minnesota 2008 election, poll workers at a precinct in a suburb of St. Paul “missed a pile of absentee ballots, and then altered the report of the number of voters who had signed in at the precinct in order to conceal the discrepancy.”<sup>277</sup> The State Canvassing Board corrected this error before litigation ensued,<sup>278</sup> but this is an example of the potential for poll workers to make errors that can change the outcome of an election.

Problems with poll worker error persisted in 2012, particularly in states that had recently changed or enacted voter ID laws. For example, a poll worker in Dallas, Texas requested that newspaper reporter show a photo ID in order to vote, despite the fact that the law was not in effect.<sup>279</sup> The voter presented his utility bill, an accepted form of ID, but the poll worker insisted, saying, “[w]e prefer a voter-registration card or a drivers’ license.”<sup>280</sup> She erroneously told the voter that “[t]here’s a list of identifications starting with registration card, driver’s license, picture ID — we prefer to go in that order.”<sup>281</sup> The individual eventually voted when another poll worker intervened. In Iowa, on Election Day, a poll worker asked a registered voter for a photo ID, though the state had no ID requirement in place at the time. The poll worker did so because “she thought she had heard on TV that ID was required.”<sup>282</sup> Some Pennsylvania poll workers also demanded that voters present ID in order to vote a regular ballot, despite the fact that a state judge stayed implementation of Pennsylvania’s strict voting ID law until after the 2012 election.<sup>283</sup> The judge’s order was particularly confusing to poll workers and voters because it allowed poll workers to request voters to present identification, but mandated that voters who did not present ID

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276. *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009); see also Edward B. Foley, *How Fair Can be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187 (2011).

277. Edward B. Foley, *The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, 134 n.28 (2011).

278. *Id.*

279. Wayne Slater, *Voter ID Law is on Hold but Some Poll Workers May Ask for Photo Anyway*, DALLAS MORNING NEWS (Oct. 29, 2012, 11:02 PM), <http://www.dallasnews.com/news/columnists/wayne-slater/20121029-voter-id-law-is-on-hold-but-some-poll-workers-might-be-asking-for-photos-anyway.ece>.

280. *Id.*

281. *Id.*

282. *ID ISSUE: Poll Worker Asks For Identification*, WHOTV.COM (Nov. 6, 2012, 4:25 PM), <http://whotv.com/2012/11/06/id-issue-poll-worker-asks-for-identification/>.

283. Parks, *supra* note 224.

be allowed to cast a regular ballot.<sup>284</sup> Since the 2012 election, local news in Cincinnati, Ohio has reported that, due to voting problems in that election, Hamilton County will retrain hundreds of poll workers, and is forcing dozens to retire.<sup>285</sup>

These issues may worsen in light of the Supreme Court's decision in *Shelby County, Alabama v. Holder*<sup>286</sup> because states are no longer required to seek preclearance for implementing restrictive voter ID laws.<sup>287</sup> Indeed, only weeks after the Supreme Court handed down its decision in *Shelby County*, North Carolina passed an election administration law that reduces the number of days in the early voting period, eliminates same-day voter registration, prohibits the counting of provisional ballots cast outside the voter's home precinct, and institutes a voter ID requirement.<sup>288</sup> Legislative history demonstrates that the North Carolina legislature adopted many of the law's strictest provisions after *Shelby County*, likely knowing that the case eliminated Section 5's preclearance requirement.<sup>289</sup> Opponents of this law urge that it is unduly burdensome on voters.<sup>290</sup> Indeed, the U.S. DOJ has challenged the legality of the law under Section 2 of the Voting Rights Act.<sup>291</sup> Also, North Carolina Attorney General Roy Cooper urged Governor McCrory to veto the law, arguing in a letter that the ID provisions would be, "unnecessary, expensive and burdensome,"<sup>292</sup> possibly both to voters and to poll workers.

#### 4. *Scholars Identify Difficult to Administer Laws as a Contributor to Poll Worker Error*

Some scholars have also concluded that voter ID laws have the potential to exacerbate poll worker error. Antony Page and Michael Pitts

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284. *Id.*

285. *Errors at Polls Lead to Worker Retraining: Hamilton Count also 'Retires' 163*, THE COLUMBUS DISPATCH (Aug. 16, 2013, 7:35 AM), <http://www.dispatch.com/content/stories/local/2013/08/16/errors-at-polls-lead-to-worker-retraining.html>.

