Crawford v. Marion County Election Board: *An Assessment through the Frame of Democratic Theory*

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Introduction

Within democratic theory, the proper relations between a state and its citizens has spurred considerable debate. A common method of assessing this has been to situate boundaries—that is, to delineate borders between the domain of the governmental enterprise and that of the private individual with his or her respective interests and initiatives. Philosopher John Rawls established a now-normative tradition of this sort in his appeal to political liberalism. Specifically, he states that the state ought to refrain from favoring some citizens' conceptions of the good life at the expense of other citizens' understandings.[1] The government must maintain a position of neutrality, and, accordingly, must only pursue policies which can equitably accommodate all possible preferences and partialities.[2] In the United States, this standard has been sacralized in the Fourteenth Amendment of the Constitution in the right to an "equal protection of the laws."[3] It has been upheld in hundreds of United States Supreme Court rulings, demonstrating remarkable salience even across a wide variety of cases and contestations. Notably, most rulings focused on consequent disparities between the treatment of citizens as a matter of political neutrality, rather than on any individual citizen's consequent burdens from any political actions. This focus on the *character* of the governmental action (rather than on its extent) is of utmost importance in that it offers to generate better outcomes for lived society, where it is observed that citizens mind encumbrances only to the extent that they are not discriminately encumbered.[4] I contend that this is especially true in considering a central democratic process: electoral procedures. It has been established in the long legal trajectory of the franchise that voters desire equal rights, those Fourteenth Amendment securements of "one vote, [per] one person."[5] In this paper, I will extend this reasoning to the recent voting-rights case, *Crawford v. Marion County Election Board (2008)*. In the case, the United States Supreme Court decided that voter (photo) identification requirements in Indiana were constitutional. However, they did so under considerations of undue burden, rather than equal protection. This incongruent judicial thinking yielded an even more discordant result. In this paper, I will canvass the case and reframe it within the more appropriate Fourteenth Amendment analysis, utilizing the stare decisis of *Yick Wo v. Hopkins (1886)* and *Harper v. Virginia State Board of Elections (1966)*. I will ultimately imply that, under this evaluation, the decision would have been unaccepting of identification requirements as they would pose a concern about political neutrality in terms of classist discrimination. Such a challenge is, in my view, absolutely necessary in order to secure proclaimed American democratic ideals.

[1] John Rawls, *Political Liberalism*, The John Dewey Essays in Philosophy, No 4. (New York: Columbia University Press, 1993), 145.

[2] Some might hold that Rawlsian philosophy does not encourage blank neutrality, but rather, a multi-partiality which recognizes internal pluralism.

[3] U.S. Const. amend. XIV, sec. 1.

[4] It is noted that this distinction alone could ferment a significant debate within political philosophy. One might claim, in counterargument, that (1) it is just as important to demarcate the boundaries of an individual's privacy against personal investigation (such as policing pat-downs or car-searches) by the State as a general standard; and (2) that this pertinence is not enhanced or otherwise elevated by a concern that certain individuals or communities (those of color, for instance), will be disproportionately affected by such State-Citizen regulative boundaries. For this paper's purposes, I argue that discriminatory treatment between citizens is more compelling than a citizen's theoretical burden in this specific case and similar cases.

[5] Reynolds v. Sims, 377 U.S. 533 (1964).

Case Overview: Crawford v. Marion County Election Board (2008)

