The Constitutionality of Requiring Photo Identification for Voting: An Analysis of *Crawford v. Marion County Election Board*

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Summary

In a splintered decision issued in April 2008, the Supreme Court upheld an Indiana statute requiring photo identification for voting, determining that lower courts had correctly decided that the evidence in the record was insufficient to support a facial attack on the constitutionality of the law. Written by Justice Stevens, the lead opinion in *Crawford v. Marion County Election Board* finds that the law imposes only "a limited burden on voters' rights," which is justified by state interests.

Background and Case History

In 2005, Indiana enacted a statute requiring citizens voting in person on primary or general election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present a photo identification card issued by the government. Often referred to as the "Voter ID Law," it does not apply to absentee ballots submitted by mail and excepts persons who reside and vote in state-licensed facilities such as nursing homes.[1] It further provides that a voter who is indigent or has a religious objection to being photographed may cast a provisional ballot that will only be counted if the voter executes an appropriate affidavit before the circuit court clerk within 10 days after the election.[2] Under Indiana law, photo identification is not required for registering to vote, and for qualified voters, the state offers free photo identification.[3]

Shortly after enactment of the Voter ID Law, the Indiana Democratic Party and the Marion County Democratic Central Committee (hereafter referred to as the "Democratic Party") filed suit in federal district court against state officials responsible for enforcement of the law, seeking a judgment declaring the statute invalid on its face[4] and enjoining its enforcement. Seeking the same relief, a second suit was filed on behalf of two elected officials and several nonprofit organizations representing groups of elderly, disabled, poor, and minority voters, and the cases were consolidated. In defense of the law, the State of Indiana intervened.[5]

In sum, the plaintiffs alleged that the Voter ID Law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate means of avoiding election fraud; and that it will arbitrarily disenfranchise qualified voters without the requisite identification and place an unjustified burden on those who cannot obtain such identification. In granting defendant's motion for summary judgment, the federal district court found that the plaintiffs had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Voter ID Law] or who will have his or her right to vote unduly burdened by its requirements."[6] Rejecting an expert's report that up to 989,000 registered Indiana voters did not possess either a driver's license or other acceptable photo identification "as utterly incredible and unreliable," the court estimated that as of 2005 (when the statute was enacted), approximately 43,000 Indiana residents did not possess driver's licenses or state-issued identification.[7] The Democratic Party appealed.

In affirming the lower court ruling, the U.S. Court of Appeals for the 7th Circuit held that the Democratic Party had standing to challenge the constitutionality of the Voter ID Law on its face. Next, pointing out that no plaintiff was claiming that the law would deter him or her from voting, the court inferred that "the motivation for the suit is simply that the law may require the

[1] Ind. Code Ann. § 3-11-8-25.1(e).

[2] Ind. Code Ann. §§ 3-11.7-5-1, 3-11.7-5-2.5(c).

[3] Ind. Code Ann. § 9-24-16-10(b).

[4] Filed before the law took effect, such facial challenges seek to strike down an entire statute; in contrast, as-applied challenges only seek to prevent application of a law in a specific circumstance. Facial challenges are frequently utilized in election litigation on the theory that once an election has taken place, it is too late for a judicial remedy.

[5] *See* Crawford v. Marion County Election Board, No. 07-21 (U.S. April 28, 2008) at 3.

[6] *Id.*, slip op. at 3 (quoting Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006)).

[7] *Id.*, slip op. at 4 (quoting Indiana Democratic Party, 458 F. Supp. 2d at 803).

Democratic Party to work harder to get every last one of their supporters to the polls."[8] Finally, rejecting the argument that the law should be evaluated under the same strict standard applicable to a poll tax, the court held that the burden placed on voters was balanced by the benefit of reducing the risk of voter fraud. The Democratic Party appealed.

Supreme Court Ruling

Voting 6 to 3, in April 2008, the Supreme Court affirmed the decision of the 7th Circuit, persuaded that both lower courts had correctly determined that the evidence in the record was insufficient to support a facial attack on the constitutionality of Indiana's Voter ID Law. Justice Stevens wrote the "lead opinion,"[9] which was joined by Chief Justice Roberts and Justice Kennedy; Justice Scalia wrote a concurrence, joined by Justices Thomas and Alito; Justice Souter filed a dissent, joined by Justice Ginsburg; and Justice Breyer filed a dissent.

Lead Opinion by Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy)

The lead opinion in *Crawford* begins with an analysis of the Court's 1966 decision in *Harper v. Virginia Board of Elections*,[10] which invalidated a Virginia statute conditioning the right to vote on the payment of a $1.50 poll tax. The *Harper* Court concluded that whenever a state makes the affluence of a voter or the payment of a fee an electoral standard, it violates the Equal Protection Clause of the Fourteenth Amendment.[11] The opinion further notes that under *Harper,* even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.[12] Clarifying that standard, however, the lead opinion finds that in the Court's 1983 decision, *Anderson v. Celebrezze*,[13] the Court confirmed the general rule that "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious" and indeed, satisfy the *Harper* standard.[14] As the opinion explains, "[r]ather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."[15] Application of this balancing test, the opinion further points out, was made in subsequent election decisions by the Court.[16]

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[8] *Id.*, slip op. at 4 (quoting Indiana Democratic Party, 458 F. Supp. 2d at 952).