286. \_\_U.S.\_\_, 133 S. Ct. 2612 (2013).

287. *Id.* at 2631.

288. See HB 589, 2013 N.C. Sess. Laws 381; see also Legislative History to HB 589, available at <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=h589>.

289. See Complaint at 18–19, United States v. North Carolina, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

290. See, e.g., *id.* at 19.

291. See *id.*

292. Letter from Attorney General Roy Cooper to Governor Pat McCrory (July 26, 2013), available at <http://www.ncdoj.gov/getdoc/be3caa6e-d2c3-49ba-a32a-06cdb9772293/voting-restrictions-letter.aspx>.

discuss discretion and error at length in their article on election administration and the problem of implicit bias.<sup>293</sup> Page and Pitts—like this author—argue that voter ID laws like Indiana’s give poll workers too much discretion in determining which voters can vote a regular ballot versus a provisional ballot. They also argue that such discretion opens the door for implicit bias and error in the polling place.<sup>294</sup>

Professors R. Michael Alvarez and Thad E. Hall also conclude that poll worker error can be linked to complicated election administration schemes.<sup>295</sup> Alvarez and Hall explore election administration through the lens of principal-agent theory.<sup>296</sup> Principal-agent theory examines “the problems associated with management and administration in a decentralized environment,”<sup>297</sup> and seeks to describe some of the problems associated with delegation. A principal delegates to an agent by hiring an agent to perform a specific task that the principal does not have the capacity to perform herself.<sup>298</sup> Problems arise because, “just as principals cannot do the task themselves, they often have difficulty knowing if they hired the right person and whether the task is being accomplished appropriately.”<sup>299</sup>

This problem can be particularly acute in election administration. Professional election staff must hire poll workers as agents to administer elections on Election Day because professional staff do not have the capacity to meet the needs of every voter.<sup>300</sup> However, professional staff members do not always have the capacity to screen poll workers and oversee the activity of poll workers in their jurisdictions.<sup>301</sup> Largely because professional election staff must delegate to poll workers, in many jurisdictions, “poll workers end up with a vast degree of discretionary authority [on Election Day] . . . [and] there is little oversight possible and few incentives available to keep poll workers from exercising their discretion.”<sup>302</sup> Alvarez and Hall document several

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293. See generally Page & Pitts, *supra* note 143, at 8–21.

294. See *id.* at 39 (noting that unconscious bias may “play a role in the interaction between prospective voters and poll workers. The quick, discretionary decisions made by poll workers where they have few points of individuating information may result in poll workers making choices that exclude African Americans and other ethnic minorities who should be allowed to cast ballots.”).

295. Alvarez & Hall, *supra* note 123.

296. See *id.*

297. *Id.* at 492 (footnote omitted).

298. *Id.*

299. *Id.*

300. See *supra* notes 156–59 and accompanying text.

301. *Id.* at 495–96.

302. *Id.* at 496.

circumstances in which poll workers used their discretion to implement voting laws incorrectly.<sup>303</sup> Based on these examples, they conclude that “poll worker errors can have dramatic consequences.”<sup>304</sup>

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Election administration laws that are difficult to implement can create opportunities for poll worker errors on Election Day. These errors may disenfranchise voters and impact the outcome of close elections. Voter ID laws are a prime example of such difficult-to-administer regulations for several reasons. First, when administering ambiguously worded laws, poll workers may have to use discretion to determine if a voter presents proper identification, or whether the name on a voter’s ID matches that listed in the poll books. Though poll worker discretion does not invariably lead to poll worker error, scholars argue that poll workers make more errors when forced to interpret ambiguous laws.<sup>305</sup> Second, voter identification laws are subject to repeated challenge—often during election season—and the status of the laws can be in flux on Election Day. This uncertainty has proven to confuse poll workers, often to the detriment of the voter.<sup>306</sup> Finally, the analogy to *Hunter* and *Husted* shows that even relatively simple poll worker responsibilities, such as directing a voter to the proper precinct or verifying that voter’s identification, may prove difficult during the stresses of Election Day.<sup>307</sup>

Having shown that poll worker error is a problem that is exacerbated, at least in part, by hard-to-administer voter ID laws, this Comment now argues that courts should consider poll worker error as a burden on voters when evaluating voter ID laws.

