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# U.S. Supreme Court Case Preview

## *Crawford v. Marion County Election Board*: Voter ID, 5–4? If So, So What?

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### INTRODUCTION

The Supreme Court's review of *Crawford v. Marion County Election Board*,[1] the Indiana voter identification case, marks the Court's first opportunity since *Bush v. Gore*[2] to consider the merits of a law concerning the casting and counting of ballots. To be sure, the Court touched on the topic of voter identification in *Purcell v. Gonzalez*.[3] But that short and unanimous opinion occurred in the context of a preliminary injunction entered by a court of appeals without offering any basis for overturning a contrary decision of the district court. As the Supreme Court in *Purcell* most pointedly observed, its decision to vacate the appellate injunction did not call for a ruling on the underlying merits of the voter identification law.

Will *Crawford* be another 5-to-4 decision, like *Bush v. Gore*? This question is significant is that a 5–4 split, especially when accompanied by an eloquent and cogent dissent, tends to deprive the majority decision of its claim to some kind of objective correctness. Instead, it looks like just another issue upon which individuals with different viewpoints can disagree.

*Bush v. Gore* was so unsettling to many because it appeared as if its outcome turned on the personal preferences of the Court's majority. In this respect, of course, *Bush v. Gore* does not differ from the myriad other 5–4 decisions that the Court has rendered, including those concerning other issues of election law. But *Bush v. Gore* felt more disconcerting because it involved the counting of ballots in a presidential election and dictated the result.

*Crawford*, thankfully, does not require the Court to pass judgment on the rules for counting presidential ballots after they have been cast. Indeed, one reason why the Court may have agreed to decide *Crawford* now, despite the absence of a fully developed division among lower appeals courts on the issue, is to avoid the possibility that the Court might be required to rule on the merits of a voter identification law in the context of a dispute over the counting of presidential ballots cast in November 2008. Yet *Crawford* will be decided in 2008, while the presidential election is still underway. If the decision is 5–4, will it also feel arbitrary or idiosyncratic, regardless of the month it is issued? In other words, will observers feel, as they did before, that the constitutional rules for the casting and counting of presidential ballots depend on nothing more than the subjective personalities of the five

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[1] No. 07-21. There are actually two separate petitions for certiorari in the Supreme Court, both of which have been granted and consolidated for oral argument. The other is *Indiana Democratic Party v. Rokita*, No. 07-25. Following Supreme Court practice, the case will be known by the first-filed petition.
[2] 531 U.S. 98 (2000).
[3] 127 S.Ct. 5 (2006).

members of the Court who control its decisions?

To answer this question, we need to: (1) discuss the details of *Crawford*; (2) assess the likelihood of a 5–4 split in the case; and (3) consider more systematically the consequences of a possible 5–4 split.

In addressing these points, I offer some ways the Court might avoid that fractured outcome, including new arguments concerning the particular features of Indiana's law in comparison with other voter ID options. One new argument, which favors the state, considers whether the limited list of permissible forms of ID under Indiana law might be justifiable from a voting rights perspective as a method of shortening lines or reducing errors at polling places. The other new argument, which favors the plaintiffs, asks whether a third "hardship" exception might exist for victims of unforeseeable difficulties in obtaining an acceptable piece of ID, in addition to the two exceptions that Indiana already provides for indigents and religious objectors. Perhaps the realization that there are new arguments worthy of further exploration would help the Justices achieve a consensus that a remand is in order to consider whether Indiana has adequately justified its particular version of a voter ID law.

## THE DETAILS OF *CRAWFORD*

### *Indiana's ID law in a national context*

The Indiana voter identification law is one of several adopted in the aftermath of the Help America Vote Act of 2002 (HAVA), which Congress passed in response to the many problems that came to light in the 2000 presidential election—not just those that led to *Bush v. Gore*. HAVA itself contains voter identification requirements. First-time voters, either when they register or when they vote, must supply a form of identification that is acceptable according to a list set forth in the federal statute: "a current and valid photo identification," *or* "current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."[4] HAVA's limited and rather complicated form of a voter identification requirement was a political compromise necessary to enact any federal post-2000 election reforms.[5] Part of that compromise was also to set forth in the text of HAVA itself that states could go further to adopt rules "more strict" than HAVA's own requirements as long as these stricter state rules were not contrary to other federal laws.[6]

Indiana, like other states, accepted this congressional invitation. In 2005, its legislature adopted a general requirement that voters present a government-issued photo identification before casting a ballot at the polls. Prior to this law, and except for the preemptive effect of HAVA's own voter ID requirements, Indiana law required only that individuals going to the polls sign their names in an official poll book of registered voters before casting their ballots.[7]

Unlike HAVA, the new Indiana law is not limited to first-time voters but rather applies no matter how many times a voter has voted previously. Moreover, the set of documents that will satisfy Indiana's requirement is much more restrictive than HAVA's menu of options. Whereas HAVA would accept any form of "current and valid photo identification"—including those issued by private-sector employers or even, presumably, ones issued by a private-sector health club like Lifetime Fitness, Inc. (such as this author carries in his wallet)—the new Indiana law stipulates that the photo identification must be issued by either the United States or Indiana government.

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[4] 42 U.S.C. § 15483(b)(2) (2007). A couple of qualifications are in order. First, the HAVA voter identification requirement does not apply to either (a) any first-time voter who registers in person at a local board of elections or (b) overseas and military absentee voters under UOCAVA, 42 U.S.C. § 1973ff-1. Second, the HAVA voter identification requirement can also be satisfied, when registering by mail, by providing a driver's license number or the last four digits of a Social Security Number, if the election officials can match the registrant's identity with previously existing information in a state database. 42 U.S.C. § 15483(b)(3) (2007).

[5] See Leonard Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004).

[6] 42 U.S.C. § 15484 (2007).

[7] A detailed discussion of the new law and the rules it superseded is contained in the district court's opinion, *Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 786–789 (S.D. Ind. 2006).

There are some important exceptions and qualifications to the applicability of Indiana's new voter identification requirement. First, it does not apply to absentee voters. Nor does it apply to voters whose polling location is at a nursing home or other state licensed health care facility where the voter resides. Finally, and perhaps most significantly, the new Indiana law contains a procedure for validating a provisional ballot cast by a voter who lacks the required identification because of either indigency or a religious objection. The failure to present the required ID at the polls will cause the voter to cast a provisional rather than regular ballot. If, however, "by noon on the second Monday following election day, the voter appears before . . . the county election board and executes an affidavit that the person is the same person who cast the provisional ballot and either (1) the person is indigent and 'unable to obtain proof of identification without payment of a fee,' . . . or (2) has a religious objection to being photographed," then the provisional ballot will be validated—and thus will count—unless there is another form of challenge to the voter's qualifications for participating in the election.[8]

Although a federal passport or military identification would be an acceptable form of ID under the new law, and although other forms of state-issued identification might also work (like a state university ID), the legislature expected that the most common form of ID used to satisfy the new statute would be an Indiana driver's license or a non-driver identification card issued by the Indiana Bureau of Motor Vehicles (BMV). It turns out, however, that obtaining a BMV-issued ID is not entirely straightforward. While the BMV does not charge a fee for a non-driver ID to anyone of voting age who lacks a driver's license, the BMV will issue this document only to individuals who present at least two other underlying forms of identification. The first of these underlying IDs, which Indiana law calls a "primary document," must be a kind that appears on a very limited list: a birth certificate, naturalization papers, passport, or military identification. The other underlying piece of ID, or "secondary document," may take one of a much wider variety of forms: bank statements, school records, insurance cards, credit cards, pay check, court papers, gun licenses, and so forth. Either the primary or secondary document, however, must contain the person's current address, or else the individual must provide yet another document that does so.

Much of the dispute in this case concerns the obstacles to obtaining a birth certificate, as a prerequisite for procuring a non-driver photo ID from the BMV. For one thing, the birth certificate itself costs money. The Indiana Department of Health charges $10 for a birth certificate. County health departments within Indiana sometimes charge less, but there appears to be no provision of Indiana law that would require a county health department to issue a birth certificate without charge to a person who could not pay for it. Likewise, for Indiana residents who were born elsewhere, the cost of obtaining a birth certificate may be as high as $28, with no way to avoid this expense.

Even if one has the money, it sometimes can be quite challenging to get a birth certificate. It is often necessary to show a form of identification to get a birth certificate, making the effort to get a birth certificate as a prerequisite to obtaining a BMV-issued ID something of a Catch-22. Similarly, for many married women, the name on their birth certificate does not match their current name, making it trickier either to obtain the birth certificate or to use the birth certificate to procure a current ID. Finally, for some individuals born in rural areas or at home, there simply may be no birth certificate to obtain.

*The litigation over Indiana's new law*

Because of the difficulties associated with obtaining a BMV-issued ID, two groups of plaintiffs sued in federal court to block enforcement of the new Indiana voter ID law—and thus return the state to a requirement of providing only a signature in the poll book, as supplemented by HAVA's more limited voter ID rules. One group of plaintiffs is a coalition of civil rights organizations and allied politicians.

