The Future of Supreme Court Jurisprudence Concerning the Regulation of Elections in the Wake of *Crawford v. Marion County Election Board*

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Crawford v. Marion County Election Bd.[1] assumes an important place in election law jurisprudence, not only because it is the Supreme Court's most recent review of election laws, but also because the case had been singled out by many academic and non-academic commentators before it was decided as a kind of sequel to *Bush v. Gore*[2]—a litmus test of the current partisan divisions on the federal high court. A number of these commentators attacked the alleged partiality of the lower federal courts previously deciding the matter by emphasizing that the district court judge upholding the law was appointed by a Republican President, the Seventh Circuit Court of Appeals panel affirming the district court's decision was divided along partisan lines, and the subsequent full-circuit court decision denying en banc review of the panel's affirmation was likewise divided. Additional evidence of alleged partisan judging on the issue of voter photo identification laws was found in the 5-2 split decision of the Michigan Supreme Court, in which the court found the state's identification law valid—with all of the Republican justices upholding the requirement and both of the Democratic justices finding it unconstitutional.[3] The subtext of this commentary was that the Indiana photo voter identification statute should be invalidated by the Republican-appointed majority of the Supreme Court to demonstrate the independence and impartiality of the judicial branch of government.

Three elements of the *Crawford* decision were distressing to its critics. *First*, Justice John Paul Stevens, the author of the plurality opinion (actually a 3/3 v. 3 split decision in which six justices agreed that the facial challenge to the Indiana law had not been established), departed from his customary alliance with the Court's liberal side of the bench, and affirmed the Seventh Circuit's and district court's decisions. *Second*, seven of the nine justices (including traditionally liberal-leaning Justices Stevens and Stephen Breyer) rejected the claim that Indiana had not established a sufficiently compelling governmental interest to justify requiring an Indiana voter to produce a current, government-issued photo identification in order to vote at the polls—relying upon a bi-partisan recommendation of the Carter-Baker Commission on Federal Election Reform (hereinafter "the Carter-Baker report") co-chaired by Democratic former President Jimmy Carter. The Carter-Baker report determined that photo identification was, and should be employed as, a useful tool to protect the integrity of the American electoral process against potential voter fraud.[4] That President Carter, in most other instances liberal on matters of national and international policy, would be the vouchsafe of the photo voter ID movement continues to be a bitter pill for these commentators. *Third*, the *Crawford* plurality opinion rejected a facial challenge to the Indiana law and promoted a more restrained jurisprudence in favor of "as applied," and thus far narrower, challenges to election laws. The *Crawford* majority rejected the reasoning of *Harper v. Virginia State Bd. of Elections*[5] in which the Supreme Court earlier had struck down a state's poll tax as invidious discrimination under the Fourteenth Amendment, broadly rejecting the state's imposition of requirements for voting that went beyond the qualifications of voters. Justice William O. Douglas, writing for the majority, held

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination runs afoul of the Equal Protection Clause.[6]

Future challenges seeking to overturn state statutes concerning elections may not be well-secured by the *Crawford* decision, but may instead still recieve less deferential treatment based upon Justice Douglas's broad brush rejection of state regulations in *Harper*.

I. The Indiana Voter ID Law

In 2005, the State of Indiana enacted Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005 (hereinafter "the Indiana Law"). This law required those individuals voting in person at elections held within the State of Indiana to present photo identification prior to casting their vote. The provisions of the Indiana Law did not include a phase-in period, meaning those provisions took effect immediately upon the adoption of the statute.[7]

To be acceptable under the Indiana Law, identification must include the following: (1) a photograph of the individual to whom the "proof of identification" was issued; (2) the name of the individual to whom the document was issued, which "conforms to the name in the individual's voter registration record"; (3) an expiration date; (4) the identification must be current or have expired after the date of the most recent general election; and (5) the "proof of identification" must have been "issued by the United States or the state of Indiana."[8]