#### IV. COURTS SHOULD CONSIDER POLL WORKER ERROR WHEN EVALUATING WHETHER A VOTER ID LAW UNCONSTITUTIONALLY BURDENS THE RIGHT TO VOTE

This Comment has explored how voter ID laws are among the complicated voting procedures that create an election system ripe for poll worker error. Specifically, Part III showed that the complicated nature of voter ID laws may contribute to poll worker error in administering these laws.<sup>308</sup> Part III also used lessons from Ohio in the

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303. *Id.* at 497.

304. *Id.*

305. *See, e.g.,* Page & Pitts, *supra* note 143, at 5–6.

306. *See supra* Part III.

307. *See supra* Part III.

308. *See supra* Part III.

2008 and 2010 elections to demonstrate that poll worker error can cause widespread voter disenfranchisement, affecting people's right to vote and potentially impacting the outcome of close elections.<sup>309</sup>

In this Part, this Comment argues that courts should consider poll worker error as a burden on voters when evaluating the constitutionality of difficult-to-administer election laws such as voter ID laws. By acknowledging that poll worker error burdens the right to vote, and that the complexity of voter ID laws exacerbates this burden, courts will conduct a more robust analysis of the constitutionality of voter ID laws. This argument does not reject the Supreme Court's test for evaluating whether state election administration laws are unconstitutional.<sup>310</sup> Rather, it suggests that the Supreme Court has misapplied this test to voter ID laws. By resisting a searching inquiry into how these laws burden voters on the day of an election, the Supreme Court's burdens analysis in *Crawford*<sup>311</sup> was impermissibly cursory.

But there is hope. Justice Stevens, the author of the majority opinion in *Crawford*, left open the possibility for plaintiffs opposing voter ID laws to bring a future challenge to those laws in the form of an "as applied challenge."<sup>312</sup> With six years of hindsight since *Crawford*—including several election cycles with voters in many states living under a voter ID regime—the time may be ripe for plaintiffs to bring such a challenge. If they do, litigants should assert, and courts should consider, poll worker error as a burden on the right to vote.

A. *The Crawford Court Overlooked an Important Burden on the Voter: The Potential for Poll Worker Error*

As discussed in Part I.C., the Supreme Court upheld Indiana's voter ID law in *Crawford v. Marion County Elections Board*.<sup>313</sup> In *Crawford*, the Court applied the *Anderson/Burdick* test to determine whether Indiana's law unconstitutionally burdened the right to vote.<sup>314</sup> In its analysis, the Court considered the law's likely burden on voters and compared that burden to the state's interests in requiring voters to

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309. *See supra* Part III.C.

310. *See generally* *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

311. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

312. *Id.* at 200.

313. *Id.*

314. *See id.* at 189–91.

present photo identification in order to vote.<sup>315</sup> But the Court overlooked an important category of burden—likely poll worker error.

In *Crawford*, the Supreme Court emphasized that *Anderson* and *Burdick* create a sliding scale of means-ends analysis, depending on the severity of the law's burden on voters.<sup>316</sup> Accordingly, facially neutral laws—like Indiana's voter identification law—may warrant increased scrutiny if those laws unduly burden the right to vote.<sup>317</sup> For that reason, whether and how an election law burdens voters' First and Fourteenth Amendment rights is of critical importance to a court's constitutional inquiry. By extension, how a court identifies a law's burden on voters, and what burdens the court considers important, are also of critical importance.

Nevertheless, the lead opinion's burdens analysis in *Crawford* was severely limited.<sup>318</sup> In it, Justice Stevens focused exclusively on the difficulty—or lack thereof—of voters showing their ID at the polls<sup>319</sup> or obtaining photo identification.<sup>320</sup> While he noted that “[a] photo identification requirement imposes some burdens on voters that other methods of identification do not share . . . ,”<sup>321</sup> Justice Stevens held that such burdens are not so significant that the law imposing them must be narrowly tailored to a compelling state interest.<sup>322</sup> For those voters not possessing a photo ID, Justice Stevens similarly concluded that “the inconvenience of making a trip to the [bureau of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”<sup>323</sup>

By focusing only on the potential difficulty in showing or obtaining an ID, Justice Stevens overlooked an important category of burden—likely poll worker error. Voter ID laws can exacerbate poll worker error, and the potential for poll worker error burdens voters as a whole by making it more difficult—or impossible—for a voter to vote

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315. *See id.* at 198–200.

