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## THE POST-*CRAWFORD* RISE IN VOTER ID LAWS: A SOLUTION STILL IN SEARCH OF A PROBLEM

*David M. Faherty*

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## THE POST-CRAWFORD RISE IN VOTER ID LAWS: A SOLUTION STILL IN SEARCH OF A PROBLEM

David M. Faherty\*

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)

[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.

*Crawford v. Marion County*, 553 U.S. 181, 204 (2008)

We are focused on making sure that we meet our obligations that we've talked about for years . . . . Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, [is] done.

Pennsylvania House Majority Leader Mike Turzai (2012)

### I. INTRODUCTION

In *Crawford v. Marion County Election Board*<sup>1</sup>, the Supreme Court upheld Indiana's voter identification law, which required registered voters to present government-issued photo identification at the polls. Instead of applying heightened scrutiny to a law that had an effect on voter qualifications, the Court simply balanced the asserted state interest of protecting the integrity and reliability of elections by preventing voter fraud against the burden imposed on eligible voters who were prevented from voting because they did not possess the required form of photo identification. Not persuaded by the fact that Indiana could not point to a single instance of voter fraud, or that significant hurdles existed for eligible voters in obtaining appropriate photo IDs, the Court upheld Indiana's voter ID law.

Five years since *Crawford*, evidence of significant voter fraud has yet to be uncovered in the United States, despite many concerted attempts to do so.<sup>2</sup> Nevertheless, voter ID laws continue to be an extremely polarizing issue. Proponents argue that without voter ID laws, there is no way to ensure the integrity of elections or voter confidence in the democratic process.<sup>3</sup> Opponents appeal to the same values to argue against voter ID laws – that the integrity of elections and

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1. 553 U.S. 181 (2008).

2. See Ivan Moreno, *Republicans Look for Voter Fraud, Find Little*, ASSOCIATED PRESS, Sept. 24, 2012, 1:22 PM, <http://bigstory.ap.org/article/republicans-look-voter-fraud-find-little>; Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES, Sept. 16, 2012, <http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html>.

3. See Moreno, *supra* note 2; see Saul, *supra* note 2.

voter confidence in the democratic process are severely limited when voter ID laws disenfranchise a significant portion of the electorate.<sup>4</sup>

This Comment argues that the disparity in post-*Crawford* rulings on voter ID laws results from the failure of the Court in *Crawford* to articulate a clear standard of review that allows courts to take equal protection considerations into account when deciding whether to uphold or invalidate voter ID laws. After surveying the landscape of post-*Crawford* decisions on state voter ID laws, this Comment argues that the balancing test articulated in *Crawford* is inherently unclear and should be abandoned in favor of a heightened form of scrutiny when reviewing state laws that impose new restrictions and voter qualifications. As the quotes above illustrate, it is time for the Supreme Court to settle the issue of ensuring voting rights in the face of the rising number of state voter ID laws.

## II. HISTORICAL BACKGROUND OF FEDERAL RESTRICTIONS ON STATE VOTER DISENFRANCHISEMENT

Although the right to vote is not expressly guaranteed in the United States Constitution, the Supreme Court has “often reiterated that voting is of the most fundamental significance under our constitutional structure.”<sup>5</sup> The Supreme Court has applied the Fourteenth Amendment, which prohibits states from “deny[ing] to any person . . . the equal protection of the laws,”<sup>6</sup> to voting. In *Harper v. Virginia Board of Elections*,<sup>7</sup> the Court explained that “once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”<sup>8</sup> Furthermore, the Fifteenth Amendment expressly protects the right to vote from racial discrimination, providing that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>9</sup>

Despite the Constitutional safeguards of the Fourteenth and Fifteenth Amendments, “the blight of racial discrimination in voting . . . infected the electoral process in parts of our country for nearly a century.”<sup>10</sup> After Reconstruction, many Southern states enacted ballot access measures specifically designed to prevent blacks from voting, notoriously instituting poll taxes, literacy tests, grandfather clauses, and property qualifications at the state and local levels.<sup>11</sup> Though race-neutral on their face, these measures were deliberately crafted to

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4. See generally KEESHA GASKINS & SUNDEEP IYER, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (Brennan Center for Justice ed., 2012); Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. TIMES, July 15, 2012, <http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws>; Thomas B. Edsall, *Killing a Fly with a Bazooka*, N.Y. TIMES, July 29, 2012, <http://campaignstops.blogs.nytimes.com/2012/07/29/killing-a-fly-with-a-bazooka>.

5. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

6. U.S. CONST. amend. XIV, § 1.

7. 383 U.S. 663 (1966).

8. *Id.* at 665.

9. U.S. CONST. amend. XV, § 1.

10. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

11. See, e.g., *id.* at 310-11; Shelby Cnty. v. Holder, 679 F.3d 848, 853 (D.C. Cir. 2012).

severely limit the number of black voters. For example, when literacy tests were enacted, “more than two-thirds of the adult [blacks] were illiterate while less than one-quarter of the adult whites were unable to read or write.”<sup>12</sup> In addition, the Court in *Katzenbach* highlighted a key speech delivered by South Carolina Senator Ben Tillman as evidence that ballot measures enacted in the South were designed with the express purpose of disenfranchising blacks.<sup>13</sup> Ultimately, the Supreme Court invalidated many of these laws on the grounds that they violated the Fifteenth Amendment,<sup>14</sup> but many states were able to stay one step ahead of the courts “by passing new discriminatory voting laws as soon as the old ones had been struck down.”<sup>15</sup>

Against this backdrop of “unremitting and ingenious defiance of the Constitution,”<sup>16</sup> Congress passed the Voting Rights Act of 1965 pursuant to Congress’s authority to enforce the Fifteenth Amendment “by appropriate legislation.”<sup>17</sup> The Voting Rights Act was intended to eliminate the “insidious and pervasive evil” of racial discrimination in voting,<sup>18</sup> and jurisdictions covered by the Act needed to demonstrate that a proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” in order for the change to take effect.<sup>19</sup> Section 2 of the Voting Rights act prohibits voting practices or procedures that discriminate on the basis of race, color, or against language minority groups.<sup>20</sup> Under the 1982 amendments to Section 2, state or local laws violate the Voting Rights Act if they have the effect of disadvantaging minority voters.<sup>21</sup> Furthermore, Section 2 authorizes litigation challenging state or local actions that are alleged to violate the section.<sup>22</sup>

In adopting the Voting Rights Act, Congress concluded that lawsuits challenging election procedures were not sufficient as a means of stopping discrimination in voting, because states often invented new and novel ways of disenfranchising minority voters.<sup>23</sup> In response to this problem, Congress adopted Section 5 of the Voting Rights Act, which requires preapproval of any attempt to change “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” in jurisdictions with a history of race

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12. *Katzenbach*, 383 U.S. at 311.

