Free Speech and Election Law

State Voter ID Requirements and the Constitution

*By Allison R. Hayward**

Most likely because it is an election year, the argument in *Crawford v. Marion County Board of Elections*, has attracted spirited attention, and almost forty briefs from outside groups. Supporters of the law, which requires Indiana voters to present a government-issued photo ID before voting (or vote provisionally or swear indigency or other inability to obtain an ID) argue that an ID requirement is necessary to prevent voter fraud.[1] If polling places do not ask for ID, the argument goes, cheaters can take advantage of bloated voter registration lists and low voter turnout to send phonies to vote in the name of others. This voting fraud crime is known as "impersonation fraud." Opponents argue that ID requirements attack a phantom problem, because there is little evidence of impersonation fraud.[2] What these laws succeed in doing, they contend, is prevent lawful voters from voting, and that the laws disproportionately impact the poor, elderly, and other voters from groups less likely to have the necessary ID. As these voters are disproportionately Democratic, voter ID laws are, say the critics, just a partisan Republican ploy.

The problem with both perspectives is that they attempt to score public policy points in the context of constitutional adjudication. The question before the Court in *Crawford* is not whether Indiana's voter ID requirement is good policy, canny politics, or even whether it is justified. The question is whether it is *facially* unconstitutional for a state to impose this specific ID requirement on all voters.

Administration of elections—even elections to federal office, is a task the Constitution commits to state lawmakers, "but the Congress may at any time by law make or alter such regulations," and each house of Congress can, constitutionally, judge the elections and qualification of its own members. Of course, this does not give states complete freedom to enforce whatever restrictions on voting they choose—the Constitution has very specific things to say about voting discrimination by race, sex, or age, or conditioning voting on payment of a tax or fee. The Constitution also requires states to extend "due process" and "the equal protection of the law" to all.

In the voting context, states have long had laws restricting the voting rights of felons, mentally incapacitated persons, aliens, and individuals residing only a short time in the jurisdiction; and every state but one requires that voters register in order to be eligible to vote. Congress has weighed in as well, with laws governing states' voter registration processes and the maintenance of voting registration lists, prohibiting discrimination in election administration and practices, and requiring federal approval of changes to voting procedures in those jurisdictions "covered" by Section 5 of the Voting Rights Act.

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So, to the extent individuals have a "right" to vote, it is a "right" that is in great part a creature of state law, as modified by Congress. Provided that a state's voting restrictions fall within the scope of recognized state authority and are reasonable, the Constitution tolerates divergence among states. We have elections to federal office, but we do not have *national* elections.

How does the Indiana law measure up? Many states have some form of identification requirement for in-person voting at the polls.[3] Even the most lenient states require individuals who register by mail to produce identification to vote a regular ballot the first time they show up to the polls. This is true notwithstanding the difficulty of demonstrating anywhere a consistent threat to election integrity from "impersonation" fraud.

Indiana's law is more burdensome, to be sure—if a person lacks the required ID, that voter may cast a "provisional" ballot, but that ballot will only count if the voter within ten days produces proof of identity. For the person in this situation, this procedure is a pain.

But how big a pain? According to briefs filed by Marion County in this case, in the local 2007 election (the first under the new ID law) thirty-four voters in Marion County (out of 166,103) were denied regular ballots because they lacked the proper identification, and cast provisional ballots instead.[4] Two of the thirty-four then followed up later with identification. There may have been other voters turned away on Election Day who left rather than cast a provisional ballot. Yet even if we increase the number of rejected voters by a factor of *ten*, we still have a "burden" of a fraction of a percent. Admittedly, the 2007 election was a low-turnout local election, and one would expect the most motivated and established voters to participate. Yet, once motivated by a contentious issue, fraud may be all the more tempting in a low-turnout context, because fewer votes would be required to turn the result.

The stakes in the *Crawford* case are less about election integrity than about what discretion the Court will recognize in state lawmakers. As noted before, election administration has been a state responsibility through history, and state excesses have been addressed via statute and constitutional amendments. Yet petitioners in this case are skeptical that state politicians should be trusted with such discretion—as elected officials conflicts of interest would seem to carry the day. Control over election regulation could further insulate these incumbents from competition, making politics less responsive and representative.

A number of briefs in *Crawford* argue that state choices should be subject to greater Court scrutiny, and found constitutional only if justified by a strong state interest (there is some divergence on how substantial that interest need be) and designed to regulate only so much activity to serve that interest.[5] The Indiana law fails under elevated scrutiny, they argue, since

there is scarce evidence of impersonation fraud. Moreover, the law was enacted by Republicans for partisan purposes.