[8] *Id.* at 787. See also Brief of State Respondents in Opposition to the Petitions, Nos. 07-21 & 07-25, at 4 [hereinafter "Opp."].

Another is the Indiana Democratic Party and one of its county-level committees. Their two suits have been consolidated throughout.

The plaintiffs claim that the new Indiana voter ID rules are an unconstitutional infringement upon the right to vote as protected by the First and Fourteenth Amendments of the U.S. Constitution. They contend that, notwithstanding the indigency exception, the rules will absolutely prevent some otherwise eligible voters from casting a ballot that qualifies to be counted. The insurmountable barrier that the voter ID law poses for these voters, the plaintiffs argue, is a form of outright disenfranchisement caused by the law. In addition to this disenfranchisement, the plaintiffs assert that the burdens associated with the new ID law deter other individuals from voting and, because the state lacks adequate justification for imposing these burdens, amount to an unwarranted barrier to the exercise of the franchise.[9]

## PRELIMINARY ISSUES

### *Standing*

In both the district and appeals courts, there were questions about whether the plaintiffs have standing to present their claims. Both courts found sufficient standing on the part of the Democratic Party to permit consideration of the plaintiffs' claims without differentiating clearly between the outright disenfranchisement and unjustified deterrence contentions. (In fairness to the courts, the plaintiffs themselves were not too clear in distinguishing between these analytically distinct arguments.) It is possible that the Supreme Court will find a lack of standing altogether, although it seems doubtful that the Justices would have decided to grant certiorari if they thought that they would be unable to address the merits of the claims. Still, it only takes four Justices to grant certiorari, and while these four might see no standing obstacle, a majority of five might conclude otherwise.

Yet, whether considered in terms of standing or the merits, the claim of outright disenfranchisement stands in a precarious posture. Both the district and appeals courts observed that the plaintiffs could identify no single individual who would be forced to cast a provisional ballot—and whose provisional ballot would be rejected and thus would suffer outright disenfranchisement—as a result of the new voter ID law. Even on the plaintiffs' account, the category of disenfranchised citizens is a narrow one: it consists of eligible voters who are neither indigent nor entitled to cast an absentee ballot (and so, under Indiana law, are neither disabled nor elderly) and who are unable to procure a birth certificate or other qualifying "primary document" that would permit them to obtain a BMV-issued identification. While theoretically such individuals may exist, both lower courts considered it a major weakness of plaintiffs' case that they produced no actual person who fit this category and who, claiming a desire to vote, would be unable to produce the required ID or qualify for the indigency exception.

### *The scope of the indigency exception*

There is some lingering uncertainty on the scope of the indigency exception in the new Indiana law. As described above, the exception applies to indigent individuals who attest that they were "unable to obtain proof of identifi-

[9] There is some confusion about exactly what provisions of the U.S. Constitution the plaintiffs rely upon for their claims, a confusion compounded by the fact that (as indicated in the text) they present analytically distinct claims although they themselves are not always clear that they do so. Protection of voting rights under the U.S. Constitution originated under the Equal Protection Clause, with claims that discriminatory treatment of similarly situated citizens with respect to the exercise of the franchise was an unconstitutional denial of "equal protection" within the meaning of the Fourteenth Amendment. All of plaintiffs' claims could be classified as Equal Protection claims, albeit analytically distinct versions. More recently, however, some voting rights plaintiffs have invoked the "freedom of speech" clause of the First Amendment, and its implied "freedom of political association" corollary, and the plaintiffs in *Crawford* evidently wish to do so as well for at least some of their arguments. Perhaps what matters more than which clause of the Constitution they invoke is what standard(s) of judicial review the Court will apply to their claims and, to the extent they are complaining of discriminatory treatment that could be remedied by some form of equalization (although not necessarily the most voter-friendly form), what constraints the U.S. Constitution imposes on a state's choice of voting procedures. For reasons that we shall discuss, this case stands to be a major one concerning these more practical matters.

cation without payment of a fee." Plaintiffs suggest in a footnote that this statutory language might be interpreted to apply only to a fee imposed to obtain the piece of government-issued photo identification that entitles a voter to cast a conventional ballot under the statute—and not to any fee necessary to procure an underlying and prerequisite form of identification, like a birth certificate.[10] But this interpretation, which is contrary to the plaintiffs' interests (because it would make the statute more restrictive), would render the indigency exception a practical nullity, since the BMV does not require a fee from any would-be voter who needs a non-driver identification.

Rather, both lower courts—and the state itself in its briefing of the case—appeared to assume that the indigency exception would embrace anyone who could not get a birth certificate because of the fee required for this document and who thus in turn could not obtain the BMV non-driver identification for failure to have the requisite birth certificate. The literal language of the statute ("unable to obtain proof of identification without payment of the fee") easily could be interpreted to encompass this situation. The district court accepted this interpretation insofar as it presumed that all homeless individuals, being indigent, would be able to validate their provisional ballots by signing an affidavit that they could not afford a birth certificate.[11] The Seventh Circuit seemingly made the same assumption that the indigent were exempt from the obligation to present a government-issued photo ID, by reason of the opportunity to cast a provisional ballot that would be validated upon signing the affidavit of indigency. Moreover, in opposing certiorari, the state observed that "the poor," like "the elderly" (because of their separate entitlement to vote by absentee ballot), are "essentially exempt from the Law."[12]

The point is an important one. If the indigency exemption does not cover the inability to obtain a birth certificate or other "primary document" necessary for a BMV-issued identification, then the scope of citizens categorically disenfranchised by operation of the new law grows much larger and is no longer merely theoretical. Indeed, the plaintiffs have identified homeless individuals who cannot get a birth certificate because of its cost. Thus, we can expect the Justices of the Supreme Court at oral argument to pin down this point, and under their questioning it is likely that the state will reaffirm that the inability to get a birth certificate because of its cost entitles an individual to sign an indigency affidavit under the statute and have one's provisional ballot validated on that basis.

*The "extra trip" issue*

There is another issue concerning the indigency exception that should be addressed at the outset. The question is whether the obligation of indigent voters to make an extra trip to a county board of elections office in order to sign their affidavit of indigency, rather than signing it at their polling place when they cast their provisional ballot, is an unconstitutionally discriminatory burden. The district court explicitly observed that this affidavit is "not available for voters to sign at the polls" but "available only at election board offices after Election Day."[13] Yet the district court did not address this distinct constitutional question, instead folding it into the general consideration of whether the new photo ID law amounts to an excessive deterrent to the right to vote. The district court did mention in a footnote the separate claim, presented in an amicus brief filed by the League of Women Voters, that religious objectors to the photo ID rule would suffer an unconstitutionally discriminatory burden as a result of their equivalent obligation to make a separate trip to sign an affidavit that enables their provisional ballot to count.[14] But the district court explicitly refused to rule on this separate claim because it was not raised by the plaintiffs themselves.

On appeal, the plaintiffs did raise the "extra

[10] Both petitions for certiorari contain the same footnote, number 4, on page 8 of each petition. (As the two petitions acknowledge, they are essentially identical in their arguments.)

[11] See, e.g., 458 F.Supp.2d at 823 n. 70 ("if Mr. Kogerma is indigent, as his homeless status would suggest, he is explicitly exempted from the photo identification requirement of [the statute].").

[12] Opp. at 9.

[13] 458 F.Supp.2d at 787.

[14] *Id.* at 830 n.85.

trip" point in the context of cataloguing the burdens imposed by the new law, in order to argue that even indigent voters purportedly exempt from the photo ID requirement would suffer an excessive and unjustified burden.[15] But the plaintiffs did not press this point in the Seventh Circuit as an analytically distinct constitutional attack on the statute, by virtue of its discriminatory imposition on the indigent. Consequently, the court of appeals glossed over it, en route to its consideration of the deterrent effect of the ID law generally.

In their reply brief in support of certiorari, the Democratic Party plaintiffs highlight this point for separate consideration. Under a boldface point heading entitled "The Law's burdens are severe, in particular by requiring indigent voters to make a minimum of two trips to have their vote counted," these plaintiffs use italics to stress their constitutional objection to the "extra trip" obligation:

> Significantly, *indigent voters* without the required identification . . . *must make a minimum of two trips for their ballot to be counted*. The first is to cast a provisional ballot on election day. The second, at a later time, is a trip, at the indigent voter's expense, to the county election board to validate the voter's provisional ballot by *personally appearing* to sign an indigency affidavit, which is *not* available on election day at the polls. This requirement is not even rational . . . .[16]

Thus, this distinctive constitutional claim may receive considerable attention in the Supreme Court, especially if the plaintiffs present it prominently in their merits-stage briefs in advance of oral argument.