13. At the South Carolina Constitutional Convention of 1895, Senator Ben Tillman explained the real aim of the new literacy test: “[T]he only thing we can do as patriots and as statesmen is to take from [the ignorant blacks] every ballot that we can under the laws of our national government.” *Id.* at 310 n.9 (quoting JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 464 (1895)).

14. *Id.* at 311-12 (collecting cases).

15. *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 94-196, at 57-58 (1975)).

16. *Katzenbach*, 383 U.S. at 309.

17. U.S. CONST. amend. XV, § 2.

18. *Katzenbach*, 383 U.S. at 309.

19. 42 U.S.C. § 1973c(a) (2006).

20. *Id.* § 1973.

21. Erwin Chemerinsky, ‘Stakes are Enormous’ in Voting Rights Case, A.B.A. J. (Feb. 5, 2013), [http://www.abajournal.com/news/article/court\\_elects\\_to\\_take\\_another\\_look\\_at\\_the\\_voting\\_rights\\_act](http://www.abajournal.com/news/article/court_elects_to_take_another_look_at_the_voting_rights_act).

22. 42 U.S.C. § 1973a.

23. Chemerinsky, *supra* note 21.

discrimination in voting.<sup>24</sup> The preapproval, or “preclearance,” must come either from the U.S. Attorney General, through an administrative procedure in the Department of Justice, or from a three-judge federal court in the District of Columbia through a request for a declaratory judgment.<sup>25</sup>

The Supreme Court upheld the constitutionality of Section 5 in *Katzenbach*, and has continued to do so over subsequent Congressional reauthorizations.<sup>26</sup> In the 2006 reauthorization, Congress found that without the continued protections of the Voting Rights Act, “racial and language minority citizens will be deprived of their opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minority voters in the last 40 years.”<sup>27</sup> In a landmark case<sup>28</sup> last term, the Supreme Court weakened the Voting Rights Act by striking down Section 4’s current coverage formula. Substituting its judgment on the nature and location of voter disenfranchisement in the United States for that of Congress, the Court held that Section 4 failed to account for positive developments<sup>29</sup> in covered jurisdictions, “keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”<sup>30</sup>

### III. VOTING RIGHTS AND VOTER FRAUD: FEDERAL AND STATE APPROACHES

#### A. The Federal Approach

In *Harper*, the U.S. Supreme Court held that Virginia could not condition the right to vote in a state election on the payment of a poll tax of \$1.50.<sup>31</sup> The Court rejected the dissenters’ argument that a rational basis existed for the poll tax based on Virginia’s interest in promoting civic responsibility by “weeding out those [voters] who do not care enough about public affairs” to pay a small sum for the privilege of voting.<sup>32</sup> The Court applied a stricter standard than the rational basis standard, concluding that a State “violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”<sup>33</sup> The Court used the term “invidious

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24. 42 U.S.C. § 1973c(a).

25. *Id.*

26. See *Lopez v. Monterey Cnty.*, 519 U.S. 9 (1996); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973).

27. An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 109-246, § 2, 120 Stat. 577, 578 (2006).

28. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

29. The Court highlighted that in covered jurisdictions, voter turnout and registration rates now approach parity, blatant discriminatory evasions of federal decrees are now rare, and minority candidates now hold office at unprecedented levels. *Id.* at 2625. Furthermore, the Court attributed these great strides to the Voting Rights Act. *Id.* at 2626. Nevertheless, it held that the deterrent effect of Section 5 on covered jurisdictions could not be immune from judicial scrutiny, because “no matter how ‘clean’ the record of covered jurisdictions, the argument could always be made that it was the deterrence that accounted for the good behavior.” *Id.* at 2627.

30. *Id.* at 2629.

31. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

32. *Id.* at 684-85 (Harlan, J., dissenting).

33. *Id.* at 666. (majority opinion).

discrimination” to describe this type of equal protection violation, and held that the State’s conduct was invidious because it was irrelevant to the voter’s qualifications.<sup>34</sup>

The Court later qualified the standard applied in *Harper* that even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications. In *Anderson v. Celebrezze*,<sup>35</sup> where an independent presidential candidate challenged the constitutionality of Ohio’s early filing deadline for independent candidates, the Court held that “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the *Harper* standard.<sup>36</sup> Instead of using a “litmus test” approach that would neatly separate valid from invalid restrictions, the Court in *Anderson* concluded that a court must identify and evaluate the interests advanced by the state as justifications for the burden imposed by the voting restrictions.<sup>37</sup> The balancing approach of *Anderson* has been used in subsequent election cases, including a case involving Hawaii’s prohibition on write-in voting.<sup>38</sup>

In *Burdick v. Takushi*,<sup>39</sup> where a registered voter challenged Hawaii’s prohibition on write-in voting, the Court applied the *Anderson* standard for “reasonable, nondiscriminatory restrictions” and upheld Hawaii’s prohibition despite the fact that it prevented a significant number of voters from participating in Hawaii elections.<sup>40</sup> In *Burdick*, the Court reaffirmed *Anderson*’s requirement that a court evaluating a constitutional challenge to an election regulation 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.”<sup>41</sup>

In *Norman v. Reed*,<sup>42</sup> where a new political party sought to overcome a restriction on the use of its name to gain a place on a local ballot, the Court identified the burden Illinois imposed on a political party’s access to the ballot. After calling for Illinois to demonstrate a “corresponding interest sufficiently weighty to justify the limitation,” the Court concluded that the restriction was not justified by a narrowly drawn state interest of compelling importance.<sup>43</sup>

In recent years, Congress has enacted legislation to help the states modernize their election procedures. For example, the National Voter Registration Act of 1993 (NVRA) establishes procedures aimed at both increasing the number of registered voters for federal elections and protecting the integrity of voting and elections.<sup>44</sup> The NVRA requires applications for state-issued motor vehicle driver’s licenses to serve as voter registration applications.<sup>45</sup> Furthermore, the NVRA also restricts the states’ ability to remove names from their lists of

34. *Id.* at 666-67.

35. 460 U.S. 780 (1983).

36. *Id.* at 788 n.9.

37. *Id.* at 789.

38. *See Burdick v. Takushi*, 504 U.S. 428 (1992).

39. *Id.*

40. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 788).

41. *Id.* (quoting *Anderson*, 460 U.S. at 789).

42. 502 U.S. 279 (1992).

43. *Id.* at 288-89.

44. 42 U.S.C. §§ 1973gg-1973gg-10 (2006).