To begin, I will examine *Crawford v. Marion County Election Board (2008)*. The case responds to the 2005 Indiana Legislature's Election Law SEA 483, colloquially called the "Voter ID Law." Petitioners included the Indiana Democratic Party, Marion County Democratic Party, and several non-profit organizations representing the elderly, disabled, poor, and minority voters. Together, they alleged that the law violates the Fourteenth Amendment in its substantial burden on the citizens of Indiana. They dispute the government action as an invasive one, penetrating into the realm of the private citizen by mandating certain imperatives (namely, the obligation to obtain and later present a form of photo identification). Such an accusation necessitates the legal calculus of determining whether the State's actions were justified by some relevant and legitimate interests, which could be "sufficiently weighty to justify" the citizens' burden.[6] In the Majority Opinion, Justice Stevens refers to this as "a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity."[7] In recognition of this task, he lists those "broad interests" of the Indiana Legislature, which include the management of voter fraud (comparable to the aforementioned election integrity), which concurrently inspires public confidence and participation in the election process. According to Stevens, democratic participation is held to have "independent significance," which ultimately quashes any worries about voters' burdens, and thus upholds the Indiana voter ID law. The Concurring Opinion additionally holds that the citizens' protest is minor in comparison to the overarching governmental objective. Thus, both analyses purport to follow in the precedent of *Burdick v. Takushi (1992)*, in which "the rigorousness of [the Supreme Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights"; that is, they both leverage a comparative, "balancing" analysis.[8,9]

Before I analyze the central concerns of the case through the lens of the Fourteenth Amendment, it is important to note a few vulnerabilities within the original analysis of the case. In the Majority Opinion, Justice Stevens elevates the Indiana Legislature's interest by matching it with two federal bills, the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. He indicates that while these two initiatives did not expressly require Indiana to develop their electoral requirements, the Indiana Legislature was likely inspired by their effort to stimulate civil participation. Justice Stevens thus concludes that the Indiana effort is related to the enhancement of democratic engagement. This conclusion is questionable on conceptual and practical grounds. Firstly, it is concerning that Justice Stevens assumes the court's efforts are definitively related to preceding legislative endeavors. In fact, they may be actually consequences of other unrelated and even potentially contrary motivations. Beyond this, the ruling does not address the practicalities of the Indiana voting situation. Additional prerequisites for any activity make it more difficult to complete that activity. While Indiana's voter ID laws, whether justified or not, clearly make civil participation less accessible, the Majority opinion claims that the dominating state interest is in broadening the exercise of the franchise. Thus, there are clear discrepancies in Stevens' assessment of the state's motivations.[10] On the opposite end, there are also obvious inconsistencies in reference to the "citizen" and the corresponding

[6] Norman v. Reed, 502 US 279 (1992)—quoted in Crawford v. Marion County Election Board, 553 US 181 (2008).

[7] Crawford v. Marion County Election Board, 553 US 181 (2008).

[8] Burdick v. Takushi, 504 U.S. 428 (1992).

[9] This practical calculus of "balancing" efforts fits well within contemporary intellectual discussions on rights. Philosopher James Nickel, in his *Making Sense of Human Rights*, holds that basic human rights (taken to be plural) must be balanced between and against each other. This "balancing" prioritizes rights by any single individual, between two or more individuals, or between one or more individuals and their governing institutions.

[10] It also does not pursue any consequentialist thinking (reflections on the repercussions of such laws). However, this absence of consideration might be easily excused by upholding the legal doctrine that such consequentialism is unwelcome in judicial deliberation.

burden. In the Majority Opinion, Justice Stevens oscillates between considering the burden upon three bodies: the whole Indiana citizenry, writ large; a portion of that populace, a "recognizable segment of potential eligible voters"; and the individual voter.[11] Theoretically, the corresponding burden would be different on each of these levels, and so in failing to clearly reference one or another body, the Majority Opinion does a disservice to the potential dimensions of those burden(s). It also stifles the appellants' ability to indicate appropriate correlative remedies, which, it is stated, "have not been properly demonstrated."[12] In his Concurring Opinion, Justice Scalia offers an alternative to this inconsistency by declaring the Indiana Legislation a "generally applicable, nondiscriminatory voting regulation," which sets standards for the whole citizenry of the state. He goes on to specify that while "the Indiana law affects different voters differently, what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters. To vote in person in Indiana, *everyone* must have and present a photo identification... The State draws no classifications."[13] To restate, Scalia holds that the burden is one distributed to the whole of the populace and is simply experienced differently by different voters. With the harm thus portrayed, Scalia deems it minimal and not significantly more challenging than the usual voting requirements. In this way, he concurs that the state's interests are compelling and dominant. While this portrayal of the burden does give it a consistency that is absent in the Majority Opinion, it also invites a new level of assessment: the one available within a Fourteenth Amendment equal-protection analysis.