The photo ID requirement of the Indiana Law does not apply to everyone. Persons living and voting in a state-licensed facility, such as a nursing home, are not subject to the requirement.[9] Additionally, a voter who does not have photo identification due to indigency or a religious objection against being photographed may cast a provisional ballot.[10] The provisional ballot will be counted if that voter executes an appropriate affidavit before the circuit court clerk within 10 days following the election.[11] In the affidavit, the voter must affirm that he is the same individual who cast the provisional ballot on election day; and does not possess photo identification because either (1) he is indigent and unable to obtain proof of identification without paying a fee; or 2) has a religious objection to being photographed.[12]

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Similarly, if a voter posses photo identification but is unable to present that identification at the polls, that voter may also file a provisional ballot that will be counted if he produces the photo identification to the county circuit clerk's office within 10 days.[13]

Finally, if a voter casts a provisional ballot and later produces their photo identification or executes an affidavit of indigency or religious objection as set forth above, the election board is required to find the provisional ballot valid if the only current objection to the provisional ballot is the voter's failure to have produced photo identification at the polls.[14] However, the election board may still reject the vote if it determines that the voter is not a legitimately qualified, registered voter of the jurisdiction for other reasons.[15]

In conjunction with the Indiana Law, the State of Indiana also enacted legislation eliminating any fees associated with obtaining state-issued identification for individuals without a driver's license, who are at least 18 years of age and able to establish their residency and identity.[16] In order to establish their residency and identity, a voter must provide the following documents: (1) one "primary document,"[17] one "secondary document,"[18] and one "proof of Indiana residency;" or (2) two "primary documents" and one "proof of Indiana residency."[19]

II. The *Crawford v. Marion County Election Board* Litigation

A. The District Court Decision

Soon after the enactment of the Indiana Law, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit in the Federal District Court for the Southern District of Indiana against state officials charged with enforcing the law.[20] The complaint sought injunctive and declaratory relief against the Indiana Law, alleging that the law was facially unconstitutional pursuant to the First and Fourteenth Amendments to the United States Constitution.[21] This case was consolidated with a similar suit later filed by elected officials and nonprofit organizations representing groups of elderly, disabled, poor, and minority voters in Indiana.[22] The State of Indiana intervened in the matter as a defendant.[23] Judge Sarah Evans Barker presided over the case.[24]

The consolidated complaints alleged that the Indiana Law unconstitutionally burdens the right to vote.[25] Additionally, the complaints alleged that the law impermissibly discriminated between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new and material requirement for voting in violation of the Indiana state constitution, and was not justified by existing circumstances or evidence.[26] In opposition, the State of Indiana and its co-defendants (hereinafter "State of Indiana") defended the Indiana Law as a justified legislative concern for preventing in-person voting fraud, and a reasonable exercise of the state's constitutional power to regulate the time, place, and manner of elections.[27]

The parties engaged in significant discovery in the matter. The discovery included an admission by the State of Indiana that "the State of Indiana is not aware of any incidents or person attempting vote, or voting, at a voting place with fraudulent or otherwise false identification."[28] The discovery further showed that no voter in Indiana history had ever been formally charged with any sort of crime related to impersonating someone else for purposes of voting.[29]

On the other hand, the discovery did include evidence of allegations and instances of in-person voter fraud in several other states, including a 1994 case in California; 14 dead people voting at the polls in a 2000 St. Louis, Missouri election; 19 ballots cast by dead voters, 6 double votes, and 77 votes unaccounted for in the State of Washington's 2004 gubernatorial elections; instances of persons voting twice by using fake names and addresses in the 2004 elections in Wisconsin; instances of citizens telling investigators that they did not vote in those same Wisconsin elections, even though the official elections report showed that someone voted in their names; and several others examples of voter identification fraud.[30] Additionally, the discovery included evidence of absentee voter fraud in Indiana itself, and that pervasive fraud regarding absentee balloting led the Indiana Supreme Court to vacate the results of a mayoral election in East Chicago.[31]

Besides voter fraud, the discovery revealed that Indiana's voter registration rolls were significantly inflated at the time, with at least 35,699 registered voters who were deceased and 233,519 potential duplicate voter registrations of the same person in different areas of the state.[32]

Finally, the discovery included several public opinion polls indicating voter concern about election fraud and support for photo identification requirements at the polls. Prior to the 2000 election, a Rasmussen Reports poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. Similarly, a Gallup Poll showed that after the 2000 elections 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. A Rasmussen Reports 2004 survey of 1000 likely voters indicated that 82% of respondents favored photo identification at the polls.[33]