[9] In the concurring and dissenting opinions, the opinion written by Justice Stevens is referred to as the Court's "lead opinion." *See e.g, id.*, slip op. at 1 (Scalia, J. concurring).

[10] 383 U.S. 663 (1966).

[11] *See Crawford,* slip op. at 5 (quoting Harper v. Virginia Board of Elections, 383 U.S. 663, 685, 666 (1966)).

[12] *Id.*, slip op. at 5-6.

[13] 460 U.S. 780 (1983).

[14] *Crawford,* slip op. at 6 (quoting Harper v. Virginia Board of Elections, 383 U.S. 663, 788, n. 9 (1966)).

[15] *Id.*, slip op. at 6.

[16] *Id.* (citing, for example, Norman v. Reed, 502 U.S. 279, 288-289 (1992)(identifying a burden that the State of Illinois had imposed on a political party's access to the ballot and calling for a demonstration of a corresponding state interest that was sufficient to justify the limitation); and Burdick v. Takushi, 504 U.S. 428, 434 (1992)(applying the standard of "reasonable, nondiscriminatory restrictions" from Anderson v. Celebrezze, upholding a State of Hawaii prohibition on write-in voting even though it prevented a significant number of voters from meaningful participation in elections, and reaffirming *Anderson's* requirement that in evaluating a constitutional challenge to an election regulation, a court (continued...)

In making the judgment in *Crawford* as to whether the Indiana Voter ID Law is justified by a legitimate state interest, the opinion analyzes each of the three interests identified by the State of Indiana—deterring and detecting voter fraud; preventing voter fraud; and safeguarding voter confidence—and finds that they are "unquestionably relevant" to the state interest of protecting the integrity of the electoral process.[17] Furthermore, it notes that even the petitioners in this case, while charging the statute was motivated by partisan goals, did not question the legitimacy of the interests identified by the State of Indiana. On the issue of voter fraud, it determines that the only type of voter fraud that the Voter ID Law seeks to address is in-person voter impersonation at the polls, but that the record contains no evidence of such fraud ever occurring within Indiana.[18]

On the other side of the coin, the *Crawford* lead opinion also discusses the burdens that the Voter ID Law imposes on voters, burdens that are not imposed by non-photo identification requirements. For example, it points out the possible inconveniences of a voter's photo identification being lost or stolen or no longer representing the likeness of a voter, thereby creating an impediment to voting. However, it concludes that "burdens of that sort arising from life's vagaries ... are neither so serious nor so frequent as to raise any question about the constitutionality of [the Voter ID Law]; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character."[19]

The relevant burdens imposed by the law, the opinion finds, are those that are placed on people who are eligible to vote, but do not possess photo identification that complies with the Voter ID Law. If the State of Indiana required voters to pay a tax or a fee to obtain the requisite photo identification, the fact that most voters already possess a valid driver's license or other acceptable identification would not save the statute under the Court's holding in *Harper*, the lead opinion notes. However, in Indiana, free photo identification cards are available through the Bureau of Motor Vehicles (BMV). In view of that fact, the opinion concludes that "for most voters ... the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote or even represent a significant increase over the usual burdens of voting."[20]

For a "limited number of persons," based on evidence in the record and facts of which the Court takes judicial notice, the Voter ID Law may still impose a "somewhat heavier burden." However, the lead opinion determines that the severity of that burden is mitigated by the fact that eligible voters may cast provisional ballots that will ultimately be counted. While casting a provisional ballot requires traveling to the circuit court clerk's office within 10 days to execute an affidavit, it is "unlikely" that the requirement would create a constitutional problem "unless it is wholly unjustified." Moreover, even if the burden cannot be justified to a few voters, it would be insufficient to establish the relief sought by the petitioners in this case: invalidation of the Voter ID Law in all its applications.[21] In view of such relief sought by the petitioners, the opinion finds that they bear a "heavy burden of persuasion," asking the Court "in effect, to perform a unique

(...continued)

"weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789)).

[17] *Id.*, slip op. at 7.

[18] *Id.*, slip op. at 11.

[19] *Id.*, slip op. at 14.

[20] *Id.*, slip op. at 15.