Still, the Supreme Court is generally disinclined to rule on a claim not addressed by either the district or appellate court. Moreover, the Court would not need to address this issue were it to invalidate the photo ID requirement insofar as it applies generally to non-indigent voters. (If Indiana cannot enforce its photo ID requirement in the first place, there is no cause to worry about special burdens associated with an affidavit-based exemption from the requirement.) Conversely, if the Court finds that Indiana's photo ID requirement is not generally invalid, meaning that it is constitutional to require non-indigent voters to present the government-issued photo ID as specified in the statute, then it is unclear that ruling on the distinct claim concerning the "extra trip" obligation imposed on indigent voters would provide an alternative ground for the injunction that plaintiffs seek. Even if the "extra trip" obligation is unconstitutional, the appropriate remedy for the federal judiciary might be to enjoin enforcement of only this portion of the statute, thereby requiring the state to provide indigency affidavits at polling places on election day (or else count the provisional ballots of indigent voters without receipt of the affidavit), rather than enjoining the statute in its entirety (which, of course, is what the plaintiffs would much prefer). Because this remedial question—as well as the merits of this distinctive "extra trip" claim—was entirely unaddressed by the two courts below, the Supreme Court might simply send this matter back for further consideration once the Court reaches the conclusion (assuming for the moment that it does) that the Indiana law is not generally invalid.

## THE MAIN ISSUE: EXCESSIVE BURDEN/DETERRENCE?

On the basic question of whether the new law excessively and unjustifiably deters eligible citizens from exercising their right to vote,

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[15] The Democratic Party plaintiffs put this sentence in their Seventh Circuit brief (at pages 25–26): "[Another] burden is that placed on voters, particularly indigent voters, who are unable to obtain the required form of photo identification by election day and who will be forced, under this law, to make a special trip to the office of the county election board, and to bear the costs associated with such a trip, to present in person the required form of identification or to sign an indigency or religious objector affidavit after having cast a provisional ballot." The other plaintiff brief contains a similar sentence (at 40): "Even those who may be declared indigent will be able to vote only after making yet another trip, this time to the office of the Clerk or County Election Board to execute the requisite affidavit." These briefs, as well as the other major filings in all three levels of the federal judiciary, are available in the Major Pending Cases database of the *Election Law @ Moritz* web site: <http://electionlaw.osu. edu>.

[16] Reply in Support of Petition, No. 07-25, at 6 (emphasis in original).

the state has employed a two-pronged defense in the litigation so far: first, the law's deterrent effect is not very large, nor enough to trigger strict judicial scrutiny under prevailing constitutional standards; and second, whatever modest burdens are associated with the obligation to show the government-issued photo ID when voting at one's polling place, these burdens are justified by the state's need to protect against the risk of fraudulent voting.

Both lower courts agreed with both these arguments made by the state. The district court found that the plaintiffs, in addition to failing to identify any individual who would be disenfranchised by the law, failed to identify any individual who would stay away from the polls (or subsequently refuse to take the extra steps to validate a provisional ballot) because of the burdens associated with the new identification law. Although the plaintiffs had offered expert testimony on the potential deterrent effect of the new requirement, the district court dismissed this testimony as entirely unreliable.[17] The district court also emphasized that most of the people the plaintiffs claimed would experience the greatest obstacles in complying with the law—the disabled and the elderly—were entitled to vote an absentee ballot and thus avoid the new requirement altogether.

The court of appeals, in a majority opinion written by Judge Posner, adopted essentially the same reasoning as the district court regarding the extent of the law's deterrent effect. To be sure, Judge Posner's rhetoric was more abrupt, but the substance was the same: "no plaintiffs whom the law will deter from voting," and "totally unreliable" expert testimony to bolster plaintiffs' claim.[18]

Consequently, both the district and appellate courts ruled that strict scrutiny was an inappropriate standard by which to assess the state's justification for its law. Citing the Supreme Court's canonical formula in *Burdick v. Takushi*[19] that strict scrutiny applies only when a state law imposes "severe" burdens on the exercise of voting rights—otherwise, "the State's important regulatory interests are generally sufficient to justify" the law—the two lower courts in this case applied the more relaxed standard of review articulated in *Burdick*.

Applying that standard, the lower courts turned to the state's justification for its new law: the desire to reduce the risk of fraudulent voting. Both courts credited that goal as a valid one. More significantly, both courts concluded that Indiana's version of a government-issued photo identification requirement was a reasonable means of pursuing that valid goal. On this point, the district court's analysis was rather thin. The court said only that the form of identification required by Indiana was one "that virtually all registered voters already possess,"[20] namely a driver's license. Even if true, the district court did not consider whether the stringency of Indiana's law was entirely gratuitous. Although the district court acknowledged that at least some percentage of voters who would be subject to the new requirement (and unable to qualify for any of its exemptions) lacked the kind of ID that the law demanded—and thus would be forced to get this kind of ID in order to preserve their right to vote—the district court never asked whether the state's anti-fraud objectives could be satisfied by permitting these voters to submit some other form of ID, like those on HAVA's list of options.

The district court said that the evidence of fraudulent voting in other states, even though no evidence had surfaced in Indiana, justified the state's effort to combat the risk of fraud. Indiana is not required to wait until the disease breaks out on its turf, the district court reasoned, before vaccinating its own electoral system. But that reasoning justifies only some form of vaccine in the abstract; it is not responsive to whether the *particular means* of combating fraudulent voting—the particular type and dosage of vaccine, as it were—is a constitutionally appropriate one. Although

[17] The district court summarized its primary reasons for rejecting the expert testimony: "(1) failing to account for voter roll inflation, (2) comparing demographic data from different years without qualification or analysis, (3) drawing obviously inaccurate and illogical conclusions, and (4) failing to qualify the statistical estimates based on socioeconomic data." 458 F.Supp.2d at 803. The district court's extended explanation of these four points is found in the next three pages of its opinion.

[18] 472 F.3d at 952.

[19] 504 U.S. 428, 434 (1992) (internal quotations omitted).

[20] 458 F.Supp.2d at 825.

seventy pages in length, the district court opinion never explains why Indiana's restrictive list of acceptable forms of ID is not unduly burdensome in relationship to the state's assumedly valid anti-fraud goals.

The court of appeals offered little more on the point than the district court. Judge Posner did focus on what might be called the operational mechanics of fraudulent voting at a polling place: the impersonation of another registered voter, perhaps one who has since died or moved away. Judge Posner asserted that a photo ID would be the only means of thwarting this kind of voter impersonation: "Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures carefully and argue with people who deny having forged someone else's signature."[21] But two questions immediately arise with regard to this assertion: (1) why isn't an obligation to provide a non-photo form of identification document—like a bank statement or utility bill—a sufficient check on the threat of voter impersonation, since poll workers could examine this document for superficial signs of authenticity with perhaps much the same ease as they could examine a photo ID? and (2) even if a photograph is thought necessary (perhaps to prevent the risk of forged non-photo identification documents), then why permit only a very limited set of photo IDs—those issued by either the U.S. or Indiana government—to qualify? In other words, if what we want is for poll workers to be able to see that the individual who casts a ballot is the same individual as the one pictured on the identification, whose name matches that of the registered voter, then why not accept a photo ID issued by an employer, private college or university, or private social service agency?[22]

There may be appropriate answers to these obvious questions, but Judge Posner did not endeavor to supply any. At the end of his opinion, Judge Posner did offer this generic observation: "Perhaps the Indiana law can be improved—what can't be?—but the details of regulating elections must be left to the states."[23] That observation indicates that Judge Posner was applying an especially deferential standard of review: as long as the law promotes its anti-fraud goal (even if only slightly), it matters not how sloppily it does so. Not even a law that produces a negligible advantage in terms of anti-fraud prevention, yet makes voting noticeably more arduous for a "discrete and insular" segment of the eligible citizenry, would run afoul of that super-deferential standard of review.[24] Yet it is hardly obvious that the more deferential of the two standards articulated in *Burdick* was intended to be as lax as the super-deferential standard employed by Judge Posner on behalf of the Seventh Circuit majority.[25]

Judge Posner's opinion prompted two dissents, one from Judge Evans who sat on the panel that decided the case, and another from Judge Wood (joined by three other Seventh Circuit colleagues, including Judge Evans) at the stage where the full court of appeals refused to rehear the case. Judge Evans invoked the fact that the Indiana legislature split on party lines when enacting the new voter identification law, and the apparently partisan motivation for the law—"a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic," in his words—was enough for him to warrant an elevated

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[21] 472 F.3d at 953.

[22] A similar point might be made with respect to the "extra trip" argument: would it harm the state to permit indigent voters to submit their affidavit of indigency at the same time as they cast their provisional ballot? See Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 39 n. 190 (2007).

[23] 472 F.3d at 954.

[24] The phrase "discrete and insular" comes from the Court's famous Footnote Four, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), and seems applicable to the small class of non-drivers, socially marginalized most likely, who now must acquire a BMV document but who would prefer to submit a more readily available form of ID.