45. *Id.* § 1973gg-3.

registered voters.<sup>46</sup>

In addition, Congress enacted the Help America Vote Act (HAVA) at the urging of President Bush in the aftermath of *Bush v. Gore*<sup>47</sup> and the 2000 general election.<sup>48</sup> HAVA requires every state to create and maintain computerized statewide lists of all registered voters,<sup>49</sup> and also requires the states to verify voter information contained in voter registration applications by either the applicant's driver's license number or the last four digits of the applicant's social security number.<sup>50</sup> In addition, HAVA requires voters who registered to vote by mail and who have not voted previously in a federal election to show either a form of current and valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.<sup>51</sup>

### B. A State Approach: Missouri

Missouri provides an illustrative example of the state-based approach to analyzing voter identification laws pre-*Crawford*. The Supreme Court of Missouri took up the issue after a statute was enacted in 2006 that required registered voters to present certain types of photographic identification issued by the state or federal governments in order to cast their ballots.<sup>52</sup> To block enforcement of the law, known as Section 115.427, plaintiffs Kathleen Weinschenk and others sued the State of Missouri on the grounds that Section 115.427 interfered with the fundamental right to vote as protected by the constitutions of Missouri and the United States.<sup>53</sup> Furthermore, Ms. Weinschenk and the others claimed that the law impermissibly required voters without photo identification, particularly low-income, disabled, and elderly voters, to spend money on the necessary documents such as birth certificates in order to obtain the requisite photo identification.<sup>54</sup> The trial court held that the law was unconstitutional because it violated Missourians' right to vote and to equal protection of the laws, finding that the law unnecessarily burdened the right to vote of registered voters who would not be allowed to vote because they did not have a form of photo identification required by the law.<sup>55</sup>

The Missouri Supreme Court fully agreed with the argument of the state that a compelling state interest existed in preventing voter fraud.<sup>56</sup> The court, however, held that the evidence presented to the trial court did not support the state's argument that the law's photo identification requirement was narrowly tailored to

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46. *Id.* § 1973gg-6(a)(3).

47. 531 U.S. 98 (2000) (per curiam).

48. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

49. 42 U.S.C. § 15483(a) (2006).

50. *Id.* § 15483(a)(5)(A)(i).

51. *Id.* § 15483(b)(2)(A)(i).

52. *Weinschenk v. State*, 203 S.W.3d. 201, 204 (Mo. 2006) (per curiam).

53. *Id.* The right to vote is expressly guaranteed to citizens who are qualified and registered under Article I, Section 25 and Article VII, Section 2 of the Missouri Constitution.

54. *Id.*

55. *Id.*

56. *Id.*



accomplish that purpose.<sup>57</sup> The court's holding was prompted by the state's acknowledgement that the photo identification requirement was intended to prevent only impersonation at the polls, and would not affect fraud committed during absentee ballot submission or voter registration.<sup>58</sup> Furthermore, the evidence presented at the trial court showed that the Missouri Legislature's enactment in 2002 of statutory precautions in response to HAVA sufficiently eliminated the potential risk of voter impersonation fraud.<sup>59</sup>

Finally, the state argued that the photo identification requirement nevertheless should remain in place because it would reassure voters who perceived that fraud existed.<sup>60</sup> In response, the Missouri Supreme Court held that this justification placed too great an encumbrance on Missourians' right to vote given the complete absence of even a single report of voter impersonation in Missouri since the state's implementation of the HAVA reforms.<sup>61</sup>

Because the statute placed a substantial burden on the fundamental right to vote, the Missouri Supreme Court applied strict scrutiny to Missouri's voter ID law.<sup>62</sup> In applying strict scrutiny, the court held that the law was neither strictly necessary nor narrowly tailored to meet the state's compelling interests,<sup>63</sup> and thus violated equal protection and the fundamental right to vote in Missouri.<sup>64</sup>

### C. Crawford and the Development of a Balancing Test

In *Crawford*, a majority of the Court agreed that *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote.<sup>65</sup> However, the Stevens Plurality and the Scalia Concurrence disagreed over the legacy of *Burdick*.<sup>66</sup> Justice Stevens argued that the Court in *Burdick* rejected the argument that strict scrutiny applies to all laws imposing a burden on the right to vote, and instead applied the "flexible standard" set forth in *Anderson*.<sup>67</sup> Justice Scalia argued that *Burdick* created a novel "deferential 'important regulatory interests' standard."<sup>68</sup>

In *Crawford*, the plurality agreed that two state interests identified by Indiana were "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process."<sup>69</sup> The plurality identified that the first state

57. *Id.*

58. *Id.* at 204-05.

59. *Id.* at 205. The Missouri Supreme Court noted that the only specific instance of possible voter fraud that had occurred since the enactment of HAVA legislation involved an attempt by a person who had voted absentee to then vote in person. Furthermore, this one instance of attempted voter fraud would not have been prevented by Missouri's photo identification law. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 215.

63. *Id.* at 217.

64. *Id.* at 221-22.

65. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008); *id.* at 204 (Scalia, J., concurring).

66. See *id.* at 190 n.8 (plurality opinion).

67. *Id.*

68. *Id.* at 204 (Scalia, J., concurring).

69. *Id.* at 191 (plurality opinion).

interest was in deterring and detecting voter fraud.<sup>70</sup> Indiana argued that it had an interest in preventing voter fraud in response to the problem that the state's voter registration rolls included a large number of names of persons who were either deceased or who no longer lived in Indiana.<sup>71</sup> In addition, Indiana argued that it had an interest in safeguarding voter confidence.<sup>72</sup>

The Stevens Plurality then turned to discuss each of these state interests. After pointing to the implementation of federal statutes such as the NVRA and HAVA, the plurality inferred that Congress seemed to believe that "photo identification is one effective method of establishing a voter's qualification to vote," and that "the integrity of elections is enhanced through improved technology."<sup>73</sup> The plurality also emphasized that this conclusion was supported by a report published by the Commission on Federal Election Reform,<sup>74</sup> which stated that "some form of identification is needed" at the polls because the United States is no longer a country where "everyone knows each other."<sup>75</sup> The plurality also highlighted the following findings and conclusions made in the report:

There is no evidence of extensive voter fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.<sup>76</sup>

The plurality next discussed the state interest of preventing voter fraud, and commented that the only kind of voter fraud that Indiana's voter identification law addressed was in-person voter impersonation at polling places.<sup>77</sup> Nevertheless, the plurality then stated that "[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."<sup>78</sup>

The Stevens Plurality assumed the petitioners' premise that the voter identification law "may have imposed a special burden" on some voters, but held that the petitioners did not assemble sufficient evidence to show that the special burden was severe enough to warrant heightened scrutiny.<sup>79</sup> In reviewing the provisions of the Indiana law, the Court held that "[t]he severity of [the] burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted . . . [if] they travel to the circuit court clerk's office within 10 days to execute the required affidavit."<sup>80</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 193.

74. The Commission on Federal Election Reform was co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker III.

75. *Crawford*, 553 U.S. at 193-94 (quoting COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005)).

76. *Id.* at 194.

77. *Id.*

78. *Id.*

79. *Id.* at 199-200.

80. *Id.* at 199.