One piece of discovery that was rejected by the district court was an expert analysis report prepared by Kimball W. Brace Election Data Services, Inc. which indicated that many voters would be disenfranchised by the Indiana Law.[34] The report was rejected for several analytical deficiencies.[35] To this end, no evidence was submitted into discovery exemplifying how any individual is unable to vote under the Indiana Law.[36] Likewise, the discovery did not include any statistics or aggregate data indicating particular groups who are unable to vote.[37]

After discovery, the parties filed cross-motions for summary judgment.[38] Focusing on the fact that the complainants had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements," and that "an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483," the district court judge found that the governmental interest in protecting against voter fraud outweighed any minimal infringements upon the right to vote.[39] The district court likewise rejected the other causes of action set forth by complainants, and granted summary judgment on behalf of the State of Indiana.[40]

B. The Seventh Circuit Decisions

The complainants appealed the district court decision to the federal Seventh Circuit Court of Appeals.[41] The appellate

court's majority opinion, written by Judge Richard A. Posner and joined by Judge Diane S. Sykes, affirmed the district court's order.[42] The majority opinion found that the importance of preventing voter fraud outweighed the negative result of a few instances of voters disenfranchising themselves by deciding not to satisfy the requirements of the new law.[43] In doing so, the appellate court accepted the district court's discounting of the expert analysis by Kimball W. Brace, and rationalized that the reason Indiana had no documented history of voter identification fraud was not necessarily the result of it not occurring, but rather the lack or difficulty of enforcement under the previous law which did not require photo identification.[44] The appellate court also summarily affirmed the district court's decision on the other causes of action.[45]

The full Seventh Circuit Court of Appeals later denied the complainants' petition for rehearing with suggestion for rehearing en banc.[46]

C. The United States Supreme Court Decision

The Supreme Court affirmed the decisions of the district and circuit courts in *Crawford v. Marion County Election Bd.*[47] The justices issued four separate opinions in the case. As evidenced below, seven of the nine justices found the governmental interest in preventing voter fraud at the polls sufficiently important to allow for some form of photo identification requirement. Of these seven, six justices determined that the Indiana Law itself was constitutional. However, these six justices split on the decision of whether the Indiana Law was constitutional in the abstract, or whether it was merely constitutional because the complainants had failed to provide sufficient evidence to convince them that the Indiana Law caused an unconstitutionally severe burden on the right to vote upon a substantial subgroup of the voting population—thus leaving open the opportunity for further litigation in this matter should such sufficient evidence later arise.

1. The Plurality Opinion of Justices Stevens and Kennedy and Chief Justice Roberts

The opinion of the Supreme Court was authored by Justice John Paul Stevens, and joined by Chief Justice John Roberts and Justice Anthony Kennedy (hereinafter "the plurality opinion"). The first issue confronted by the plurality opinion was the proper standard of judicial scrutiny. Reviewing past Supreme Court decisions in voting rights matters, the plurality opinion explained that restrictions on the right to vote were "invidious" and subject to the highest level of judicial scrutiny if the restrictions were unrelated to voter qualifications, i.e., poll taxes which related to a voter's affluence rather than their qualifications as a voter.[48] On the other hand, recognizing its precedent set forth in *Anderson v. Celebrezze,*[49] the plurality opinion noted that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not inherently invidious and pass constitutional muster if a court makes the "hard judgment" that the governmental justification for the restriction outweighs the burden imposed by the law.[50] "[A] court evaluating a constitutional challenge to an election regulation weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"[51]

After applying the *Anderson* "balancing approach" to the matter, the plurality opinion reviewed three asserted interests proffered by the State of Indiana in defense of its law: 1) deterring and detecting voter fraud; 2) deterring fraud potentially arising from its inflated registration rolls; and 3) safeguarding voter confidence.[52] To the first of these interests, the plurality decision noted that the Carter-Baker report called for photo identification at polls as a means of preventing the real and potentially election-changing problem of voter fraud.[53] Despite the lack of evidence of actual voter identification fraud at the polls in Indiana, the plurality opinion relied upon the evidence of such fraud in other states, finding:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.[54]