[25] For a comprehensive and analytically powerful discussion of the level-of-scrutiny issues left open by *Burdick*, see Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. ___ (forthcoming 2007), available on SSRN at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980079#PaperDownload>. (It is perhaps arguable that Judge Posner applies a level of review slightly more stringent than that employed by the district court in *Crawford*, but even if so it is a nuance without practical significance.)

standard of review he labeled "strict scrutiny light."[26] Applying that standard, Judge Evans saw the law as a disproportionate response to the threat of fraudulent voting. Characterizing it as a "sledgehammer to hit either a real or imaginary fly on a glass coffee table,"[27] he asserted that "Indiana's law, because it allows nothing except a passport or an Indiana ID card to prove that a potential voter is who he says he is, tips far too far in the wrong direction."[28] It is unclear from his dissent whether Judge Evans thought it necessary to apply the rather rigorous standard of "strict scrutiny light" in order to invalidate the law, or instead whether he would have ruled it unconstitutionally disproportionate on some lesser standard—perhaps the proverbial "rationality review with teeth," which the Supreme Court has employed in some Equal Protection cases.[29]

Judge Wood's dissent indicated that she was prepared to demand strict scrutiny, although she called only for the full appellate court to consider the question. Judge Wood, in particular, faulted Judge Posner for thinking that the appropriate level of scrutiny under *Burdick* depended on the number of citizens affected by the law rather than the severity of the burden imposed on any one individual. She put her point this way: "Even if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a 'severe' injury for that particular individual."[30] This point, while cogent, seems to conflate the distinction between outright disenfranchisement and deterrence of voting rights. While absolutely preventing even one eligible citizen from casting a ballot that counts might well warrant strict scrutiny under the Supreme Court's precedents, including *Burdick*, it is not clear that a law that has the effect of discouraging only one person from voting, and still does not impose an insurmountable obstacle on even that individual, would call for strict scrutiny. Nor did the hypothetical example of Natalia Burzynski respond to Judge Posner's observation, made also by the district court, that the plaintiffs had not identified a single real example of a person either disenfranchised or deterred from voting by the law.

## THE CHANCES OF A 5–4 SPLIT, AND SOME POSSIBLE GROUNDS FOR AVOIDING ONE

With the merits of *Crawford* now before the Supreme Court, there is a high likelihood of a 5–4 decision. We can surmise (based on general voting patterns in constitutional cases) that four Justices will be inclined to sustain the constitutionality of the Indiana law: Chief Justice Roberts, Justices Scalia, Thomas, and Alito. We can equally presume that four other Justices will be predisposed to invalidate the law as excessively restrictive: Justices Stevens, Souter, Ginsburg, and Breyer. In this case, as in so many others since Justice Alito replaced Justice O'Connor, Justice Kennedy occupies the pivotal position. Temperamentally, he is likely to lean more in favor of upholding the statute than in striking it down, but in his internal deliberations he is likely to feel a tug-of-war between competing instincts, in which case he will begin the deliberate process less oriented to one side or the other than any of his eight other colleagues. Even so, if the other eight end up as expected, then the result is a 5–4 decision no matter which side Justice Kennedy ultimately comes down on.

To be sure—and this is a crucial even if obvious point—for none of the Justices are their initial inclinations controlling. They are just that: initial inclinations. A variety of factors during the deliberative process can move them from their preliminary predispositions to a different point of view: the force of precedent upon a review of it, the available evidence concerning key facts, or the presentation of arguments raising points of principle or policy not

[26] 472 F.3d at 954 (Evans, J., dissenting).
[27] *Id*. at 955.
[28] *Id*. at 956.
[29] See, e.g., *City of Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985).
[30] 484 F.3d at 438 (Wood, J., dissenting from denial of rehearing en banc).

previously considered or reflected deeply upon.

Consequently, it is worth considering whether there is any reason to believe that the dynamic of the deliberative process in *Crawford* might cause the Court to end up, not in the easily predictable 5–4 split, but instead in a more lopsided or perhaps even unanimous outcome for one side or the other.

*Precedent*

The Court's prior election law opinions are unlikely to cause any of the Justices to deviate from their own internal preferences concerning the constitutional questions in *Crawford*. The relevant constitutional standards, especially as articulated in *Burdick*, are notoriously abstract, even vacuous, and malleable. They will not lead a Justice in a different direction from one in which he or she wishes to go.

There is the famous Poll Tax Case, *Harper v. Virginia Board of Elections*,[31] and one important subsidiary question in *Crawford* is its relationship to the *Burdick* dichotomous approach to levels of scrutiny in election cases. *Harper* involved the obligation of Virginia voters to pay a $1.50 tax as a prerequisite to the right to cast a ballot. The Supreme Court invalidated that prerequisite as a denial of Equal Protection, discriminating against those otherwise qualified voters who were too poor to pay the tax. In applying an early form of strict scrutiny, on the ground that the fundamental right to vote was at stake, the Court reasoned that a citizen's degree of wealth or poverty "is not germane to one's ability to participate intelligently in the electoral process."[32]

In considering the relationship between *Harper* and *Burdick*, one possibility is that strict scrutiny applies to any regulation of the *voter's* participation in the election, as distinct from identification of *candidates* who are presented to voters as the options from which they may select. (*Burdick* sustained the constitutionality of a state law that denied voters the ability to cast a ballot for a write-in candidate and thus can be seen as a candidate-limitation, rather than voter-limitation, case.) But this possibility seems too extreme, as some regulation of the voter's ability to participate in the election will be thought by the Justices to fall under the lower level of *Burdick*-bifurcated scrutiny. Not only did *Burdick* itself specifically contemplate as much, referring to voter registration procedures as an example of routine regulation for which less-than-strict scrutiny might be appropriate. In addition, it is easy to identify "common sense" examples to illustrate why the Justices would resist the application of strict scrutiny to all regulation of the voting process. Is the decision to hold the election on Tuesday, rather than Monday, or just one day rather than two, or to keep polling places open twelve hours rather than fourteen, subject to strict scrutiny (which would thereby require the state to justify its more restrictive practice as *necessary* to serve a *compelling* state interest)? In all instances, it is possible to imagine an eligible citizen for whom the more restrictive practice acts as a barrier to voting: the citizen works a double shift on Tuesdays, but not on Mondays, and is ineligible under state law to cast an absentee ballot. Yet the mere fact that an eligible citizen cannot arrange his or her own personal circumstances to take advantage of the opportunity that the state provides to cast a ballot does not necessarily trigger strict scrutiny. To be sure, one can also hypothesize circumstances in which a state's limits on the time available for voting—polling places open only six hours, from 10am to 4pm, on a single day—are so draconian as to be unconstitutional, but that conclusion would flow from an application of less-than-strict scrutiny.

A more promising account of the relationship between *Harper* and *Burdick* might be to say that strict scrutiny applies to any rule that sets an absolute eligibility prerequisite for the right to cast a ballot. The consequence of noncompliance with this eligibility prerequisite is outright disenfranchisement: disqualification from participation, not merely an obstacle to participation. The poll tax in *Harper* fits this de-

[31] 383 U.S. 663 (1966).
[32] *Id.* at 668.

scription: nonpayment means no ballot, and for the destitute there is no possibility of payment.[33]

But does the Indiana voter identification requirement also fit this description? Since the rise of post-HAVA state statutes that adopt more restrictive voter ID requirements, there has been a widespread effort by opponents of these laws to call them a contemporary form of poll tax. This argument surely is a powerful one with respect to any ID law that obligates the voter to pay a fee for the required ID. It even might work for a state law that requires the voter to pay a fee in order to get a subsidiary piece of identification, like a birth certificate, as a necessary precondition for obtaining the mandatory voter ID itself. But can this "poll tax" argument work for a state law that explicitly exempts from the ID obligation anyone too poor to pay any fee necessary to obtain the ID, as the Indiana law presumably does (for reasons we have discussed above)?

Thus, it might be possible to achieve unanimity among the Justices for the proposition that a voter ID law with no indigency exception would trigger strict scrutiny under *Harper*. And it might even be possible to get all nine Justices to sign on to an opinion saying this in *Crawford*, as a signal to state legislatures and lower courts about the outer limits of constitutionally permissible voter ID rules, even though such a statement would be a dictum inapplicable to the Indiana law under adjudication in *Crawford* itself. But even assuming this degree of unanimity on the Court, is there any reason to believe the Justices will also find consensus on the level of scrutiny to apply to a voter ID requirement that is explicitly inapplicable to the indigent?

Some Justices might take the position that, notwithstanding an exemption for the indigent, a voter ID law still requires strict scrutiny because it operates as an absolute eligibility prerequisite for the non-indigent: no ID, no ballot that counts (only a provisional ballot that, absent indigency or religious objection, cannot be validated). But other Justices are unlikely to accept this view. Do even HAVA's more lenient ID rules trigger strict scrutiny, requiring Congress to show their *strict necessity*—as opposed to mere *reasonableness*—in combating fraudulent voting? Even a pre-HAVA rudimentary signature requirement would be subjected to strict scrutiny on this view, since signing the poll book would be a rigid prerequisite to the right to cast a ballot, and whether or not this basic signature requirement would satisfy strict scrutiny, some of the Justices would think strict scrutiny inappropriate for such a straightforward rule. Strict scrutiny implies judicial suspiciousness, and there is no reason for judges to be suspicious of a basic signature requirement. These Justices might be willing to be suspicious about a voter ID rule that lacks protection for indigent voters, because of *Harper* and the historical concerns about disenfranchisement of the less affluent, but absent this element they would treat a voter ID rule, like a signature requirement,

[33] The Supreme Court cases concerning the availability of absentee voting support this distinction. In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the Court rejected the claim that the unavailability of absentee voting for pre-trial detainees was a violation of Equal Protection. The Court did so on the assumption that alternative methods of voting may have been available to these individuals, as the Court subsequently explained in *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). In the latter case, by contrast, the Court ruled unconstitutional the unavailability of absentee voting for pre-trial detainees because there the plaintiffs had demonstrated this denial amounted to an "absolute bar" on their ability to cast a ballot despite their legal qualifications to do so. *Id*. at 530.