Although a narrow ruling on the validity of a single state's voter ID law, *Crawford* nevertheless defined the parameters from which proponents and opponents of voter ID laws would base their arguments in legal challenges that followed. For example, the Court held that "for most voters . . . the inconvenience of making a trip to the BMV [to obtain photo identification] . . . does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."<sup>81</sup> In addition, because Indiana's law allowed eligible voters without the appropriate identification to sign an affidavit attesting to their identity as a registered Indiana voter, the holding of *Crawford* is necessarily limited to voter ID laws that allow for such alternative voting opportunities for voters who lack the appropriate identification on election day.

#### IV. RECENT STATE ACTIONS TO PREVENT VOTER FRAUD

##### *A. Pennsylvania*

On March 14, 2012, the Pennsylvania Legislature passed a law ("Act 18") requiring citizens voting in-person on election day to present photo identification.<sup>82</sup> Made effective immediately, Act 18 changed Pennsylvania's Election Code<sup>83</sup> by eliminating the distinction between photo identification and other forms of acceptable identification by defining the term "proof of identification" as a list of attributes of acceptable forms of photo identification.<sup>84</sup> Act 18 also eliminated the option for electors without photo identification to present an alternative form of

81. *Id.* at 198.

82. Act of March 14, 2012, P.L. 195, No. 18, 2012 Pa. Legis. Serv. 2012-18 (West) (amending the definition of "proof of identification" in the Penn. Election Code) [hereinafter Act 18].

83. 25 PA. CONS. STAT. ANN. §§ 2600-3591.

84. Act 18, 2012 Pa. Legis. Serv. 2012-18. Act 18 defines "proof of identification" as the following:

- "(1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.
- (2) For an elector who appears to vote under section 1210, a document that:
  - (i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;
  - (ii) shows a photograph of the individual to whom the document was issued;
  - (iii) includes an expiration date and is not expired, except:
    - (A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or
    - (B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and
  - (iv) was issued by one of the following:
    - (A) The United States Government.
    - (B) The Commonwealth of Pennsylvania.
    - (C) A municipality of this Commonwealth to an employee of that municipality.
    - (D) An accredited Pennsylvania public or private institution of higher learning.
    - (E) A Pennsylvania care facility.

*Id.*

identification showing the name and address of the elector.<sup>85</sup> In addition, Act 18 required the Secretary of the Commonwealth to disseminate information to the public regarding the new photo identification requirement, and further required the Department of Transportation to issue a free identification card to any registered elector who applies and who includes an affirmation that he or she does not possess photo identification.<sup>86</sup> Despite the claims by proponents in the Pennsylvania Legislature that Act 18 was meant to help curb voter fraud in the state, Republican State House Majority Leader Mike Turzai openly suggested that the real intent of the law was to aid the Republican Party politically.<sup>87</sup> In response, several individuals and organizations filed a suit against the Commonwealth of Pennsylvania seeking a preliminary injunction of the enforcement and implementation of Act 18.<sup>88</sup>

In the Commonwealth Court of Pennsylvania, opponents of Act 18 issued a facial challenge by claiming that Act 18 violated the Pennsylvania Constitution in the following three ways: (1) by unduly burdening the fundamental right to vote in violation of Article I, Section 5; (2) by imposing unequal burdens on the right to vote upon voters in violation of the equal protection guarantees of Article I, Sections 1 and 26; and (3) by imposing an additional qualification on the right to vote in violation of Article VII, Section 1.<sup>89</sup> To prevail in the trial court, the opponents of Act 18 carried the burden of establishing all of the requirements of a preliminary injunction.<sup>90</sup> The Commonwealth Court held that the opponents of Act 18 failed to establish the following requirements of a preliminary injunction: (a) that immediate and irreparable harm would result from the implementation of Act 18, because they failed to establish that “disenfranchisement was immediate or inevitable;”<sup>91</sup> (b) that greater injury would occur from refusing to grant the injunction than from granting it, because the public outreach and education components of implementation of Act 18 were much harder to start or restart than

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85. *Id.* The alternative forms of acceptable non-photo identification included the following: “(1) nonphoto identification issued by the Commonwealth, or any agency thereof; (2) nonphoto identification issued by the United States Government, or agency thereof; (3) a firearm permit; (4) a current utility bill; (5) a current bank statement; (6) a paycheck; [or] (7) a government check.” *Id.*

86. *Id.*

87. Kelly Cernetich, *Turzai: Voter ID Law Means Romney Can Win PA*, POLITICS PA (June 25, 2012, 12:53 PM), <http://www.politicspa.com/turzai-voter-id-law-means-romney-can-win-pa/37153/> (In a speech at a Republican State Committee meeting, Turzai said: “We are focused on making sure that we meet our obligations that we’ve talked about for years. . . . Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, [is] done.”).

88. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 3332376, at \*1 (Pa. Commw. Ct. Aug. 15, 2012), *vacated*, 54 A.3d 1 (Pa. 2012).

89. *Id.*

90. *Id.* at \*3. The elements of a preliminary injunction include the following:

(1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the public interest will not be harmed if the injunction is granted.

*Id.* (citing *Brayman Constr. Corp. v. Dep’t of Transp.*, 13 A.3d 925, 935 (Pa. 2011)).

91. *Id.*

to stop;<sup>92</sup> and (c) that the opponents of Act 18 would likely prevail on the merits.<sup>93</sup>

In analyzing the likelihood that the opponents of Act 18 would prevail, the Commonwealth Court favored the more deferential “flexible standard” approach set forth in *Anderson* and applied in *Crawford* over the “strict scrutiny” approach advocated by the opponents of Act 18.<sup>94</sup> The court used the “flexible standard” approach of balancing the burdens against the legitimate state interest, and held that Act 18 on its face does not “expressly disenfranchise or burden any qualified elector or group of electors,” but instead “applies equally to all qualified voters [because] to vote in person, everyone must present a photo ID<sup>95</sup> that can be obtained for free.”<sup>96</sup> For purposes of the preliminary injunction, the court concluded that Act 18 imposed “only a limited burden on voters’ rights, and the burden [did] not outweigh the statute’s plainly legitimate sweep.”<sup>97</sup>

In reaching this conclusion, the court examined the Commonwealth’s stated justifications for the photo ID law, which were to “improve the security and integrity of elections in Pennsylvania in a manner that [was] in keeping with the photo ID requirements of many other secure institutions and processes,” and to use the photo ID requirement as “a tool to detect and deter voter fraud.”<sup>98</sup> However, the Commonwealth had stipulated that despite these stated justifications, it did not know of any incidents, investigations, or prosecutions of in-person voter fraud in Pennsylvania or in any other states.<sup>99</sup> Nevertheless, the court held that the absence of proof of in-person voter fraud in Pennsylvania was not dispositive.<sup>100</sup> Thus, the court concluded that Act 18’s photo ID requirement was “a reasonable, nondiscriminatory, non-severe burden when viewed in the broader context of the

92. *Id.* at \*5.