As to the second interest of combating voter fraud potentially resulting from inflated voter registration lists, the plurality opinion decided that "[e]ven though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification."[55] Finally, again referencing the Carter-Baker report, the plurality opinion found that the State of Indiana had a legitimate government interest in protecting public confidence in the integrity and legitimacy of elections by requiring photo identification from voters as such confidence "encourages citizen participation in the democratic process."[56]

Having identified the precise interests of the State of Indiana in requiring photo identification at the polls, the plurality opinion then reviewed two separate types of burdens upon the right to vote imposed by the Indiana Law. First, the plurality opinion reviewed the burden imposed upon those who possessed acceptable photo identification but could not produce such identification at the polls. The plurality opinion concluded that the minimal inconvenience of requiring such voter to cast a provisional ballot and subsequently file an affidavit at a later time did not outweigh the governmental interest of deterring and detecting voter fraud.[57]

> [A] voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character.[58]

Next, the plurality opinion addressed the issue of voters who did not possess acceptable photo identification because of indigency, lack of mobility, or other issues. First, the plurality opinion noted that the law would be akin to a poll tax and unconstitutional if acceptable photo identification was not available free of charge.[59]

> The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper* [*v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)], if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, 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.[60]

The plurality opinion recognized that some individuals may have trouble securing the records necessary for attaining free photo identification under the Indiana Law.[61] However, the plurality opinion determined that any such burdens were adequately mitigated by the ability to cast a provisional ballot without photo identification.[62]

> The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.[63]

Nevertheless, despite finding that the State of Indiana had legitimate interests for imposing the photo identification requirement at the polls, and finding that any burdens imposed by the Indiana Law upon segments of the electorate who did not possess acceptable photo identification appeared to have been adequately mitigated by the provisional ballot provisions of the law, the plurality opinion left open the possibility that the law could be found unconstitutional in subsequent litigation should evidence later arise that those provisional ballot provisions did not adequately mitigate any resulting severe burdens.[64] The plurality opinion stated that, based on the record presented in the matter, the Court could only scrutinize the impact of the law on the general population rather than specific subgroups because there had been no evidence proffered regarding the quantity and quality of any extra burden imposed upon a subgroup of the population. Without any evidence of how many qualified voters do not possess acceptable photo identification, and without any evidence of the weight of the burden imposed upon that subgroup, the Court could not judge whether any alleged extra burden imposed upon that segment was "excessively burdensome" rendering the law unconstitutional.[65]

> Petitioners ask this Court, in effect, to perform 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. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.
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> First, the evidence in the record does not provide us with the number of registered voters without photo identification…. Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.
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> …
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> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" When we consider only the statute's broad application to all Indiana voters we conclude that it "imposes only a limited burden on voters' rights." The "'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.[66]

Finally, the plurality opinion noted that even should a future complainant provide evidence that the Indiana Law excessively burdened a substantial percentage of the voting population, such a complainant would also have to proffer sufficient reason why the entire law should be found unconstitutional as opposed to specific provisions or incorporating "as applied" exceptions.[67]

> Finally we note that petitioners have not demonstrated that the proper remedy-even assuming an unjustified burden on some voters-would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.[68]

2. The Concurring Opinion of Justices Scalia, Thomas, and Alito

Justice Antonin Scalia authored a concurring opinion, joined by Justices Clarence Thomas and Samuel Alito. Like the plurality opinion, the concurring opinion recognized that the proper standard for determining the level of judicial scrutiny stemmed from the *Anderson* opinion.[69] However, whereas the plurality opinion viewed the subsequent decision in *Burdick v. Takushi*[70] as merely re-affirming the balancing approach first articulated in *Anderson*, the concurring opinion viewed *Burdick* as newly determining that the severity of burdens imposed by voting regulations are to be determined only as they apply to all subjected voters, not individuals or sub-groups of that universe.[71]

> In the course of concluding that the Hawaii laws at issue in *Burdick* "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote," [citation], we considered the laws and their reasonably foreseeable effect on *voters generally*. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the *Burdick* dissenters, who would have applied strict scrutiny to the laws because of their effect on "some voters."[72]