316. *Id.* at 190–91; *see also* DIMINIO ET AL., *supra* note 23, at 556.

317. *See* NEOCH v. Husted, 696 F.3d 580, 592 (6th Cir. 2012) (explaining the “flexible” *Anderson/Burdick* test as it applies to facially neutral statutes); DIMINIO ET AL., *supra* note 23, at 556.

318. *Crawford*, 553 U.S. at 197–99.

319. *Id.* at 197.

320. *Id.* at 199.

321. *Id.* at 197.

322. *See id.*

323. *Id.* at 198.

effectively.<sup>324</sup> Courts should consider this burden when analyzing whether these laws are constitutional under the *Anderson/Burdick* test.

The forgoing Parts demonstrate several ways that voter ID laws can exacerbate poll worker error. For example, voter ID laws like Indiana's can give poll workers discretion to determine who exercises the franchise.<sup>325</sup> These laws are also frequently subject to legal challenge that can confuse poll workers about the law's status on Election Day.<sup>326</sup> Furthermore, Ohio's provisional balloting law shows that poll workers may have difficulty administering complicated election administration statutes.<sup>327</sup>

Poll worker error can disenfranchise voters in a number of ways.<sup>328</sup> When checking a voter's identification, a poll worker may fail to match that identification with the voter's name in the poll book.<sup>329</sup> Similarly, the poll worker may be unclear about the types of identification that their jurisdictions accept.<sup>330</sup> Finally, poll workers may be unsure about the status of the law in their jurisdiction.<sup>331</sup> Poll workers may ask for identification when none is required, or poll workers may not know that prior to the election a judge stayed the voter ID law in that jurisdiction.<sup>332</sup> In all of these circumstances, a poll worker may refuse to permit a voter to vote, or may require her to cast a provisional ballot.

By potentially disenfranchising voters, poll worker error impacts "the [Fourteenth Amendment] right of qualified voters, regardless of their political persuasion, to cast their votes effectively."<sup>333</sup> As the court recognized in *Anderson v. Celebrezze*, this impact is cognizable as a burden on voters as a whole.<sup>334</sup>

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324. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

325. *See supra* Part III.A.

326. *See supra* Part III.B.

327. *See supra* Part III.C.

328. *See supra* Part III.

329. *See supra* Part III.A.

330. *See supra* Part III.D.3.

331. *See supra* Part III.D.3.

332. *See supra* Part III.D.3.

333. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

334. *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (citing *Williams*, 393 U.S. at 30–31).

*B. In Future Challenges to Voter ID Laws, Litigants Should Argue—  
and Courts Should Consider—Poll Worker Error as a Burden on  
Voters*

Courts should consider poll worker error when evaluating whether voter identification laws are constitutional under the *Anderson/Burdick* test. Doing so would make the burden analysis much more complete: not only would courts consider the law's ex ante burdens on voters—for example, the difficulty for some voters of securing photo identification—courts would also consider the law's post hoc burdens. Among those post hoc burdens are that voter ID laws are difficult to administer and can cause poll worker error.

The lead opinion in *Crawford* leaves room for a more robust burdens analysis in future decisions. While rejecting *Crawford*'s facial challenge to Indiana's voter identification law, Justice Stevens intimated that the Court would be willing to entertain future as-applied challenges to similar laws.<sup>335</sup> In such challenges, courts could apply a more robust analysis based on evidence that voter ID laws exacerbate poll worker error and that poll worker error burdens the right to vote.

Courts reviewing challenges to voter ID laws should undertake the following analysis. First, courts should consider whether the voter ID law under review burdens voters in the manner identified by the Court in *Crawford*. Accordingly, courts should consider whether the voter identification law “imposes some burdens on voters that other methods of identification do not share” such as “[b]urdens of [the] sort arising from life's vagaries. . .”<sup>336</sup> Courts should also consider whether the voter ID law burdens a discrete segment of voters, such as those who do not possess an accepted form of photo identification.<sup>337</sup> Second, courts should consider whether poll workers are likely to have difficulty administering the law in question, and whether that difficulty may be likely to contribute to poll worker error. Courts may conduct this analysis by looking at the administration of laws similar to the one in question, scholarship analyzing the impact of voter ID laws, or voters' and poll workers' experiences under a similar regulatory regime.<sup>338</sup>

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335. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008).