The Court's cases concerning registration deadlines present something of a conundrum with respect to this distinction. The Court has ruled that a state may impose a reasonable deadline in order to prepare its voter rolls for election day (in part to ward off fraud), but may not make the deadline too early. Compare *Dunn v. Blumstein*, 405 U.S. 330 (1972) (residency requirement of 15 months too long), with *Burns v. Fortson*, 410 U.S. 686 (1973) (50-day registration deadline permissible), and *Martson v. Lewis*, 410 U.S. 679 (1973) (same). Even a 30-day registration deadline might be considered an "absolute bar" to individuals unable to comply with it (perhaps because they move into the state within that time period). But because this prerequisite is temporal, and easily can be met before the next election, it arguably is not a substantive requirement that the voter must satisfy to receive a ballot in the same way that one can view the ability to pay a poll tax.

For further analysis of these and many other Supreme Court precedents relevant to drawing the line between the two tiers of judicial scrutiny for election cases, see Elmendorf, supra n. 25.

as requiring no greater scrutiny than the laws specifying the hours when the polls are open.[34]

Is it possible, then, that all nine Justices will agree that the Indiana law, because it specifically exempts the indigent from its ID obligation, requires only lower-level scrutiny under *Burdick*? This, too, seems doubtful. Several of the Justices will remain suspicious of the Indiana law notwithstanding this exemption. They will see it as deviating from the national norm set in HAVA and think any more restrictive departure from this norm warrants strict scrutiny. The fact that the Indiana law was enacted on a party-line vote might reinforce their suspiciousness and thus their insistence on strict scrutiny in this case. This latter point was a key factor in Judge Evans's dissent, as we have seen, and it is likely to be echoed in questioning at oral argument and could well make it into one or more opinions from the Justices.[35]

Of course, the choice of what level of scrutiny to apply is merely a threshold issue. What ultimately matters is whether the law is upheld or invalidated. But the Court's precedents, which fail to dictate a level of scrutiny that all the Justices will feel compelled to follow, are even less controlling with respect to ultimate resolution of *Crawford*.

*Evidence*

As many commentators on the recent public debates over voter ID have observed, there is a noticeable absence of evidence concerning both the costs and benefits of these laws. This point is certainly true of the Indiana law. As both lower courts found, and even the dissents acknowledged, the evidence is thin on how many non-indigent citizens who want to vote will give up, or suffer hardship, because of obstacles encountered as a result of this new law. Likewise, as Judge Posner candidly conceded, evidence is lacking that voter impersonation is a problem in need of legislative attention. Although Judge Posner theorized why evidence of this kind of fraud might not exist even if the fraud does occur with disconcerting frequency, the fact remains that the evidence is not there.

Thus, the question is: how will this absence of evidence affect the Justices? Will any of them be "swayed" by the silence in the record? Or will that silence simply permit each of them to stick with his or her initial predisposition in the case? (Some Justices clearly had been hoping for some solid evidence on the voter ID issue, as Justice Stevens signaled in his *Purcell* concurrence,[36] but they granted certiorari in *Crawford* knowing that the evidence remains lacking in this case.)

Some might argue that the plaintiffs' failure to identify injured individuals might serve as a basis for building a consensus among the Justices for a narrow ruling in *Crawford*: affirm the lower courts on the ground that plaintiffs did not meet their basic burden of proof, leaving the door open to other challenges—in Indiana and elsewhere—by different sets of plaintiffs with better evidence. But this scenario seems unrealistic. First of all, its narrowness deprives the case of much significance and thus contra-

[34] Given this analysis, one might offer yet another attempt at explaining the relationship between *Harper* and *Burdick*. The inherent suspiciousness of the poll tax in *Harper* results from the fact that it makes one's eligibility to participate in the franchise turn on an aspect of one's personal identity: one's financial circumstances. A signature requirement, unless it fails to contain an appropriate exemption for the physically disabled, would not do that. Nor would a law that specifies the time, place, and manner of casting ballots. The obligation to bring a particular ID document to the polling place, except insofar as it operates as a poll tax, would seem to fall on the latter side of this divide. (I credit Chris Elmendorf for this point, although he might put it somewhat differently.)

[35] Elmendorf, supra n. 25, would focus on both the party-line vote and the deviation from HAVA's national norm as "danger signs" that would justify higher scrutiny under *Burdick*.

[36] His three-sentence concurrence was devoted entirely to the desirability of more evidence. The middle sentence is the key one:

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. *At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements.* Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

127 S.Ct. at 8 (emphasis added).

dicts early grant of certiorari on this issue, to establish nationwide guidance in advance of the 2008 general election. More important, several Justices will be disinclined to think that the plaintiffs' lack of proof is an insurmountable hurdle. After all, under the lower level of *Burdick* scrutiny, the state must offer a sufficient reason for imposing even a modest burden on the right to vote, and there is no doubt that the Indiana law does that (as both lower courts recognized).

Nor are all nine Justices likely to agree that voter ID laws must fall unless and until states come up with more evidence of voter impersonation at the polls. Whether or not they agree with Judge Posner's explanation for the missing evidence, some Justices will accept the basic proposition that states need not confine themselves to an honor system for voting if they are unable to show that voter impersonation occurs. The Justices do not need evidence to know that fraudulent voting is an evil to be avoided. Consequently, *some* measures to combat this evil will be constitutionally permissible without any evidence on the extent of its occurrence. Again, a signature requirement would need no proof that, without it, the incidence of voter impersonation would rise to intolerable levels. Similarly, the constitutionality of HAVA's version of voter ID does not depend on a scientific showing that the marginal reduction in the rate of voter impersonation as a result of moving from a baseline signature requirement to the higher (but still relatively lax) HAVA regime outweighs the marginal increase in difficulties that voters have in supplying the HAVA-required documentation rather than just a signature.

The Justices will also be aware that, although Indiana has defended its voter ID law solely in terms of avoiding voter impersonation, the issue of non-citizen voting is lurking beneath the surface of this case. Arizona, for example, in the law that the Justices took a preliminary look at in *Purcell*, includes a proof of citizenship requirement as part of its own new voter ID law. Since citizenship is an obviously legitimate prerequisite to voting, some Justices will be sympathetic to the notion that the states or Congress can adopt some method to require would-be voters to demonstrate their citizenship, at least so long as the legislative method accommodates the inability of the indigent to pay for proof of citizenship and thus avoids the poll tax problem. The evidence of voting by non-citizens may or may not be stronger than the evidence of voter impersonation, but these Justices are unlikely to require states or Congress to show significant instances of non-citizen voting before the enactment of relatively modest and well-tailored measures to ward off this possibility. Thus, one can confidently predict that *Crawford* will not produce a unanimous opinion holding that voter ID laws are unconstitutional absent proof of unlawful voting of the kind that the laws are intended to prevent.

But there still remains the question whether Indiana's failure to provide a reason, either in evidence or argument, for its particularly restrictive form of a voter ID law will make a difference in the minds of the Justices initially inclined to uphold the law. All the Justices know full well that, whatever level of scrutiny applies, judicial review of a law's constitutionality under the Fourteenth Amendment requires two inquiries: first, an examination of the law's professed aims, to see if they are sufficiently weighty; and second, examination of the relationship between the law and its aims, to see how well they fit (including what collateral consequences, unrelated to its aims, the law causes). In *Crawford* so far, Indiana has devoted all of its energy to the first of these two inquiries: arguing the importance of combating fraudulent voting. The state has given virtually no attention to the second, and equally important, prong of Fourteenth Amendment analysis: why the particular law it has adopted is an appropriate response to the problem of fraudulent voting, even accepting its sufficient importance.

If a Justice in *Crawford* is willing to apply the lowest level of judicial review under the Fourteenth Amendment—"minimum rationality"—then the state needs no evidence to support its chosen means. It is self-evident that a requirement to produce a government-issued photo ID *conceivably* could assist in reducing any temptation to engage in fraudulent voting, even if this stringent requirement advances that goal no better than other (more lenient) measures,

and even if the more restrictive law produces significant adverse consequences unrelated to its anti-fraud objective. That this relationship between the law and its goal is merely *conceivable*, and not necessarily true in fact, is all that is necessary for the state to prevail under the "minimum rationality" standard. Because Judge Posner apparently assumed that this super-deferential standard controlled (in the absence of greater harm demonstrated by the plaintiffs), he saw no need to examine whether the stringency of Indiana's government-issued photo ID requirement was warranted.