Justification for Alternative Equal Protection Analysis

At this juncture, one might question my motivation for such a shift in deliberation. If the United States Supreme Court understood the Indiana voter ID law to be justified under burden-based constitutional considerations, why ponder it further under other clauses? To this query, I respond that such a discursive technique is of paramount importance to legal justifications. Oftentimes, a case will invite comments from multiple angles and, in pursuing such commentary, the Court is able to construct robust interpretations of the Constitution, filling in both hypothetical blanks and application-based queries through multiple analyses. Furthermore, often by referencing other aspects of the Constitution, one is empowered to take a multi-perspectival account of the issue at task. Consider, for instance, Justice Kennedy's recent statements in the *Gill v. Whitford (2017)* oral arguments, that another constitutional provision might be utilized in consideration of partisan gerrymandering. He recommends shifting from the Fourteenth Amendment frame of analysis to that of the First Amendment. This would enable the Court to consider "not the permissibility of an enactment's classifications, but whether a generally permissible classification has been used for an impermissible purpose."[14] Such an open-minded, considerate attitude toward jurisprudence indubitably fosters more developed, nuanced legal outcomes. And this can only bolster the legitimacy of the judiciary. Thus, it is certainly more than warranted to resituate *Crawford* within an explicit equal-protection analysis.

In his Concurring Opinion, Justice Scalia ultimately asserts that a voter's claim of disproportionate treatment by some law does not yield the law's unconstitutionality, as long as it is authored to be universally applicable. Put otherwise, without proof of discriminatory intent in its original articulation, no regulation can be challenged as violative of the Fourteenth Amendment. Is this true of equal protection precedent? Such a broad question would require a legal review of hundreds of cases, but I will attend to one case in particular which has become a cornerstone of equal protection thinking and a verified legacy of the judiciary. This case is *Yick Wo v. Hopkins (1886)*. While one might be displeased by such a selection and might accuse it of being biased towards my ends, I retort that *Yick Wo* continues to be held as valid legal precedent, and, furthermore, is a guiding principle for American political philosophy. Such a choice is

[11] Crawford v. Marion County Election Board, 553 US 181 (2008).

[12] Ibid.

[13] Ibid.

14 Vieth v. Jubelirer, 541 U.S. 267 (2004).

therefore not predisposed to any conclusions except those that are in line with our unique democratic culture. Yet, while the case is a very appropriate one in terms of the overarching political philosophy, its specific contents do not pertain to voting rights exclusively, and so I will also review a second case—*Harper v. Virginia Bd. of Elections (1966)*—which more closely resembles the electoral contingencies and contestations at task. In fact, with its discussion of voting eligibility requirements, it is as close to the topic of voter identification eligibility requirements as conceptually possible. It is frequently cited within the voting rights domain, and it continues to hold *stare decisis* stature. After an investigation of both cases and their conclusions, I will calibrate their implications to reframe the consideration of *Crawford*.

Yick Wo v. Hopkins (1886)