93. *Id.* at \*6.

94. *Id.* at \*\*16-17; see *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008).

95. The Commonwealth Court based its prediction that qualified electors would not be disenfranchised by Act 18 on “the believable testimony about the pending [Pennsylvania Department of State] photo IDs for voting, and the enhanced availability of birth confirmation through the Department of Health for those born in Pennsylvania.” *Id.* at \*4.

96. *Id.* at \*9.

97. *Id.*

98. *Id.* at \*27.

99. *Id.* at \*28. Both the Commonwealth and the opponents of Act 18 stipulated to the following facts:

1. There have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and the parties do not have direct personal knowledge of any such investigations or prosecutions in other states;
2. The parties are not aware of any incidents of in-person voter fraud in Pennsylvania and do not have direct personal knowledge of in person voter fraud elsewhere;
3. [The Commonwealth] will not offer any evidence in this action that in-person voter fraud has in fact occurred in Pennsylvania or elsewhere; . . .
5. [The Commonwealth] will not offer any evidence or argument that in person voter fraud is likely to occur in November 2012 in the absence of the Photo ID law

*Id.*

100. *Id.* The court also considered the comments of House Majority Leader Mike Turzai, determining that the evidence did not invalidate the interests supporting Act 18 because the statement was made away from the chamber floor of the General Assembly and because “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.” *Id.* (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008)).

widespread use of photo ID in daily life,” and that “[t]he Commonwealth's asserted interest in protecting public confidence in elections [was] a relevant and legitimate state interest sufficiently weighty to justify the burden.”<sup>101</sup>

On appeal, the opponents of Act 18 reasserted their facial constitutional challenge to the law and sought to preliminarily enjoin its implementation, arguing that due to limitations in the Commonwealth's identification card issuing infrastructure,<sup>102</sup> a number of qualified Pennsylvania electors would not have had an adequate opportunity to become educated about Act 18's requirements and obtain the necessary identification cards, and would thus be disenfranchised in the upcoming November 2012 general election.<sup>103</sup> In reviewing the opinion of the Commonwealth Court, the Supreme Court of Pennsylvania held that the lower court's predictive judgment rested primarily on the assumption that the Commonwealth's efforts both to educate the voting public and to compensate for the barriers to receiving identification cards from the Pennsylvania Department of Transportation would sufficiently prevent the possibility of disenfranchisement.<sup>104</sup> Given the state of affairs at the time of the appeal, the Supreme Court of Pennsylvania vacated the lower court's order and remanded for the court to determine whether the Commonwealth's procedures for issuing alternative identification cards comported with the requirement of Act 18's “liberal access” requirement.<sup>105</sup> If these procedures did not meet the liberal access requirement, the Supreme Court held that the Commonwealth Court was obligated to enter a preliminary injunction.<sup>106</sup>

On remand, the Commonwealth Court held that the Commonwealth's proposed changes did not cure the deficiency in the liberal access requirement of Act 18.<sup>107</sup> After reviewing evidence<sup>108</sup> on the number of photo identification cards issued to date, the court explained that it was no longer convinced of its predictive judgment that no voter disenfranchisement would result from the Commonwealth's

101. *Id.* at \*29.

102. On appeal, the Commonwealth conceded that Act 18 was not being implemented according to its terms, due to inconsistencies between the law's requirements for ID applications and the higher standard that the Pennsylvania Department of Transportation requires for its ID applications. In addition, the Pennsylvania Departments of State and Transportation acknowledged that under the current regime, some registered voters will not be able to qualify for a Department of Transportation identification card in time for the 2012 General Election. Finally, officials from the Departments of State and Transportation testified that if the law was enforced “in a manner that prevents qualified and eligible electors from voting, the integrity of the upcoming General Election [would] be impaired.” *Applewhite v. Commonwealth*, 54 A.3d 1, 3-4 (Pa. 2012).

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 5. The Supreme Court of Pennsylvania also instructed the Commonwealth Court that it may not base its predictive judgment merely on the assurances of government officials. *Id.*

106. *Id.*

107. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at \*2 (Pa. Commw. Ct. Oct. 2, 2012).

108. As of September 25, 2012, between 9,300 and 9,500 Department of Transportation voting IDs and between 1,300 and 1,350 Department of State voting IDs had been issued. According to Department of Transportation statistics, the period of March 2012 to September 2012 showed only a slight increase in the number of initial drivers' licenses and initial photo IDs issued in Pennsylvania than over the same period in 2011. *Id.*

implementation of Act 18 for the 2012 general election.<sup>109</sup> Accepting the opponents of Act 18's argument that the gap between the photo IDs issued and the estimated need would not be closed in the remaining five weeks before the election, the Commonwealth Court preliminarily enjoined the implementation of Act 18's photo identification requirement for the 2012 general election.<sup>110</sup>

### B. Wisconsin

In 2011, Wisconsin enacted a voter identification law ("Act 23") mandating that qualified electors display acceptable government-sanctioned photo identification either at the polls or to election officials by 4:00 p.m. on the Friday after election day.<sup>111</sup> To accommodate qualified electors who did not have photo identification, the legislature required the Department of Transportation to issue free photo identification cards to qualified electors.<sup>112</sup> Two separate legal actions were filed simultaneously in response, challenging the implementation of the law both generally and specifically for the forthcoming 2012 general election.<sup>113</sup>

In *League of Women Voters*,<sup>114</sup> the Dane County Circuit Court permanently enjoined implementation of Act 23's photo ID requirement.<sup>115</sup> That court held that Act 23 was unconstitutional because it disqualified otherwise qualified electors from voting, a violation of the Wisconsin Constitution, which specifies that "[e]very United States citizen . . . who is a resident of an election district in this state is a qualified elector in that district."<sup>116</sup> Under the state constitution, the government may exclude from voting only those either (a) convicted of a felony, or (b) adjudged by a court to be incompetent to understand the objective of the elective process.<sup>117</sup> While recognizing that the legislature had the power to regulate the mode, manner, and timing of the electoral process, the court stated that the legislature did not have the right to destroy or substantially impair the right of a qualified elector to cast his or her ballot.<sup>118</sup> The court held that Act 23 was unconstitutional because its photo ID requirements were not merely elections regulations but "impermissibly eliminate[d] the right of suffrage altogether for certain constitutionally qualified electors."<sup>119</sup>

In *Milwaukee Branch of the NAACP*,<sup>120</sup> the Dane County Circuit Court issued

109. *Id.* at \*3.

110. *Id.* at \*\*2-3.

111. Act of May 25, 2011, 2011 Wisconsin Act 23, §§ 18, 90, 2011-2012 Wis. Legis. Serv. Act 23 (2011 A.B. 7) (West) (creating, amending, repealing, and renumbering statutes related to voter identification requirements).