But it is possible that all nine Justices will agree that lower-level scrutiny under *Burdick* requires more than minimum rationality. It is possible that they will agree on this point, moreover, even if they divide on whether they would go further and subject the Indiana law to the higher level of *Burdick* scrutiny (as discussed above). Because voting is involved, all the Justices may feel that the case calls for scrutiny more searching than the lowest standard, which is used for generic economic and social legislation. Indeed, *Burdick* itself talks in terms of assessing the *reasonableness* of a state's law under its lower level of review, and in Fourteenth Amendment parlance *reasonableness* is a more searching standard than minimum rationality. Reasonableness usually requires the state to be attentive to the balance of competing considerations (in this case, balancing the interest in combating voter fraud against the risk of impeding the exercise of the franchise by eligible citizens), and this balancing usually requires some evidence concerning the trade-offs between regulatory alternatives available to the legislature (in the case, evidence that the extra stringency of Indiana's law in comparison to HAVA or other options justifies the increased impediments to voting associated with the stricter rules).[37]

Thus, if the Justices can agree that the lower level of *Burdick* requires reasonableness rather than minimum rationality, then it is also possible that their agreement might extend to faulting Indiana for failing to offer evidence for a reason to adopt its particular version of a voter ID law rather than, for example, HAVA's. A unanimous opinion might make clear that the Court in no way was ruling out voter ID laws altogether, but instead requires states to justify measures more stringent than the national benchmark of reasonableness set by Congress in HAVA. The opinion might even explicitly remand the case to the lower courts to consider whether Indiana, at this stage of the litigation, should be permitted to offer proof on the reasonableness of its chosen method. (The case was decided by the district court on motions for summary judgment, so there has not yet been any kind of trial at which the state might submit such evidence.) A remand of this nature would signal that the Court was not foreclosing voter ID laws stricter than HAVA, but only that their extra stringency needs distinctive justification beyond the generic argument concerning the desire to thwart fraudulent voting.

It is difficult to gauge the chances for unanimity along these lines. Undoubtedly, there would be initial resistance to it from the most conservative members of the Court, Justices Scalia and Thomas. But in the end, depending upon how the language of the opinion were crafted, even they might go along with the notion that Indiana needs to do more to defend its particular version of voter identification than just attempting to persuade the Court that voter identification is valid in general.[38]

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[37] On the need for balancing as part of either level of *Burdick* review, see, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1980): "In passing judgment, the Court must not only determine the legitimacy and strength of each of [the state's] interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional."

[38] In addition to their general preference for less rather than more federal court scrutiny of state laws, as well as their sympathy with measures aimed to counteract what conservatives perceive as a threat to the integrity of elections (a sympathy Justice Scalia expressed in his separate opinion justifying the stay of the recount in *Bush v. Gore*), Justices Scalia and Thomas are likely to believe—at least initially—that invalidation of a state's voter identification law is inconsistent with an originalist approach to constitutional interpretation. Interestingly, however, an originalist might come around to the view that voter identification laws more stringent than a signature requirement are constitutionally suspicious, because the demand for documentation of a voter's identity at a polling place is not part of the longstanding tradition of democracy in America since either the Founding or the ratification of the Fourteenth Amendment.

*Arguments*

One factor making it difficult to predict what the Justices will do in *Crawford* is the possibility of new and unanticipated arguments that might influence their thinking. Perhaps the most famous example of this kind of development occurred in *Grutter v. Bollinger*,[39] the University of Michigan affirmative action case. There, a group of highly distinguished former military officers filed an amicus brief explaining the need for affirmative action in the military academies (and ROTC programs) in order to achieve racial diversity among officers and thereby secure the allegiance of enlisted personnel. This amicus brief, sometimes characterized as one of the most influential amicus briefs ever, had the effect of adding to the government's interest in the case the overriding national security need to maintain appropriate military discipline.[40] (The stories recounted in the amicus brief of insubordination during the Vietnam war, when there was racial diversity among enlisted soldiers but not among officers, were revelatory.) An amicus brief in *Crawford* need not be as dramatic as this military brief in *Grutter* in order to change the dynamic of the Court's deliberations on the issue of voter ID. As no merits briefs in *Crawford* have yet been filed, by any party or amicus, we cannot know whether one or more will manage to have this kind of effect.

But to illustrate how a new argument might influence the Court's deliberations, let us consider one idea that was not featured in the lower court proceedings but could surface in Supreme Court briefs. This idea offers a defense for Indiana's highly limited set of options to satisfy its voter ID requirement, in contrast to the much more flexible menu of choices offered by HAVA. The idea is that it is simpler for poll workers to implement a voter ID requirement that has very few acceptable options and that this simplicity translates into shorter lines at polling places, to the benefit of voters and their exercise of voting rights generally. (As we have reviewed, Judge Posner briefly considered the simplicity of looking at a photo, rather than a signature, as part of the anti-fraud justification for Indiana's law, but that point differs from a separate argument that an easier ID rule for poll workers to administer enhances voting rights by reducing the risk of long lines that would cause some would-be voters to leave before being able to cast either a regular or provisional ballot.)

The key to this argument is that it is *not* a claim that the particular restrictiveness of the Indiana law is intended to advance the goal of combating fraudulent voting. This argument is readily prepared to concede that, with respect to that primary goal of the legislation, its restrictive list of options does no better than more flexible alternatives. Rather, the restrictiveness serves an important *secondary* goal, one that the state is entitled to pursue along with its primary anti-fraud goal. The Indiana law is the best, or at least an especially well-suited, means of achieving both important goals simultaneously and should be sustained on that basis.[41]

It is a general observation, from one who teaches courses in Constitutional Law as well as Election Law, that states' attorneys seem to have difficulty formulating defenses for their statutes in terms of combined, rather than single, goals. Sometimes states' attorneys offer several separate interests that a statute plausibly could serve, but in these cases the states' attorneys usually invite the judiciary to consider these interests seriatim, one at a time, rather than collectively as a package. But the notion that a state law may be defended suc-

[39] 539 U.S. 306 (2003).

[40] For a riveting account of the genesis of this amicus brief, and the role it played in the Court's deliberations in *Grutter*, see Jeffrey Toobin, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 212–214, 217–221, 224 (2007).

[41] This argument is obviously conjectural, for illustrative purposes. It is possible that Indiana's stricter ID law might actually cause *longer lines* at the polls, if more individuals need to cast provisional ballots as a result. Of course, whether this is true might depend on how election officials structure their polling operations: if separate poll workers staff the provisional voting queue, then a longer wait there would not detract from the speedier process to check ID before casting a regular ballot. In any event, for purposes of evaluating this new potential argument, the relevant comparison concerning the length of lines is between (1) Indiana's law and (2) a wider menu of ID options, not between (a) Indiana's law and (b) only a signature requirement. (I am grateful to Michael Pitts for raising these points.) Ultimately, as I say later in text, the factual questions relevant to this new argument might justify a remand for purposes of developing an evidentiary record on them.

cessfully on the ground that it promotes the combination of two (or more) goals is not foreign to Fourteenth Amendment law. *Grutter* again serves as a useful example. There, the state's primary goal of classroom diversity could have been achieved equally well, without letting an applicant's race play a role in admissions decisions, by employing a lottery. But a lottery would have defeated the state's secondary goal, which was to maintain rigorous and selective academic standards for its flagship law school. Affirmative action was the best (and perhaps only) means of achieving simultaneously the twin goals of diversity and academic excellence.

So, too, it might be argued that a very narrow set of voter ID options, limited exclusively to government-issued documents that bear the official seal of either the United States or the specific state in which the voting occurs, is the best way simultaneously to *both* thwart fraudulent voting *and* move voters speedily through polling place lines. Whether the Supreme Court would be willing to consider this kind of defense for the Indiana law, when it was not squarely presented to or passed on by the lower courts, is another matter—as is whether the Court would require some form of evidence to support this alternative argument. But the presence of this argument in the Supreme Court could change the dynamic of the Court's deliberations over the constitutionality of voter ID laws, if enough Justices were conceptually on board with the basic idea that the avoidance of longer lines is a valid secondary interest for states to pursue when drafting the details of these laws.[42]

But if the Court is willing to entertain a new secondary justification for the narrow scope of acceptable IDs under Indiana's statute, then perhaps the Court also should consider another new reason for requiring the state to broaden the scope of the affidavit alternative it provides to the ID requirement. The Indiana statute, as we have seen, contains an indigency exception. But why not an "unforeseeable hardship" exception as well? In other words, since Indiana permits indigent individuals to validate their provisional ballots by signing an affidavit that they could not obtain an ID because of the obligation to pay a fee, then perhaps the state should also permit individuals to validate their provisional ballots with an affidavit that they were unable to obtain an ID because of unforeseeable difficulties (for example, delays in receiving a birth certificate from an out-of-state agency). The state allows non-indigent individuals who go to the polls on election day without the required ID to return within the next two weeks to supply the missing ID if they sign an affidavit that they are the same individuals who cast the provisional ballot. Indeed, in addition to the indigency exception, the state also permits voters with religious objections to presenting a photo ID to sign an affidavit to that effect. Given the post-voting regime the state already has put in place for validating

[42] Another new argument that defenders of the Indiana law might make is that its more limited set of acceptable forms of ID reduces the likelihood of erroneous implementation of the identification requirement by poll workers. During the 2006 election in Ohio, there were allegations (backed by evidence) that the complexities of that state's new identification law, which permits a much wider menu of options than Indiana's, caused poll workers and other election officials to make many mistakes in its application, resulting in differential treatment of similarly situated voters. This error-induced differential treatment gives rise to a potential Equal Protection claim modeled after *Bush v.Gore*, a possibility I analyze extensively in two pieces published as part of a symposium on election law in the Roberts Court: *The Future of* Bush v. Gore*?*, 68 Ohio St. L.J. 925 (2007), and *Refining the* Bush v. Gore *Taxonomy*, 68 Ohio St. L.J. 1035 (2007).