Thus, to begin, *Yick Wo v. Hopkins (1886)* emerged in California after Chinese laundromat owners Yick Wo and Lee Wick were detained for their violation of a San Francisco City Ordinance, which required all "laundry-mats" [sic] in wooden buildings to hold a permit issued by the city's Board of Supervisors. Wo and Wick sued, protesting the discriminatory distribution of those permits. Though 89% of "laundry-mat" businesses in wooden-buildings were owned by Chinese individuals, not a single one was given a permit by the Board. In light of such discriminatory administration, the appellants argued that their Fourteenth Amendment rights to equal treatment had been effectively denied.[15] Markedly, the ordinance itself was, in Justice Scalia's terms, "a generally applicable, nondiscriminatory regulation"; it a perceivably reasonable requirement for operation within an industry and it applied to all relevant businesses within that domain.[16] Does the prejudiced enforcement of the City Ordinance matter? In their unanimous ruling in *Yick Wo*, the Court concluded that it absolutely should. In the Opinion, author Justice Matthews concentrated on the regulation's reality, and ruled that even if the law is impartial or even-handed in script, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[17] Put otherwise, if a State Act is enforced in an equal fashion, the Act is justiciable as a Fourteenth Amendment concern in light of that execution. The ruling effectively denies Justice Scalia's separation of written regulation and actual enforcement, as aforementioned in the Case Overview section. It is important to note that this ruling appealed to originalist sentiment, which argues that the original framers of the Constitution would have not entertained a political philosophy that allowed for such discriminatory administrative discretion. Rather, Justice Matthews wrote that the guiding principles espoused in the Constitution would have presupposed absolute— that is to say, both philosophical and practical—neutrality in State-Citizen relations.

Harper v. Virginia Bd. of Elections (1966)

Eighty years later, this principle was confirmed in the particular context of voting rights in *Harper v. Virginia Bd. of Elections (1966)*. In *Harper*, the constitutionality of poll taxes in the state of Virginia was under deliberation. Ms. Annie Harper filed on behalf of herself and other affected citizens, arguing that access to the franchise should not be conditioned on one's financial capacities. She further charged that such attention to wealth effectively violated the Equal Protection Clause, as it discriminately affected the poorer citizens and communities.[18] In the Majority Opinion, the Court agreed. Justice Douglas further elevated the language of the infraction, stating that "whenever it [the State] makes the affluence of the voter or payment of any fee an electoral standard… it *invidiously* discriminates."[19] That is, it not only mechanistically pursues unequal treatment of citizens, but it conscientiously acts in a harshly prejudiced manner. Such additional requirements were further described as "capricious" and "irrelevant."[20] It is important to note that these

[15] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[16] Crawford v. Marion County Election Board 553 US 181 (2008).

[17] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[18] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[19] Ibid. (Emphasis added)

[20] Ibid.

scathing statements were forwarded within a whole suite of landmark litigation about voting rights in the United States. Just two years earlier, *Reynolds v. Sims (1964)* had pronounced the rule of "one person, one vote," which described the right to the franchise as intrinsic to citizenship. This elevated the matter: "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[21] In application, this means that the claims of Ms. Harper—*and* those of the protestors of Indiana's voter ID legislation—ought be acknowledged. Yet, it does not seem that these claims were fully recognized in *Crawford*.