112. *Id.* §138.

113. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Mar. 12, 2012); *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Mar. 6, 2012).

114. 2012 WL 763586.

115. *Id.* at \*5.

116. *Id.*; WIS. CONST. art. III, § 1.

117. WIS. CONST. art. III, § 2.

118. *League of Women Voters*, 2012 WL 763586, at \*3.

119. *Id.* at \*4.

120. *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6, 2012).

a temporary injunction against the enforcement and implementation of the photo identification requirements of Act 23.<sup>121</sup> The court based its decision on the probability of success of the plaintiff's argument that the photo ID requirements violated the Wisconsin Constitution by unreasonably burdening the right to vote and denying substantive due process and equal protection.<sup>122</sup> The court held that because the right to vote is a fundamental interest in Wisconsin, the court should apply "a strict or heightened standard of review to determine [if Act 23] remains within that range of authority permitted under the constitution."<sup>123</sup> The court held that the sweep and impact of Act 23 was very broad, and had not been "sufficiently focused to avoid needless and significant impairment of the right to vote."<sup>124</sup>

In addition, the court offered three reasons why *Crawford* did not control the case's outcome. First, the court held that Wisconsin's Constitution, unlike the United States Constitution, expressly guaranteed the right to vote. Second, the court held that the Indiana law in *Crawford* was less rigid than Act 23 because it allowed for alternative voting opportunities for voters who lacked photo ID. Third, the court held that while *Crawford* came to the Court based upon a flawed factual record lacking substantial evidence of voter disenfranchisement, this case did not suffer from the same inadequacy.<sup>125</sup>

The State of Wisconsin appealed both cases, which were both certified for appeal by the Wisconsin Court of Appeals.<sup>126</sup> However, the Wisconsin Supreme Court denied both petitions for appeal.<sup>127</sup> Thus, the photo identification requirements of Act 23 were invalidated, and Wisconsin voters do not need to display a photo ID to gain access to the polls.

### C. Texas

On May 27, 2011, Texas passed Senate Bill 14 ("SB 14") requiring photo identification at the polls. However, because Texas was a jurisdiction covered by section 5 of the Voting Rights Act, Texas needed to obtain preclearance from either the United States Attorney or a three-judge panel of the D.C. Federal District Court before it could implement any changes to its voting procedures.<sup>128</sup> To obtain preclearance, Texas needed to demonstrate that SB 14 "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race[,] color," or "member[ship] [in] a language minority group."<sup>129</sup> Section 5 of the Voting Rights Act prohibits covered states from implementing voting laws that will

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121. *Id.* at \*7.

122. *Id.*

123. *Id.* at \*5.

124. *Id.* at \*6.

125. *Id.* Plaintiffs submitted evidence that 221,975 eligible Wisconsin voters did not possess photo identification. *Id.* at \*2.

126. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. 2012), *cert. denied*, 811 N.W.2d. 821 (Wis. 2012); Milwaukee Branch of the NAACP v. Walker, No. 2012AP557-LV, 2012 WL 1020254 (Wis. Ct. App. 2012), *cert. denied*, 811 N.W.2d. 821 (Wis. 2012).

127. League of Women Voters of Wisconsin Education Network, Inc. v. Walker, 811 N.W.2d. 821 (Wis. 2012); Milwaukee Branch of the NAACP v. Walker, 811 N.W.2d. 821 (Wis. 2012).

128. 42 U.S.C. § 1973c(a) (2006).

129. *Id.* §§ 1973c(a), 1973b(f)(2).



have a retrogressive effect on racial minorities. Furthermore, the covered jurisdiction bears the burden of proof, which means that it must show by a preponderance of the evidence that a proposed voting change lacks both discriminatory purpose and retrogressive effect.<sup>130</sup>

Replacing less stringent Texas voting laws, SB 14 required in-person voters to identify themselves at the polls using one of five approved government-issued forms of photo identification.<sup>131</sup> SB 14 also prohibited the use of photo IDs that have expired more than sixty days before being presented at the polls.<sup>132</sup> Voters who did not have an acceptable form of photo ID under SB 14 were able to obtain at the Texas Department of Public Safety a photographic “election identification certificate” (“EIC”), a pocket-sized card that resembles a driver’s license, for use at the polls.<sup>133</sup> Furthermore, SB 14 made EICs available at the Texas Department of Public Safety free of charge. However, because voters needed to spend money both to travel to the nearest Department of Public Safety office and to obtain the required identifying documentation,<sup>134</sup> EICs were not completely without cost.

The D.C. Federal District Court held that SB 14, if implemented, would have “a retrogressive effect on Hispanic and African American voters” in Texas, which is impermissible under the Voting Rights Act.<sup>135</sup> In support of this holding, the court outlined three basic rationales and facts related to the implementation of SB 14 in Texas: (a) a substantial subgroup of Texas voters,<sup>136</sup> a large number of which are African American or Hispanic, lacked a photo ID; (b) the burdens associated with obtaining a photo ID weighed most heavily on the poor; and (c) racial minorities in Texas were disproportionately likely to live in poverty.<sup>137</sup> Thus, the court held that SB 14 would likely impermissibly deny or abridge the right to vote on account of race, making it ineligible for preclearance under section 5 of the Voting Rights Act because of its likely discriminatory effect in Texas.<sup>138</sup>

*Shelby County* breathed new life into the dispute over voter ID laws in Texas. Hours after Texas was no longer subject to federal preclearance under section 5 of the Voting Rights Act, the Texas Legislature swiftly moved forward to reenact SB

130. *Georgia v. United States*, 411 U.S. 526, 538 (1973).

131. TEX. ELEC. CODE ANN. § 63.0101 (West 2012). The five forms of acceptable government-issued photo identification include: (1) a Texas driver’s license or personal ID card; (2) a Texas license to carry a concealed handgun; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; or (5) a U.S. passport. *Id.*

132. *Id.*

133. TEX. TRANSP. CODE ANN. § 521A.001(e) (West 2012).

134. SB 14 requires EIC applicants to present at least one of the following underlying forms of identification: (a) an expired Texas driver’s license or personal ID card, (b) an original or certified copy of a birth certificate, (c) U.S. citizenship or naturalization papers, or (d) a court order indicating a change of name and/or gender. 37 TEX. ADMIN. CODE § 15.182 (2012).

135. *Texas v. Holder*, 888 F.Supp.2d. 113, 138 (D.D.C. 2012).

136. Texas submitted to the U.S. Attorney General a computer-generated list of 795,955 registered voters it was unable to match with corresponding entries in the Texas Department of Public Service’s driver’s license and personal ID database. Texas estimated that this “no-match” list consisted of approximately 304,389 voters (38.2%) who were Hispanic and 491,566 (61.8%) who are non-Hispanic. *Id.* at 117.

137. *Id.* at 138.

138. *Id.* at 143-44.