336. *Id.* at 197.

337. *Id.* at 200–02.

338. This Comment does not argue that the Supreme Court necessarily would have reached a different conclusion in *Crawford* if the Justices had considered poll worker error as a likely burden on voters. Nor does it argue that voter ID laws such as Indiana's necessarily are unconstitutional because poll workers have difficulty administering them. Rather, the Comment argues that courts considering the constitutionality of voter identification laws should broaden the scope of their

As discussed above, the current burden analysis in the *Crawford* lead opinion is limited to a few sentences.<sup>339</sup> A court conducting a richer burdens analysis, one that includes consideration of poll worker error, would perhaps go on to say the following:

Although burdens arising from life's vagaries are neither so serious nor so frequent as to require a remedy, research and common sense show that the impact of voter identification laws is not limited to these kinds of burdens. Indiana's law burdens voters by contributing to a day-of election administration system that is ripe for poll worker error. Indiana's law allocates the responsibility of checking identification to poll workers. These individuals may not have the training or experience to evaluate whether the identification a voter offers complies with the law. Poll workers may also lack the time or patience to discern whether the name on a voter's ID matches the name that is listed on the voting rolls. Also, misinformation in the media about voter identification requirements may lead poll workers to be stricter than the law requires. Finally, poll workers that are tired from a long day and feel stressed by long lines may be more prone to error checking identification. This potential for poll worker error is a burden on Indiana voters' Fourteenth Amendment rights to "cast their votes effectively." We must weigh this burden—together with the burdens identified above—against the state's specific, identifiable interest in passing the law.

This analysis would track the courts' consideration of poll worker error in *NEOCH v. Husted*. In that case, the district court initially concluded that poll workers made enough errors administering Ohio's provisional balloting law as to unconstitutionally burden Ohio voters' right to vote.<sup>340</sup> Considering this burden in light of Ohio's interest in maintaining its precinct-based provisional ballot system, the district court concluded that the likely burden on voters outweighed the benefits of the law.<sup>341</sup> The Sixth Circuit upheld this finding, noting that, "the summary rejection of poll-worker-induced right-place/wrong-precinct ballots. . . ." was a substantial burden on voters.<sup>342</sup> Otherwise stated, the Sixth Circuit held that poll worker error caused by complicated,

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burdens analysis to include consideration of poll worker error.

339. *Crawford*, 553 U.S. at 197.

340. *NEOCH v. Husted*, 696 F.3d 580, 586 (2012).

341. *Id.* at 587 (citation omitted).

342. *Id.* at 597.

difficult-to-administer laws was a substantial burden on voters. The same could hold true for voter ID laws: the complexity of such laws make them difficult to administer and may create a high instance of poll worker error. Such error—like the error identified in *Husted*—may be a severe burden on voters.

## CONCLUSION

As of this writing, nineteen states have enacted laws that require individuals to present a piece of photo identification in order to vote. Those who do not present ID, do not present the proper ID, whose name listed in the voting rolls does not match that listed on their ID, or are otherwise deemed by a poll worker to be unqualified to vote, must cast a provisional ballot instead of a regular ballot. States count provisional ballots much less frequently than regular ballots, often for reasons unrelated to voter qualification. For this reason, voting a provisional ballot is an inadequate substitute for voting a regular ballot.

In *Crawford v. Marion County Elections Board* the Supreme Court verified the constitutionality of Indiana's voter identification law, in part because it determined that Indiana's law poses a minimal burden on voters. Six years of hindsight show that the Court's burdens analysis in *Crawford* was inadequate.

Moving forward, courts considering the constitutionality of voter identification should go beyond the *Crawford* burden analysis: courts should consider the likelihood that voter identification laws will contribute to poll worker error as a burden on voters. Doing so will give courts a richer view of how voter identification laws actually impact voters, thus making the court's application of the *Anderson/Burdick* balancing test more accurate. By conducting a more robust—and therefore more realistic—burdens analysis, courts will better protect the right to vote guaranteed by the First and Fourteenth amendments against impermissible restriction by the states.