In addition to scrutinizing the question pursuant to voting rights jurisprudence, the concurring opinion also rejected scrutinizing individual or sub-group burdens under equal protection precedent, finding that such precedent does not invalidate generally applicable laws with disparate impacts lacking discriminatory intent.[73]

> Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, [citation], weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.[74]

Finally, the concurring opinion rejected the notion of allowing "as applied" challenges to photo identification laws by individuals and subgroups incurring exceptional burdens unrealized by the general voting public, as then such laws would be subject to constant litigation.[75]

> This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.[76]

Accordingly, finding the governmental interest sufficient, and citing the plurality opinion's own admission that "[f]or most voters who need them, the inconvenience of making a trip to the BMV, 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," the concurring opinion explained that it would find the Indiana Law constitutional upon that factual finding alone.[77]

3. Justice Breyer's Dissenting Opinion

Justice Stephen Breyer issued a dissenting opinion in *Crawford*. Like that of the plurality and concurring opinions, Justice Breyer agreed that the governmental interest in deterring and detecting voter fraud was sufficient to validate photo identification laws.[78] In doing so, Justice Breyer placed great weight on the Carter-Baker report coming to this same conclusion.

> I give weight to the fact that a national commission, chaired by former President Jimmy Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs. See Report of the Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (Sept.2005) (Carter-Baker Report), App. 136-144. Because the record does not discredit the Carter-Baker Report or suggest that Indiana is exceptional, I see nothing to prevent Indiana's Legislature (or a federal court considering the constitutionality of the statute) from taking account of the legislatively relevant facts the report sets forth and paying attention to its expert conclusions. Thus, I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* forbid Indiana from enacting a photo ID requirement.[79]

However, Justice Breyer disagreed that the specific provisions of the Indiana Law did not substantially burden the right to vote beyond the acceptable limits of the United States Constitution.[80] Relying upon the Carter-Baker report's recommendation that acceptable photo identifications "be easily available and issued free of charge" and that the requirement be "phased in" over two federal election cycles to ease the transition, Justice Breyer found the underlying requirements for receiving a free photo identification overly burdensome to elderly, the indigent, and other disadvantaged groups.[81]

> For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system.… For another, many of these individuals may be uncertain about how to obtain the underlying documentation… upon which the statute insists. And some may find the costs associated with these documents unduly burdensome….[82]

Finally, Justice Breyer compared the Indiana Law to a similar law in Florida which allowed for a greater variety of acceptable photo identifications (e.g., employee badge, debit card, student ID, neighborhood association ID…), as well as to a similar law in Georgia which allowed for a greater variety of documents to qualify for a state-issued photo identification (e.g., paycheck stub, Social Security card, Medicare or Medicaid statement, school transcript ...).[83] "The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter-Baker Commission recommended nationwide."[84]

Accordingly, Justice Breyer dissented: "while the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs."[85]

4. Justice Souter's Dissenting Opinion

Finally, Justice David Souter published a dissenting opinion, joined by Justice Ruth Bader Ginsberg. Agreeing with the plurality opinion, Justice Sourter found that a balancing analysis was appropriate, but emphasized that the State of Indiana bore the burden of factual proof that the burdens imposed by the voting regulation was outweighed by the importance of the governmental interest.[86]

> Under *Burdick*, 'the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,' upon an assessment of the 'character and magnitude of the asserted [threatened] injury,' and an estimate of the number of voters likely to be affected.[87]

To this purpose, Justice Souter found the travel costs and fees involved in obtaining acceptable photo identification under the Indiana Law a severe burden.[88] Likewise, Justice Souter did not find the availability of a provisional ballot sufficiently mitigating, as voters employing provisional ballots were required to incur the travel costs of affirming the provisional ballot in every election.[89] Furthermore, Justice Souter rejected the provisional ballot option in the Indiana Law itself for the additional reason that it was only available to those willing to admit indigency or those who had a religious objection, rather than all persons without such identification.[90]

Next, accepting the district court's estimate that

approximately one percent of the qualified voters in Indiana likely do not have acceptable photo identification, Justice Souter found that the number of voters severely burdened by the Indiana Law was substantial.[91]