Fourteenth Amendment Application

For analysis to be developed on this matter, it is important to respond to one additional counter-argument about the two preceding cases and their applicability to *Crawford*. This is the contention that the two cases above are dated from 1886 and 1966, respectively, and that this great temporal distance excuses them from bearing any relevance on the conditions within the 2008 case.[22] If one remains committed to the legal "balancing" strategy, one might hold that the security of democratic participation is more endangered today than previously. Moreover, dicta in *Harper* would support that even the Fourteenth Amendment applicability might have shifted. Justice Douglas wrote that "the Equal Protection Clause is not shackled to the political theory of a particular era... Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."[23] That is, interpretations of Fourteenth Amendment guarantees can evolve to meet the evolved socio-political norms and ideals.[24] While this argument for adaptive capacity is sustained, I still hold that the standards established in the above cases are consistent with the current political philosophy of the Constitution and the cultural landscape. The consistent, broad-based expectation is of political neutrality, more or less as advocated by the Rawlsian doctrine. Consequently, these precedents continue to apply in full force and effect. In particular, the *Yick Wo* rule that the Court must consider administered realities of unequal justice, even if the rule is non-discriminatory on its face, must be applied to the present challenges of *Crawford v. Marion County Election Board (2008)*. In *Crawford*, Justice Scalia claims oppositely that "the Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. A fortiori it does not do so here, [wherein] the classes are complaining of disparate impact."[25] This claim is incompatible with the proper modus operandi of the Fourteenth Amendment precedent. Such incongruence is likely due to the misplaced judicial discourse around "balancing" State-Citizen positions; this, in practice, led to an overemphasis of the State's interests, which were used to the neglect of the Citizens' disparate impacts. In the Majority Opinion of *Crawford*, the esteemed "integrity and reliability of the electoral process itself" were used to justify the voter ID legislation's "even handed restrictions."[26] As aforementioned, per *Yick Wo,* the "even handed restrictions," as discriminately-handled, are actually unconstitutional. Furthermore, per *Harper*, the broader governmental promotion of "interest in civic responsibility" was not valid enough to override Fourteenth Amendment securities. In *Harper*, these claims failed the balancing instrument specifically because the citizen's position was examined not only as a general burden, but as a fully Fourteenth Amendment equal protection concern. This could be similarly done in *Crawford*. In the Dissenting Opinion, Justice Souter notes that "The State's requirements here, that people without cars travel to a motor vehicle registry and that the poor who fail to do that get to their county seats within 10 days of every election, likewise translate into unjustified economic considerations uncomfortably close to the outright $1.50 fee we struck down 42

[21] Reynolds v. Sims, 377 U.S. 533 (1964).

[22] In acknowledging the distance between *Crawford* and *Yick Wo*, it is pertinent to note that *Plessy v. Ferguson (1896)* largely negated what was established in *Yick Wo* very soon after its ruling. In many cases, the stare decisis does not hold, and the impact of *Yick Wo* is much more limited than one might have hoped.

[23] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[24] Note that the term "evolved" is used to indicate shifts which have progressed into the future, not necessarily improvement or linear progression.

[25] Crawford v. Marion County Election Board, 553 US 181 (2008).

[26] Ibid.

years ago." In other words, the Indiana voter ID law imposes wealth-based prejudices akin to those rejected in *Harper*. These constitute invidious, non-neutral State actions. When characterized as such, it is irrelevant how many citizens exactly were disenfranchised by the State's de-privileging of their conception of the good. In the *Crawford* Majority Opinion, Justice Stevens estimated that only "around 43,000 Indiana residents lacked a state-issued driver's license or identification card," and so would be disadvantaged. This obviously affected the burden under consideration and minimized any potential qualms. Alternatively, within equal protection deliberation, the extent or scale of the discrimination is not relevant—the fact that it exists is enough to warrant "careful and meticulous scrutiny," and to ultimately rule the law unconstitutional.[27]

Conclusion and Implications

Thus, it has been comprehensively demonstrated that the Fourteenth Amendment Equal Protection considerations, as forwarded in *Yick Wo* and in *Harper*, would have affected the judiciary's reasoning in *Crawford* by situating its contentions at the crux of disparate treatment by the State. This is to say that the case would have been comprehended within the canon of discrimination stare decisis. Instead, it was canvassed only with respect to interest-burden judicial calculus. The justices punted the claims of differential actualization by attending more attentively to legally-leveraged burdens, those implementations imagined in the initial legislation. Ultimately, I argue that if this had not been the case, the outcome of the *Crawford* would have necessarily been different. And, in a broad view, it could have subsequently fostered a completely transformed practical voting situation in state and federal elections. This redefined reality would be closer to the quintessential democratic ideals promulgated by American political philosophy, as articulated by John Rawls and countless others.

In the contemporary political landscape of the United States, representation is not a singular concern about one individual's capacity within a state, but, rather, something evaluated in conjunction and in comparison with the capacities of fellow citizens. The American socio-political fabric is premised on and emphasizes a broad scope of equitable participation by its citizens, and so the lack of judicial attention to this central value is deeply troubling. Alas, the work from idealism to actuality continues.

[27] Reynolds v. Sims, 377 U.S. 533 (1964).

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