14.<sup>139</sup> In response, minority groups in Texas and the Department of Justice have asked a Texas court to return the state to federal preclearance requirements.<sup>140</sup> As of the date of publication of this Comment, this challenge is still pending.

## V. RECENT TRENDS IN VOTER FRAUD

### A. *The Myth of Voter Fraud*

Since the elections of 2000, only seven convictions have occurred for voter impersonation fraud in the United States.<sup>141</sup> None of these convictions involved a conspiracy to commit voter impersonation fraud.<sup>142</sup> In addition, a report published by the New York Times in 2007 revealed that election fraud was extremely rare, finding that an aggressive five-year investigation into voter fraud by the Bush Administration's Department of Justice resulted in only eighty-six convictions of any kind of election crime throughout the country.<sup>143</sup> Tellingly, in researching his book, "The Voting Wars," Richard Hasen reported that he could not find a single case since 1980 when "an election outcome could plausibly have turned on voter-impersonation fraud."<sup>144</sup> After years of painstaking research, Lorraine Minnite confirmed that voter fraud is rare in the United States, describing the concept of voter fraud as "a politically constructed myth."<sup>145</sup>

One such example of voter fraud was exposed during the 2012 election season in the important swing state of Florida. In August 2012, Florida resident Josef Sever pleaded guilty to illegally voting in the November 4, 2008, presidential election.<sup>146</sup> Born in Austria, Sever is a Canadian citizen, and admitted to registering and voting in at least two presidential elections.<sup>147</sup> His conviction of illegal voting represented the only case of immigrant voter fraud being investigated by Florida state law enforcement in 2012.<sup>148</sup> Sever's illegal voting was discovered during Florida Governor Rick Scott's controversial effort to purge non-citizens from Florida's voting rolls by using information from Florida's motor vehicle

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139. Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, FRONTLINE (June 26, 2013, 2:58 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws>. In addition to Texas, South Carolina, Alabama, Virginia, and Mississippi have either passed or have expressed interest in passing voter ID laws now that they no longer require federal preclearance. *Id.*

140. Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html>.

141. Jane Mayer, *The Voter Fraud Myth*, THE NEW YORKER, Oct. 29, 2012, [http://www.newyorker.com/reporting/2012/10/29/121029fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2012/10/29/121029fa_fact_mayer).

142. *Id.*

143. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, <http://www.nytimes.com/2007/04/12/washington/12fraud.html>.

144. Mayer, *supra* note 141.

145. LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010).

146. Toluse Olorunnipa, *Canadian Man Living in Broward Pleads Guilty to Voting Illegally in '08 Presidential Election*, MIAMI HERALD, Aug. 30, 2012, <http://www.miamiherald.com/2012/08/30/2977205/canadian-man-living-in-broward.html>.

147. *Id.*

148. *Id.*

agency.<sup>149</sup> Despite the fact that Florida's Department of State amassed a list of 180,000 potential non-citizens registered to vote in Florida, the Department only sent Josef Sever's name to the Florida Department of Law Enforcement to conduct a criminal investigation.<sup>150</sup> Outside of Governor Scott's effort to purge Florida's voting rolls of registered non-citizens, in 2012 the Florida Department of Law Enforcement reported that it was investigating, in a state of more than eleven million registered voters, a total of six cases of potential voter fraud.<sup>151</sup>

Interestingly, the case of Josef Sever in Florida is a type of voter fraud that could not have been avoided with the implementation of a strict voter identification requirement. As a registered voter in Florida, Sever would have still been eligible to vote on election day. The reason for this is because he had unlawfully registered himself as a voter in Florida, which means that all he had to do to receive a ballot on election day was to show photo identification that he was the registered voter on Florida's voting rolls. Thus, a strict voter identification law in Florida would not have prevented Josef Sever, one of the few people to have committed voter fraud in the United States, from fraudulently voting in two presidential elections.

#### *B. Negative Effects of Voter Identification Laws*

According to a study conducted by the Brennan Center for Justice, eleven percent of the voting age population lacks the type of voter identification cards required to vote in the states with the strictest voter identification laws.<sup>152</sup> This population of eligible voters who nevertheless do not have proper documentation in these states includes twenty-five percent of African Americans, sixteen percent of Hispanics, and eighteen percent of Americans over the age of sixty-five.<sup>153</sup> In contrast, only nine percent of eligible white voters do not have proper photo identification.<sup>154</sup>

Another study, conducted by Cathy Cohen of the University of Chicago and Jon Rogowski of Washington University prior to the 2012 presidential election, predicted that the rise of voter identification laws since the 2008 election would have a negative impact on voter turnout for young people of color aged 18-29.<sup>155</sup> Overall, the study estimated that up to twenty-five percent of eligible young voters of color between the ages of eighteen and twenty-nine could become demobilized by new voter identification laws, which would account for a decrease in voter participation ranging from 538,000 to 696,000 votes compared to turnout figures from the previous two presidential elections.<sup>156</sup> In addition, the study cited three races in the U.S. House of Representatives among the several that could be affected by the "disproportionate demobilization" of young minorities from state voter identification laws, including Georgia's 12th District, Pennsylvania's 6th District,

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149. *Id.*

150. *Id.*

151. *Id.*

152. GASKINS & IYER, *supra* note 4, at 1.

153. *Id.* at 2.

154. Sonya Ross, *Study: ID Laws Could Trip Up Young Minority Voters*, ASSOCIATED PRESS, Sept. 12, 2012, 2:53 AM, <http://bigstory.ap.org/article/study-id-laws-could-trip-young-minority-voters>.

155. *Id.*

156. *Id.*

and Tennessee's 9th District.<sup>157</sup>

Several factors may explain why a disproportionate percentage of young minorities do not have a proper form of photo identification required by strict state voter identification laws. First and foremost, state voter identification laws have strict requirements for which forms of photo identification are allowed.<sup>158</sup> Marc Morial, President of the National Urban League, described state voter identification laws as, "not about having ID. [These are] about having a specific type of ID. You can't show up with your Sam's Club card and vote."<sup>159</sup> For example, young minority voters tend to be poorer and more transient, which means they are less likely to have a current address on their driver's licenses or other forms of identification.<sup>160</sup> Driver's licenses are also easily suspended or revoked due to unpaid fines.<sup>161</sup> Finally, for those voters who do not have photo identification, it can be extremely difficult to pull together the necessary documentation to obtain a valid form of photo identification, which may also present additional administrative hurdles and costs to the voter.<sup>162</sup>

## VI. RECOMMENDATION AND CONCLUSION

### *A. Articulating a Meaningful Standard of Review*

A better defined standard is needed to provide guidance to states in drafting election laws that do not create an undue burden on qualified voters. Blind adherence to the notion that the state's interest in preventing voter fraud is the sole means of protecting the integrity and reliability of a state's elections does not serve as a useful guide to the states. Voter ID laws are not the sole means of protecting voter confidence in the democratic process. In fact, no evidence exists that universal voter identification requirements would actually raise public confidence in the electoral process.<sup>163</sup> Thus, at the very least the balancing test favored in *Crawford* should not be so lopsided that the burdens imposed by voter ID laws are largely downplayed or ignored.