Given the aforementioned findings, in addition to the fact that the Indiana Law "is one of the most restrictive in the country," Justice Souter found that the proffered governmental interests should be subject to "more than a cursory examination."[92] In turn, while accepting that the government has an interest in detecting and deterring against voter fraud at the polls, Justice Souter discounted the weight of such interest as overriding the burdens imposed by the Indiana Law.[93] First, Justice Souter found the asserted interest in detecting voter fraud lacked significant weight as the Indiana Law

> leaves untouched the problems of absentee-ballot fraud…; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot-stuffing, ballot miscounting, voter intimidation, or any other type of corruption on the part of officials administering elections.[94]

Likewise, Justice Souter discounted the weight of interest in deterring in-person voter fraud due to the lack of any documentary evidence that such fraud occurs in Indiana.[95]

Justice Souter further seemed to take umbrage that there was no stated interest in phasing-in the photo identification requirement as recommended by the Carter-Baker report.[96] Additionally, Justice Souter found no governmental interest in requiring the provisional ballot affidavit be filed at a different location from the polls on a different date—in effect rejecting the Carter-Baker report's recommendation on that matter.[97]

Next, Justice Souter rejected the asserted interest that the inflated voter rolls of the State of Indiana presented a legitimate governmental interest for requiring photo identification.[98]

> The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests that the State is not as serious about combating fraud as it claims to be.[99]

Finally, Justice Souter did not find a connection between public confidence in elections and a photo identification requirement absent documented evidence to the contrary.[100]

> It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence…. But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. While we found in *Nixon* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," there is plenty of reason to be doubtful here, both about the reality and the perception. It is simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls.[101]

Having found a substantial burden imposed upon the right to vote to a significant percentage of the population, and in comparison having found little factual evidence that the proffered governmental interests were substantially furthered by the regulations imposed, Justice Souter found the Indiana Law unconstitutional.[102]

III. The Future of Supreme Court Jurisprudence Concerning Election Regulations

While the 6-3 decision in *Crawford* seems to have secured state efforts to protect the integrity of the vote against voter fraud by rejecting facial challenges to photo ID laws, the direction of the courts on such issues remains uncertain. Changes in the composition of the Supreme Court might correspondingly alter the Court's jurisprudence with respect to photo voter ID requirements as well as the deference accorded states in fashioning election protection legislation.

With respect to the tenuous status of state photo ID legislation, litigants may take up the *Crawford* plurality opinion's challenge to prove that such laws indeed impose a substantial burden on the right to vote. In its current makeup, there appear to be only three justices of the Supreme Court who are prepared to validate any photo identification requirement so long as the regulations do not appear facially discriminatory—Justices Scalia, Thomas, and Alito. On the other hand, three justices are prepared to validate photo identification requirements only so long as those opposing such laws fail to proffer evidence that the laws actually impose severe burdens upon a substantial portion of the population—Chief Justice Roberts and Justices Stevens and Kennedy. Additionally, two of the current justices are prepared to invalidate photo identification requirements unless the propounding government proffers evidence that the regulations do not impose severe burdens upon a substantial portion of the population—Justices Souter and Ginsburg. Finally, Justice Breyer appears to require the government to prove that the regulations provide for photo identifications that are "easily available and issued free of charge."

Therefore, aside from Justices Scalia, Thomas, and Alito, the justices of the Supreme Court could be viewed as amenable to challenges to invalidate photo voter identification laws if the plaintiffs proffer evidence of actual severe burdens to a substantial portion of the population, however that is defined.

CONCLUSION

In *Crawford*, seven justices of the Court found that states have a legitimate interest in requiring photo identification at the polls to deter and detect voter fraud. State photo voter identification requirements can be crafted constitutionally under the federal Constitution as long as the particular regulations do not impose a severe burden upon a substantial portion of the population. While facial challenges to such regulations are disfavored, and narrower, "as applied" challenges will face significant hurdles in light of the *Crawford* opinions, *Crawford* is far from being settled precedent. The decision remains politically controversial and thus the fate of such laws

is likely to remain as unsettled as predictions of political winds and the Supreme Court's composition.