The relevant point here is that avoidance of these mistakes—and thus promotion of equal treatment of similarly situated voters—would be another secondary justification for a state to choose a simpler (and more limited) set of voter ID options. This secondary justification also differs from the notion that voter identification laws in general promote equal voting rights because they increase the confidence of some citizens that their valid votes will not be diluted by ineligible ballots. This other notion, which the Supreme Court mentioned in *Purcell* and Judge Posner also invoked, has received considerable criticism among academics. See Hasen, supra n.22, at 35–36; Pamela Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 Ohio St. L. J. 743, 765–66 (2007), Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio. St. L. J. 1065, 1089 (2007). But while this other notion is rather diffuse and lacks empirical support, the need to avoid poll worker error is much more concrete and has some evidence in its favor. See also Stephen Ansolabehere, *Ballot Bonanza*, Slate (Mar. 27, 2007), available at <http://www.slate.com/id/2161928/> (recounting the preliminary results of a national study showing widespread poll worker error—and variability—in the administration of voter ID rules; concluding that this evidence indicates the need for simplicity to achieve equality).

these provisional ballots, including two different grounds of hardship (indigency and religious objection), is it too much to ask the state to open up this process to voters who have other forms of genuine hardship that prevents them from obtaining an ID for the purpose of validating their provisional ballots?

The state even could demand that any voter signing this alternative hardship affidavit supply other corroborating evidence that the voter is who he or she purports to be (and thus is not engaged in fraudulent voting). For example, the voter could submit an extra affidavit—from a spouse, sibling, or neighbor—swearing that the person claiming hardship is the same one who cast the provisional ballot. As long as the state has strong evidence that the provisional voter is genuine, as is the reason for asserting hardship, then the state's interests are fully satisfied. Since few voters will attempt to take advantage of an ability to claim hardship by supplying affidavits, rather than the required IDs, the availability of a third hardship exception will not be appreciably more disruptive than the existing indigency and religious objector exemptions. (It is relevant, too, that other states with a photo-only voter ID requirement, like Michigan, provide a broader affidavit alternative than Indiana.[43])

In sum, it seems like adding this kind of broader hardship exception to the Indiana law would provide a reasonable accommodation of the interests on both sides of this case. Perhaps the nine Justices unanimously could embrace the conclusion that the law should contain this exception. Some of the Justices might be reluctant to impose their will on the legislative process to this extent. The idea that the unelected Court should refrain from acting like a group of Platonic Guardians, supervising the legislative process so that the laws of our society reflect enlightened policy judgments, is well-engrained in our constitutional tradition and deservedly so.

But voter ID is one topic where unanimous Platonic Guardianship from the Court might not be so bad for our democracy. The topic is mired in strategic partisan disagreement, which prevents state legislatures from developing a reasonable accommodation of the competing interests involved. If the nine members of the Court collectively take it upon themselves to guarantee that voter ID laws will be sensibly respectful of both the costs and benefits of these laws, then the Court could make up for this regrettable defect in the existing democratic process.

Here is one case in which the existing ideological divide among the Justices would work to their collective advantage, if they could coalesce in a unanimous opinion on the constitutionality of Indiana's law. Any unanimous opinion issued in *Crawford* necessarily would be fair to both liberal and conservative views on the voter ID issue. The liberals on the Court would not join if it were unfair from a voting rights perspective. Likewise, the conservatives would balk if it did not give due consideration to the interest in avoiding fraudulent voting. Thus, any unanimous opinion would reflect a consensus across the ideological divide that state legislatures have been unable to achieve.

For this reason, it might be beneficial if the Supreme Court unanimously constrained the states to a range of reasonable legislative alternatives regarding voter identification. But whether or not this outcome would be beneficial, it seems less than likely. Instead, as we have canvassed, there are too many different avenues of temptation in the case to pull the Justices back to positions associated with their initial ideological instincts. They can use precedent, evidence or the lack thereof, or novel arguments, to take them in a direction they were inclined to go anyway. Thus, the most probable result is indeed the expected 5–4 decision, with the ideological divisions on the Court reflecting the ideological divisions of the public debate at large.

Yet, until that happens, one can hold out hope that focusing on the need for the state to justify the specific features of its voter ID law, including the possibility of new arguments in connection with this prong of Fourteenth Amendment analysis, might cause both wings of the Court to gravitate towards a consensus that a remand is required on this point.

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[43] See Michigan Secretary of State, *Picture Identification at the Polls: Instructions to Election Officials*, in Election News, No. 49 (Sept. 12, 2007), available at <http://www.michigan.gov/documents/sos/Issue_No49_207594_7.pdf>.

## THE SIGNIFICANCE OF A 5–4 SPLIT

Assuming that *Crawford* does end up a 5–4 case, what really would be the consequence of that division? It depends, in part, on the particular form a 5–4 split would take. Signs of deep divisions within the 5-member majority itself, with Justice Kennedy taking a sharply different approach than the other four with whom he joins in the Court's judgment, would invite further litigation over voter ID laws, even (or perhaps especially) in the heat of the 2008 general presidential election. It seems improbable, however, that the fractiousness of the Court's ruling in *Crawford* would affect the outcome of the presidential election itself. Instead, the most serious consequence of a deeply divided Court in *Crawford* would be to increase the bitter partisan battles surrounding Supreme Court nominations, exacerbating the perception that the Court itself is a purely political institution whose judgments deserve no more respect than those of Congress, the President, or any other political body.

### *Increased litigation?*

A 5–4 decision can come in two very different forms. One is a clean, decisive opinion of the Court, with no extra concurrences, that makes clear where the majority stands on matters of voter identification, even if four Justices vehemently disagree. The other is a muddle, with no opinion speaking for the Court as such, but only a plurality opinion that at least one Justice in the 5-member majority refuses to join.

Any fragmented scenario of this kind would encourage more litigation over the constitutionality of other voter ID laws, in contrast to the clean and decisive 5–4 split. A single majority opinion, whether it upholds or invalidates the Indiana statutes, can demarcate a clear line between permissible and impermissible ID laws. Folks in Ohio, Arizona, or elsewhere[44] who might be inclined to press forward in court with either an attack on or defense of that state's voter ID law, will know exactly where they stand and will see the futility of further judicial proceedings. If no such clear-cut ruling occurs, however, then these folks will press forward.

Thus, unless Justice Kennedy and four of his colleagues can figure out a way in *Crawford* to avoid the kind of fragmented majority that occurred in the *LULAC* redistricting case[45] and in so many other recent decisions, he and the rest of the Court face the unsavory prospect of ongoing litigation over voter ID laws right up to and perhaps even beyond the November 2008 presidential vote. This prospect could easily include dueling opinions from the Sixth, Ninth, and other circuits, as ideologically aggressive and intellectually ambitious appellate judges attempt to occupy the space left open by the Court's failure to resolve the matter decisively in *Crawford*. (These appellate judges, too, could be expected to outdo Judge Posner in their effort to tee up the topic for the Court's next stab at it.) It would be difficult for the Court to avoid revisiting the issue again, given the clamor for it to clean up the mess it made in *Crawford*. This situation would be exactly the one that the Court hoped to avoid by the early grant of certiorari in *Crawford* itself, so the desire not to waste the opportunity that *Crawford* presents the Court presumably will be a strong incentive for the Justices, including Justice Kennedy specifically, to avoid the kind of fragmented majority that frequently has occurred before.

But desire does not always equal possibility. ("Where there's a will, there's a way" does not necessarily hold true in the dynamics of the Court's internal deliberations.) The Justices presumably wanted to avoid another fragmented majority in *LULAC*, given the previous fragmentation over redistricting in *Vieth v. Jubelirer*.[46] And if one takes Chief Justice Roberts at his word, he wishes to avoid such fragmentation in all cases. Yet he was unsuccessful in this respect in the most recent campaign finance case, *FEC v. WRTL*.[47] Thus, there is a good chance of such fragmentation in *Crawford*, despite the strength of the Justices' contrary desire.