In addition, the Court's rationale in *Crawford* relied heavily on the availability of provisional ballots as an alternative for Indiana voters lacking appropriate photo identification at the polls, making Indiana's law a model for states seeking to enact voter ID requirements. However, two concerns remain about the deterrent effect of this alternative. First, evidence from the polls in Indiana suggests that a majority of voters who cast provisional ballots due to lack of appropriate photo identification

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157. *Id.*

158. *See, e.g.*, WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 5-6 (Brennan Center for Justice ed., 2011).

159. Ross, *supra* note 154.

160. *Id.*

161. *Id.*

162. *Id.*

163. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1759 (2008).

do not return to have their provisional ballots counted.<sup>164</sup> Second, even with this alternative for voters without IDs, the risk of misinformation and voter intimidation still exists. Eligible voters who lack the appropriate photo identification could be afraid that they will be turned away from the polls, or worse, that they could be prosecuted for attempting to commit voter fraud. For example, in upholding a Tennessee statute barring political posters or signs within 100 feet of polling places, the Supreme Court recognized that preventing voter intimidation was a compelling governmental interest.<sup>165</sup> Eligible voters continue to experience burdens under voter ID laws with the provisional balloting alternative, and are still likely to be disenfranchised by these laws.

It is also important to note that the administration of elections in the United States is not immune to partisan influences. In many cases, state and local election officials “are either elected in partisan elections as Democrats or Republicans, or are appointed and supervised by partisans.”<sup>166</sup> Richard Hasen likens the management of U.S. elections to “allowing the foxes to guard the henhouse.”<sup>167</sup> Because the United States lacks an independent and impartial body to administer elections, courts must act to protect the rights of voters in the face of partisan influences affecting the electoral process for political gain. The *Crawford* standard, however, provides inadequate protection to these essential democratic rights.

Courts should instead use a standard of review that actually takes into equal consideration the interests of the state and the burdens on eligible voters. The balancing approach of *Crawford* is inadequate because it fails to account for the interests and burdens asserted by weighing the number of eligible voters estimated to be disenfranchised by the law against the estimated impact of eliminating voter fraud. A one-by-one comparison of the estimated number of fraudulent votes prevented against the estimated number of eligible voters disenfranchised is not inconsistent with the important role voting and elections play in the democratic process. Instead of applying the *Crawford* balancing test, the Supreme Court should apply a heightened scrutiny standard to new laws dealing with voter qualifications. While strict scrutiny could make it difficult for states to make changes to election laws, the use of intermediate scrutiny for changes to state election laws is a way of balancing the competing interests of preserving voting integrity and preventing voter disenfranchisement. Heightened scrutiny seems especially apt given the fact that the *Crawford* balancing test upheld Indiana’s voter ID law despite Indiana’s inability to point to a single instance of in-person voter impersonation fraud in its entire history.<sup>168</sup>

Indiana’s fantasy with voter fraud is not unique. As discussed above, voter fraud is almost non-existent in the United States. The vast majority of states that have enacted photo ID laws as a means of combatting voter fraud have yet to

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164. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 504 (2008).

165. *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

166. RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* xi (2012).

167. *Id.*

168. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008).

actually experience any voter fraud, and have no indications that voter fraud is likely to become a problem in the future. For this reason, state legislation requiring photo identification at the polls is a solution in search of a problem.

In addition, states with photo identification laws that offer free photo identification to registered voters require them to provide copies of official documents that are costly and burdensome to acquire. For example, Pennsylvania voters need to provide an original copy of their birth certificate and a proof of address to apply for photo identification issued free of charge by the State of Pennsylvania. As the commonwealth court noted on remand in *Applewhite*, Pennsylvania had failed to issue a sufficient amount of photo IDs to registered voters in time for the 2012 General Election despite its statutory campaign of providing free photo IDs to the registered voters of Pennsylvania.<sup>169</sup> Thus, despite the commonwealth court's lengthy justification of Pennsylvania's voter ID law, which relied heavily on U.S. Supreme Court precedent, the court nevertheless was not convinced that implementation of the voter ID law for the 2012 general election would not disenfranchise a large portion of Pennsylvania's electorate.<sup>170</sup>

While the Court in *Crawford* minimized the burden on voters needing to travel to their closest State Bureau of Motor Vehicles to receive a photo identification, the costs involved with the so-called "free" photo identification provided by the states have significant constitutional ramifications. Dissenting in *Crawford*, Justice Breyer argued that the costs of obtaining the underlying documentation to qualify for Indiana's "free" photo identification could be considered by some as unduly burdensome.<sup>171</sup> In 1966, the Court held in *Harper* that a poll tax of \$1.50 was unconstitutionally burdensome,<sup>172</sup> which, adjusted for inflation, would be approximately \$10 today.<sup>173</sup> In Indiana, the cost of obtaining a birth certificate in 2008 was \$12.<sup>174</sup>

The only way to prevent "free" state-issued photo identification from being considered a poll-tax is to either remove the birth certificate requirement or provide birth certificates free of charge. Both of these options are problematic, however, because removing the birth certificate requirement could potentially allow noncitizen residents to obtain voter identification, and residents born out of state would still need to pay a fee to obtain their birth certificates.

### B. Conclusion

*Harper* solidified the notion that voting is a fundamental right under the U.S. Constitution.<sup>175</sup> As a fundamental right, voting receives special protection from federal and state legislation by "a more exacting judicial scrutiny."<sup>176</sup> Instead of relying solely on a patchwork of state constitutional rights, the right to vote is also

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169. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at \*2 (Pa. Commw. Ct. Oct. 2, 2012).

170. *Id.* at \*3.

171. *Crawford*, 553 U.S. at 239 (Breyer, J., dissenting).

172. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 n.1 (1966).

173. *Crawford*, 553 U.S. at 239 (Breyer, J., dissenting).

174. *Id.*

175. *Harper*, 383 U.S. at 665.

176. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

protected under the equal protection clause of the Fourteenth Amendment.<sup>177</sup> Voting rights in the United States should not differ based on where citizens live – our system of federalism does not allow for state experimentation with the fundamental rights of its citizens. *Crawford's* balancing approach gives too much power to the states to enact legislation that impinges upon voting rights.

The Supreme Court has recognized the important role voting plays in the democratic process. Indeed, voting is integral to our nation's ability to function as a true democracy. Voter ID laws have the potential to significantly interfere with our nation's democratic process, and as such should be scrutinized with a more meaningful standard of review than the one articulated by the Court in *Crawford*.

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177. *Id.*