Yet respondents can point to the negligible burden imposed by the ID requirement, the existence of voter fraud generally in select contexts, and the popularity of the law in the state to argue that the Court should respect state discretion here as it has in other election administration contexts. Partisan motives can be found behind many legislative votes, and do not undermine a law's constitutionality. With evidence that no more than a miniscule fraction of legitimate voters may be "disenfranchised" by the requirement, at worst the law is ineffective, and merely a sop to public opinion. Were the Court to reject on Constitutional grounds state laws that are ineffective yet politically popular, the volume of such challenges would soon become immense.

A related claim is that none of the parties challenging the law have been injured by it, and lack standing to bring this claim.

It is almost always risky to guess how the Court will handle any case, but here we may see a majority form behind a consensus that, whatever the standard of scrutiny, there just is not a litigant with standing, or harm of a *constitutional* dimension, in this *facial* challenge.[6] Laws governing voter registration and voting will impose some burden, and that burden is more heavily borne by voters with less education, experience in voting, and funds. If this ID requirement is facially unconstitutional, then it is hard to see how many other voting laws, including registration requirements, remain on the books.

If the Court reaches deeper into the issues, we may see four Justices supporting state discretion (Alito, Roberts, Scalia, and Thomas) and four Justices applying elevated scrutiny to the law (Breyer, Ginsburg, Souter and Stevens). This is a facial challenge to the law, and thus petitioners have the burden of arguing that the law is unconstitutional in essentially all applications. To find for petitioners, these Justices would need to fashion an argument that resolves this point against the state. The petitioners' brief, aware no doubt of this problem, specifically plays to Justice Breyer's standard, articulated in *Randall v. Sorrell*, that laws presenting certain "danger signs" receive closer scrutiny.[7] But since *Randall* was an as-applied challenge to a state campaign finance restriction, it is not clear that Breyer's locution is useful here.

Justice Kennedy, not surprisingly, may again occupy the swing position, and given his penchant for impressionistic assessments, could conclude the law is facially constitutional, based perhaps upon the lack of real burden, the historic role of state in election administration, the posture of the case as a facial challenge, the popularity of ID requirements, the broad incorporation of ID laws in other states, and perhaps other reasons. States and litigants may be left with a murky decision that provides little guidance in future cases.

In short, the safer bet is that the Supreme Court will uphold the Indiana Voter ID law against this facial challenge. A narrow decision focused on standing, or perhaps issues of federalism, could also provide useful precision to an inchoate area, and assist state lawmakers in understanding the discretion they have and the considerations they must honor.

Endnotes

1 Ind. Code § 3-5-2-40.5 (voting in person requires proof of identification showing a photograph, a name that conforms with the registration records, was issued by state or US government, has not expired as of precious general election.) If the precinct board knowingly fails to challenge a voter whose ID is inadequate, that member has committed a felony. § 3-14-2-14. A voter without adequate ID may cast a provisional ballot, then produce within 10 days adequate ID or swear an affidavit that the voter has an objection to being photographed or is indigent and cannot afford ID. § 3-11.7-5-2.5(b)-(c).

2 Brief of Petitioners, Indiana Democratic Party v. Rokita, No. 07-25, at 7.

3 Brief of Amici Texas, et al., Crawford v. Marion County Board, No. 07-21, at 9-14 (describing variety of state Voter ID laws).

4 Brief for respondent Marina County Election Board, Crawford v. Marion County Board, No. 07-21, at 8-9.

5 *See* Brief of Amici Brennan center, et al., No. 07-21, at 8 (applying balancing test); Brief of Amicus Prof. Erwin Chemerinsky, NMo 07-21, at 9-12 (noting confusion in precedent, advocating "close scrutiny" when law denies vote, balancing when law poses indirect burden). Professors Chris Elmendorf and Dan Tokaji also co-authored an amicus bried devoted to the standard of scrutiny, as did Prof. Rick Hasen.

6 "Petitioners elected to bring a facial challenge... [s]uch a challenge is the 'most difficult challenge to mount [and] is undercut by the undisputed fact that they have failed to identify a single individual in Indiana whose ability to vote depends on that law." Brief of the Amicus United States, No. 07-21, at 10 (citing *United States v. Salerno*).

7 Brief for Petitioners Indiana Democratic Party, No. 07-25, at 24, 29.