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[44] In addition to Ohio and Arizona, litigation over voter identification laws is currently pending or threatened in Georgia, Michigan, and New Mexico, and could arise in Florida as well.

[45] *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594 (2006).

[46] 541 U.S. 267 (2004).

[47] 127 S.Ct. 2652 (2007).

*Effect on the 2008 presidential election?*

Even if *Crawford* results in a messy and indecisive 5–4 decision, chances are extremely remote that the ruling will influence the outcome of the presidential election. It is doubtful that the topic of voter ID will become a major issue in the campaign itself. Public opinion polls tend to show majorities of both Democrats and Republicans favoring some form of voter ID requirement. Even heated exchanges of rhetoric among the Justices in opinions released at the end of June, with Justice Kennedy showing ambivalence as he did in *Vieth* and *LULAC*, would be unlikely to attract much attention among the electorate.

As for the ruling having an operational effect on the counting of the presidential ballots themselves—an effect that would determine which candidate receives the larger total—only a "perfect storm" confluence of improbabilities could create such a situation. First of all, the majority of Electoral College votes would need to hinge on a state with a voter identification law still in dispute after *Crawford*. Ohio or Arizona might fit this role, depending upon what issues a fragmented ruling in *Crawford* would leave open. But in the pivotal state, there still would need to be enough ballots to fight over in order for a judicial contest over those ballots to determine the Electoral College winner.

In the November 2006 general election, as a result of failing to show a required identification, 2,726 provisional ballots were rejected in Ohio, and 1,977 provisional ballots were rejected in Arizona.[48] For sake of argument, let us assume that because of higher turnout in a presidential election, especially among marginal voters less familiar with the voting process (including the obligation to bring the required ID), this number swells to 5,000 in whichever of these two states decides the presidency. Again, for sake of argument, let us assume (perhaps somewhat unrealistically) that this category of rejected provisional ballots skews 80%–20%, or 4,000–1,000, in favor of the Democratic presidential candidates (on the theory that Democratic voters are much more likely to show up at the polls without the required ID). The Republican presidential candidate would have to prevail in that state by less than 3,000 votes among all other ballots cast and counted in order for fighting over this set of provisional ballots to matter. Possible, given Florida 2000, but exceedingly improbable.[49]

There is also the possibility, perhaps even more remote, that the Supreme Court would need to consider a *Bush v. Gore* issue with respect to provisional ballots cast because voters lacked ID. The *Bush v. Gore* issue would be that, because of ambiguities in a state's voter ID law, some local officials enforce it more leniently than others, with the result that equivalent provisional ballots get treated differently (some counted, others rejected).[50] In fact, in *Crawford* itself, the plaintiffs raised this kind of argument in the lower courts. But the plaintiffs did not present this distinct argument as part of their

[48] These numbers come from a preliminary examination of the 2006 Election Day Survey conducted under the auspices of the U.S. Election Assistance Commission. They are one measure of the disenfranchising effect of the new voter identification laws in those states.

[49] To be sure, it is also possible (but equally unlikely) that *Crawford* could have decisively settled in advance whether the U.S. Constitution requires the counting of these 5,000 provisional ballots notwithstanding the voters' failure to comply with the state's ID law. In that alternative scenario, it could be argued that *Crawford* determined the winner of the 2008 presidential election. (The other candidate would have won the key state, and thus the Electoral College, had *Crawford* gone the other way.) But if by July 2008 *Crawford* makes clear whether or not states may reject provisional ballots cast because the voter lacks ID, then it is unlikely that the public will hold the Supreme Court responsible for picking the President should that ruling turn out to come into play in November. (The rules of the game were set in advance, for all races not just the presidency, without foreknowledge of what effect these rules might have on any of the races; and the candidates and their supporters had ample opportunity to adjust their get-out-the-vote strategies to take account of the ruling, which after all preceded the official nomination of the candidates at their national party conventions.) Only if in November, during the process of reviewing which provisional ballots to count and to reject, the Supreme Court must settle an issue left unresolved by an indecisive ruling in *Crawford*—would the public then hold the Supreme Court accountable for selecting the president in the same way that it did after *Bush v. Gore*.

[50] This kind of ambiguity-induced discrimination among voters is one of many potential *Bush v. Gore* claims on the horizon that I consider in the symposium articles cited in note 42, supra (the error-induced discrimination discussed there being another variety). See also *ACLU of NM v. Santillanes*, 506 F.Supp.2d 598 (D.N.M. 2007) (embracing this kind of claim with respect to Albuquerque's new voter ID law).

petitions for certiorari, and it is highly doubtful that the Court would consider it without any kind of showing of variability in actual practice. But that point applies whether *Crawford* is 9–0, 5–4, or somewhere in between.

In sum, it is possible to spin out scenarios where *Crawford* might make a difference to the counting of presidential ballots, but these scenarios are all extremely speculative, and for at least some of them it would make no difference whether or not *Crawford* itself were a fragmented 5–4 ruling. The real significance of a 5–4 result in *Crawford*, if any, lies elsewhere.[51]

*Confirmation controversies and increased politicization of the Court*

The phenomenon of 5–4 decisions in high-profile cases, with Justice Kennedy controlling the outcome, is hardly novel. Last year's lengthy list included cases involving abortion, school desegregation, the death penalty, and campaign finance. How can it possibly matter if *Crawford* is merely one more 5–4 case?

Let us not discount the cumulative importance of adding the voter ID case to the set of subjects on which to scrutinize a prospective Supreme Court nominee. We are still early in the era of the Roberts Court, where Justice Kennedy's vote—rather than both his and Justice O'Connor's—makes all the difference in the key ideologically charged cases. Although far from the only topic on which to question a nominee to replace Justice Stevens, for example, voter ID could become one of several focal points during the nominee's confirmation hearings if it is clear from *Crawford* that replacing Justice Stevens could tip the balance on that issue.

But quite apart from this cumulative significance, a 5–4 decision in *Crawford* is likely to draw attention in any future confirmation battle because of its intrinsic interest to Senators given its particular relevance to the rules governing their own reelection efforts (or potential presidential bids). Justice Kennedy's pivotal role in redistricting cases does not directly concern Senators, since redistricting affects only the House of Representatives and state or local elections. Thus, a 5–4 decision in *Crawford* will present to the Senators more directly than ever before the fact that a single member of the Supreme Court has such a major role in setting the rules for their own elections.[52]

The upshot will be to politicize the confirmation process to an even greater extent than has occurred previously. One cannot predict exactly where this spectacle will lead, but it is a safe bet that over time the independence of the Court from politics will suffer significant additional erosion.

## CONCLUSION

A unanimous, or even 7–2, decision in *Crawford* would diminish the sense that the result was just politics, rather than the principled interpretation of the U.S. Constitution. It will be highly beneficial to the nation if the Court can figure out a way to achieve that degree of consensus in *Crawford*. The case is an important one symbolically, which is one reason why it has the potential for high salience in contentious confirmation battles over future Supreme Court nominees.

I have suggested several ways in which the Justices, despite their divergent ideological instincts, might find common ground in *Crawford*. In particular, I have suggested that all the Justices might agree to remand the case to see if the state can justify the particular voter identification law it adopted rather than just the idea of voter identification in the abstract. Achieving consensus for this kind of remand might be more palatable to conservatives on

[51] Obviously, if the Supreme Court ends up deciding the constitutionality of a referendum that converts California's allocation of Electoral College votes from winner-take-all to a proportional basis, and that Court decision is seen as determining the outcome of the presidential election, that decision—especially if it is 5–4—would overshadow *Crawford*.

[52] By itself, *Bush v. Gore* could be ignored by Senators as an anomaly, involving out-dated punch-card technology that the Senate worked to eliminate with the enactment in HAVA. But *Crawford* concerns a recurrent issue about the voting process, one addressed in HAVA itself. If *Crawford* is 5–4, then it would be clear to the Senators that what ultimately determines the rules by which their elections are governed is not the laws that they enact in Congress, but who sits in that pivotal seat across the street in the Marble Palace.

the Court if, for example, it specifically directed the lower courts to consider whether the state can offer evidence to show that the limited range of acceptable options under Indiana's law helps to shorten lines or reduce errors at polling places. Conversely, liberals on the Court might be more enamored of this remand if it also directed the lower courts to consider whether Indiana's law should include a third "hardship" ground for its affidavit-in-lieu-of-ID procedure: unforeseeable difficulties in obtaining an underlying document, like a birth certificate, necessary for the required voter ID.

It will take leadership and diplomacy among the Justices to forge a consensus of this kind. Can such statesmanship come from Chief Justice Roberts, Justice Stevens, Justice Kennedy, some other Justice (Breyer?), or a combination of several? As we have seen, there are pressures in *Crawford* to achieve this kind of consensus—pressures unique to this case, because it does involve the casting and counting of ballots in a presidential election. If the nation is lucky, these pressures will help facilitate the statesmanship needed to overcome the centrifugal forces that have been on display in so many other major recent cases, including those involving redistricting and campaign finance.

Yes, the nation may end up lucky in this respect. But I wouldn't bet on it.

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