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Crawford V. Marion County Election Board: The Disenfranchised Must Wait

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Crawford v. Marion County Election Board: The Disenfranchised Must Wait

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I. INTRODUCTION

Since the controversial presidential election in 2000, states have enacted more restrictive election laws resulting in an increased number of lawsuits alleging disenfranchisement.[1] Indiana enacted one of the most restrictive voter-identification laws in the country,[2] which prompted facial challenges shortly after its enactment.[3] In *Crawford v. Marion County Election Board*,[4] the United States Supreme Court granted certiorari to determine the constitutionality of the Indiana law.[5] Upholding the constitutionality of the Indiana statute, the Court held that Indiana's interest in enacting the law justified the minimal burdens the law imposed on voters.[6]

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1. Demian A. Ordway, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1174–75 (2007).

2. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1642 (2008) (Souter, J., dissenting) ("Indiana has adopted one of the most restrictive photo identification requirements in the country.").

3. *Crawford*, 128 S. Ct. at 1614.

4. 128 S. Ct. 1610 (2008).

5. *Id.* at 1615.

6. *Id.* at 1623.

This note argues that *Crawford* failed to provide the clarity needed in this growing body of law and, in fact, will create more confusion for the courts since a majority of the Court neither agreed on the applicable standard nor on the approach to assess the burdens imposed by state election laws. Moreover, this note proposes that by misapplying the standard, the lead opinion created the possibility for states to pass restrictive election laws purposefully aimed at skewing election results. Part II of this note presents the relevant case law and social climate leading up to *Crawford* while Part III discusses the requirements of Indiana's voter identification law, as well as the procedural posture of *Crawford.* Additionally, Part III analyzes the evidence before the United States District Court for the Southern District of Indiana and examines Judge Barker's handling of the evidence. *Crawford*'s lead and concurring opinions are examined with an emphasis on their application of precedent and lines of reasoning in Part IV. Part V notes post-*Crawford* developments, including related litigation and studies. Finally, Part VI comments on the broader implications *Crawford* will have in terms of providing guidance to the courts and its potential to encourage states to enact burdensome election laws aimed at skewing election results.

II. PERSPECTIVE: EVOLUTION OF THE STANDARD AND RESURRECTION OF DISENFRANCHISEMENT CLAIMS

While the right to vote has consistently been recognized as a fundamental right,[7] the standard for determining the constitutionality of state election laws has evolved over time.[8] In *Harper v. Virginia Board of Elections*,[9] the Court applied strict scrutiny when holding that a poll tax was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.[10] Under *Harper*'s analytical framework, the Court struck down on equal protection grounds numerous state election laws that burdened the right to vote.[11]

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7. *See* Burdick v. Takushi, 504 U.S. 428 (1992); Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

8. *Compare Harper*, 383 U.S. 633 (applying strict scrutiny to an election law burdening the right to vote), *with Burdick*, 504 U.S. 428 (evaluating a law prohibiting write-in votes under a balancing test).

9. 383 U.S. 663 (1966).

10. *See id.*

11. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (holding that Tennessee durational residence law violates the Equal Protection Clause); Bullock v. Carter, 405 U.S. 134, 149 (1972) ("Since the State has failed to establish the requisite justification for this filing-fee system, we hold that it results in a denial of equal protection of the laws."); Williams v. Rhodes, 393 U.S. 23, 34 (1968) ("But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.").

The Court's approach changed significantly, however, when deciding *Anderson v. Celebrezze*[12] and *Burdick v. Takushi*.[13] In *Anderson*, the Court set forth a flexible balancing standard to assess the constitutionality of challenged election laws.[14] The *Burdick* Court adopted and clarified *Anderson*'s balancing test[15] and pronounced that "[e]lection laws will invariably impose some burden upon individual voters" and "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[16] The Court moved away from *Harper*'s notion that strict scrutiny must be applied whenever a state election law burdens the right to vote and adopted a balancing test weighing the burden imposed by the election law against the State's interest in enacting it.[17]

"In the 1980s and 1990s, disenfranchisement claims were rare."[18] Since the highly contested presidential election in 2000, however, courts have seen a dramatic increase in the number of lawsuits alleging that state election laws are denying citizens the right to vote.[19] Recently, challenges to the constitutionality of laws requiring photo identification for in-person voters were brought in the federal courts.[20] Indiana and Georgia had nearly identical voter-identification laws; however, two federal courts applying the same constitutional standard rendered different judgments.[21]

III. *CRAWFORD* BACKGROUND

A. *Indiana's Voting Procedures*

Prior to the voter-identification law, Indiana's in-person voting procedure was much less burdensome. Individuals wanting to exercise their

12. 460 U.S. 780 (1983) (holding Ohio's early filing deadline for independent candidates unconstitutional).