Endnotes

1 128 S.Ct. 1610 (2008).

2 531 U.S. 98 (2000).

3 *See* In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, Michigan Supreme Court Case No. 130588 (July 18, 2007).

4 The Carter-Baker report, "Building Confidence in U.S. Elections: Report of the Commission of Federal Election Reform, September 2005," played a significant role in the various opinions authored by the various Supreme Court justices in *Crawford*. Led by former President Jimmy Carter and former Secretary of State James A. Baker, III, the "Commission on Federal Election Reform" was organized by The Center for Democracy and Election Management at American University, in association with the James A. Baker III Institute for Public Policy at Rice University, The Carter Center, and electionline.org, a national clearinghouse of election reform information sponsored by The Pew Charitable Trusts.

The Commission issued its report on September 19, 2005, with 87 recommendations on how to improve the conduct of elections. Building Confidence in U.S. Elections Report of the Commission on Federal Election Reform September 2005, Center for Democracy and Election Management, American University, (September 19, 2005) (hereinafter "Carter-Baker Report"). Included within this report was the recommendation that states require individuals voting in person at polls to present photo identification prior to casting their vote. The Commission determined that this requirement not only provided a mechanism against voter fraud, but also improved the electorate's confidence in the election process.

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed. There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

Carter-Baker Report, § 2.5.

After reviewing how more than half of the states in the country were in different stages of enacting laws requiring photo identification at polling places, the Commission rejected the argument that such laws prevent only an imaginary evil. As the Commission noted, undeniably some election identity fraud occurs, and in a close election even the smallest amount of such fraud could affect the outcome of an election. Additionally, the Commission determined that even if such fraud is wholly non-existent, the fact that people believe such fraud exists requires defense mechanisms in order to buttress public confidence.

> While the Commission is divided on the magnitude of voter fraud—with some believing the problem is widespread and others believing that it is minor—there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system. A good ID system could deter, detect, or eliminate several potential avenues of fraud—such as multiple voting or voting by individuals using the identities of others or those who are deceased—and thus it can enhance confidence.

Id.

In terms of the type of identification to use in elections, the Commission suggested the REAL ID card which was part of the REAL ID Act signed into law earlier that year. The REAL ID Act requires states by 2010 to verify an individual's full legal name, date of birth, address, Social Security number, and citizenship prior to issuing a driver's license or personal identification card. According to the Commission, "The REAL ID card adds two critical elements for voting—proof of citizenship and verification by using the full Social Security number." For those persons who do not have a driver's license, the Commission urged that "IDs should be easily available and issued free of charge." *Id.*

Finally, due to the phase-in period of the REAL ID card, the Commission advised a phase-in period of any photo identification requirement for voting as well. "For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified." *Id.* After the phase-in period, the Commission determined that a vote cast by a person without photo identification should only be counted if the person returns to a designated official with photo identification soon after the election. "After the REAL ID is phased in, i.e., after January 1, 2010, voters without a valid photo ID, meaning a REAL ID or an EAC-template ID, could cast a provisional ballot, but they would have to return personally to the appropriate election office within 48 hours with a valid photo ID for their vote to be counted." *Id.*

5 383 U.S. 663 (1966).

6 *Id.* at 668 (internal quotations omitted).

7 Ind. Code § 3-5-2-40.5.

8 *Id.*

9 Ind. Code Ann. § 3-11-8-25.1, subd. (e).

10 Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5, subd. (c).

11 *Id.*

12 Ind. Code Ann. § 3-11-7.5-2.5, subd (c).

13 Ind. Code Ann. § 3-11.7-5-2.5, subd. (b).

14 Ind. Code Ann. § 3-11-7.5-2.5, subd. (d).

15 Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

16 *See* 2005 Ind. Acts p.2017, § 18; § 9-24-16-10, subd. (b).

17 A "primary document" is defined under pertinent Indiana state law as an official document used to verify identity, date of birth, and citizenship, including a United States Birth Certificate with a stamp or seal, documents showing that the person was born abroad as an American citizen or is a naturalized citizen, a passport, or a U.S. military or merchant marine photo identification. Redman Deposition, Ex. 2.