[21] *Id.*, slip op. at 16.

balancing analysis that looks specifically at a small number of voters who may experience a special burden" and weigh that against the State of Indiana's interests in protecting election integrity.[22]

On the basis of the record before the Court, the lead opinion determines that it "cannot conclude that the Voter ID Law imposes 'excessively burdensome requirements' on any class of voters"[23] and that it "'imposes only a limited burden on voters' rights,'" which are justified by the interests advanced by the State of Indiana.[24] It also finds that if a "nondiscriminatory law is supported by valid neutral justifications," those justifications should not be ignored merely "because partisan interests may have provided one motivation" for its enactment.[25] Finally, the opinion cautions that even if the statute constituted an unjustified burden on some voters, the petitioners failed to demonstrate that the proper remedy was to invalidate the entire statute.[26]

Concurrence by Justice Scalia (joined by Justices Thomas and Alito)

The concurrence, written by Justice Scalia, finds that the Indiana Voter ID Law is "a generally applicable, nondiscriminatory voting regulation" and disputes the notion that "individual impacts are relevant to determining the severity of the burden it imposes."[27] Indeed, according to the concurring opinion, it is the job of state legislatures to assess the costs and benefits of election regulations and "their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."[28] Judicial review of such election regulations must be applied in such an objective and uniform manner that legislatures know beforehand whether the resulting burden is too severe. Specifically criticizing the lead opinion, the concurrence characterizes it as a "record-based resolution" that "neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned."[29] In sum, the concurrence labels it an "indulgence" that the State of Indiana accommodates certain voters by permitting the casting of provisional ballots, finding it not to be a constitutional requirement. Instead, it concludes that it is constitutionally sufficient that the Voter ID Law does not significantly increase typical burdens of voting and that the state's interests are enough to sustain that minimal burden. According to the concurrence, "[t]hat should end the matter."[30]

[22] *Id.*, slip op. at 17.

[23] *Id.*, slip op. at 18 (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)).

[24] *Id.*, slip op. at 18 (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992)).

[25] *Id.*, slip op. at 20.

[26] *Id.*, slip op. at 19. The opinion further explains that when evaluating a neutral, nondiscriminatory voting regulation, a court must be mindful of the fact that a ruling of unconstitutionality runs counter to the intent of the people's elected representatives. *Id.* (citing Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 329 (2006)(quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984)(plurality opinion)).

[27] *Id.*, slip op. at 3 (Scalia, J. concurring).

[28] *Id.*, slip op. at 5 (Scalia, J. concurring).

[29] *Id.*, slip op. at 6 (Scalia, J. concurring).

[30] *Id.*

Dissent by Justice Souter (joined by Justice Ginsburg)

The Souter dissent warns that the Voter ID Law poses a threat of "nontrivial burdens" on the voting rights of tens of thousands of Indiana's citizenry and accordingly, is likely to result in a substantial percentage of those individuals being deterred from voting.[31] It concludes that the law is unconstitutional under the standard the Court established in its 1992 decision, *Burdick v. Takushi*, finding that a state may not burden the right to vote "merely by invoking abstract interests" even if legitimate or compelling, but must make a "particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."[32] In view of "no evidence of in-person voter impersonation fraud in the State,"[33] the dissenting opinion determines that the State of Indiana failed to justify the practical limitations on voting rights created by the law and finds that it creates an "unreasonable and irrelevant burden on voters who are poor and old."[34]

Dissent by Justice Breyer

The Breyer dissent compares the Voter ID Law with similar laws in Georgia and Florida that require photo identification for voting, but accept a broader range of identification. For example, the State of Florida accepts student ID cards, employee badges and cards from neighborhood associations, and will accept a provisional ballot on the condition that the voter's signature matches the signature on file.[35] The State of Indiana, according to the dissent written by Justice Breyer, did not sufficiently justify the "significantly harsher, unjustified burden" created by its law.[36]

Implications

In the wake of the Supreme Court's ruling in *Crawford*, some commentators have speculated that more states are likely to enact laws requiring photo identification for voting.[37] However, even though the Court's ruling strikes down a facial challenge to Indiana's Voter ID Law, it appears to leave open the possibility of "as applied" challenges to such laws, if greater evidence of the burdens imposed on voters' rights can be provided.[38] Furthermore, while three members of the Court—Justices Scalia, Thomas, and Alito—hold the position that a "record-based" evaluation of the impact of such laws on individuals is inappropriate, that view does not appear to be shared by the remainder of the Court.

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[31] *Id.*, slip op. at 1 (Souter, J. dissenting).

[32] *Id.*, (citing Burdick v. Takushi, 504 U.S. 428 (1992).

[33] *Id.*, slip op. at 28 (Souter, J. dissenting).

[34] *Id.*, slip op. at 30 (Souter, J. dissenting).

[35] *See Id.*, slip op. at 3 (Breyer, J. dissenting)(citing Fla. Stat. § 101.043(1)).

[36] *Id.*, slip op. at 5 (Breyer, J. dissenting).

[37] *See, e.g.*, Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, April 29, 2008 (noting that in addition to Indiana, the States of Florida, Georgia, Hawaii, Louisiana, Michigan, and South Dakota also require photo identification for voting).

[38] *See, e.g.*, *Crawford*, slip op. at 18-19, n. 20 (criticizing the record for not providing even a rough estimate of the number of indigent voters who lack copies of their birth certificate).

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