18 A "secondary document" is defined to include a wide variety of documents, including official court, U.S. and state government agency documents, bank records and credit cards. The full listing is omitted but is contained in the Redman Deposition, Ex. 2.

19 A "proof of Indiana residency" requires that an applicant present some proof of a residential address, but not a post office box. Proof of residency documents include any primary or secondary document that contains the applicant's name and residential address as well as documents including, but not limited to: Child Support Check from the [Family and Social Services Administration] with name and address of the applicant attached; Change of Address Confirmation form (CNL 107) from U.S. Postal Service listing old and new address; current Bill or Benefit Statement (within 60 days of issuance); Indiana Driver's License, Identification Card or Permit with Photograph; Indiana Property Deed or Tax Assessment; Indiana Residency Affidavit; or Voter Registration Card. Redman Deposition, Ex. 2. Ind. Dem. Party v. Rokita, Case No. 1:05-CV-0634-SEB-VSS, Deposition of BMV Designee Carol Redman ("Redman Deposition") at 5, Ex. 2.

20 Ind. Dem. Party v. Rokita, Case No. 1:05-CV-0634-SEB-VSS (S.D.Ind).

21 Ind. Dem. Party v. Rokita, 458 F.Supp.2d 775, 783-84 (S.D.Ind. 2006).

22 *Id.* at 782-83, 796.

23 *Id.* at 783.

24 *Id.* at 782.

25 *Id.* at 783-84.

26 *Id.* at 784.

27 The State of Indiana also raised standing and inappropriate party objections which are not pertinent to this article. *Id.*

28 *Id.* at 792-93.

29 *Id.* at 793.

30 *Id.* at 793-94.

31 *Id.* at 793.

32 *Id.*

33 *Id.* at 794.

34 *Id.* at 803.

35 *Id.* at 803-07.

36 *Id.* at 822.

37 *Id.* at 822-823.

38 *Id.* at 784.

39 *Id.* at 783, 807, 830.

40 *Id.* at 830-45.

41 Crawford v. Marion County Election Bd. Case Nos. 06-2218, 06-2317 (7th Cir.).

42 *Crawford*, 472 F.3d 949, 954 (7th Cir. 2007).

43 *Id.* at 952-54.

44 *Id.* at 952-53.

45 *Id.* at 954.

46 *Crawford*, 484 F.3d 436, 437 (7th Cir. 2007).

47 128 S.Ct. 1610 (2008).

48 *Id.* at 1615-16.

49 460 U.S. 780, 788, fn. 9.

50 *Id.* at 1616.

51 *Id.*

52 *Id.* at 1617.

53 *Id.* at 1618.

54 *Id.* at 1619.

55 *Id.* at 1620.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 1620-21.

60 *Id.*

61 *Id.* at 1621.

62 *Id.*

63 *Id.*

64 *Id.* at 1621-23.

65 *Id.* at 1622-23.

66 *Id.* (internal quotations omitted).

67 *Id.* at 1623.

68 *Id.* (internal quotations omitted).

69 *Id.* at 1624.

70 504 U.S. 428.

71 *Id.* at 1624-26.

72 *Id.* at 1625 (internal quotations omitted).

73 *Id.* at 1626.

74 *Id.* (internal quotations omitted).

75 *Id.* at 1626-27.

76 *Id.* at 1626.

77 *Id.* at 1627.

78 *Id.* at 1643-44.

79 *Id.*

80 *Id.* at 1644.

81 *Id.*

82 *Id.*

83 *Id.* at 1644-45.

84 *Id.* at 1645.

85 *Id.*

86 *Id.* at 1628-31.

87 *Id.* at 1628 (internal quotations omitted).

88 *Id.* at 1629-1631.

89 *Id.* at. 1631-32.

90 *Id.* at 1632.

91 *Id.* at 1634.

92 *Id.* at 1634-35.

93 *Id.* at 1635-39.

94 *Id.* at 1636-37.

95 *Id.* at 1637-1639.

96 *Id.* at 1640.

97 *Id.* at 1640-41.

98 *Id.* at 1641-42.

99 *Id.*

100 *Id.* at 1642.

101 *Id.* (internal quotations omitted).

102 *Id.* at 1642-43.