13. 504 U.S. 428 (1992) (holding Hawaii's prohibition on write-in voting constitutional).

14. *Anderson*, 460 U.S. at 789.

> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id.

15. *See Burdick*, 504 U.S. 428.

16. *Id.* at 433 (citation omitted).

17. *See Burdick*, 504 U.S. 428.

18. Ordway, *supra* note 1, at 1174.

19. *Id.* at 1174–75.

20. *Id.* at 1175.

21. *Id.*

fundamental right would only have to travel to their local precinct and sign the poll book.[22] "There was no requirement that a voter show any form of identification in order to vote after the prospective voter signed in with the clerk."[23] The voter's signature from the poll book would then be compared "to the signature contained in the voter registration records."[24] Members of the precinct election board could challenge voters suspected of misrepresenting their identity and either political party's clerk could also challenge an individual's ballot based on signature comparison.[25] Individuals caught casting fraudulent ballots could be charged and convicted of a felony.[26] Under this framework, there had not been a single instance of in-person voter fraud.[27]

Indiana's voter-identification law became effective on January 1, 2006.[28] Applying to both primary and general elections,[29] the statute requires a citizen voting in-person or casting an absentee ballot in-person to provide a form of photo identification[30] that satisfies several specific conditions.[31] For example, the photo identification must be issued by the United States or the State of Indiana.[32] Other proof-of-identification requirements mandate that the name of the individual appearing on the photo identification "conforms to the name in the individual's voter registration record," the identification contains an expiration date, and the document "is not expired; or expired after the date of the most recent general election."[33]

Under certain circumstances, the photo-identification requirements do not apply.[34] The statute includes an exception for individuals voting at the same state-licensed care facilities where he or she resides—the "nursing home exception."[35] Also, absentee voters are exempt from the photo-identification requirement when "mailing, delivering, or transmitting" their absentee ballots—the "absentee ballot exception."[36] Under the nursing home and absentee ballot exceptions, "the voter is not required to provide any proof of identification in order to vote in-person

22. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 788 (S.D. Ind. 2006).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 792–93.
28. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 642 (2007).
29. IND. CODE ANN. §§ 3-10-1-7.2, 3-11-8-25.1 (West 2006 & Supp. 2009).
30. IND. CODE ANN. § 3-11-8-25.1 (West 2006 & Supp. 2009).
31. IND. CODE ANN. § 3-5-2-40.5 (West 2006).
32. IND. CODE ANN. § 3-5-2-40.5(4) (West 2006).
33. IND. CODE ANN. § 3-5-2-40.5 (West 2006).
34. *See, e.g.*, IND. CODE ANN. § 3-11-8-25.1(e) (West 2006 & Supp. 2009).
35. *Id.*
36. IND. CODE ANN. § 3-11-10-1.2 (West 2006).

and to have his vote counted."[37]

Indiana's voter-identification law also establishes a provisional ballot system enabling an individual to vote in-person without photo identification; however, timely follow-up steps are required in order to have the provisional ballot counted. Individuals failing to produce acceptable photo identification may sign the poll book and vote by provisional ballot after signing "an affidavit attesting to the voter's right to vote in that precinct."[38] For the provisional ballot to count, the individual must "appear before the circuit court clerk or the county election board by noon on the second Monday following the election to prove the voter's identity."[39] In addition to individuals failing to produce acceptable photo identification, provisional voting is available to indigent individuals and those with religious objections to being photographed.[40] These provisional ballots are not counted, however, unless the voter appears "in person before the circuit court clerk or county election board within 10 days of the election, to sign an affidavit attesting to indigency or religious objection to being photographed."[41]

Promptly after the statute's enactment, two facial challenges were brought in the United States District Court for the Southern District of Indiana seeking a judgment declaring the law unconstitutional and enjoining its enforcement.[42] The plaintiffs alleged that the Indiana law substantially burdened the fundamental right to vote, discriminated between different classes of voters, and disproportionately affected disadvantaged voters.[43] The two facial challenges were consolidated, and the State of Indiana intervened to defend the constitutionality of the voter identification law.[44]

The District Court for the Southern District of Indiana granted the defendants' motion for summary judgment[45] finding that the petitioners did "not introduce evidence of a single, individual Indiana resident who will be unable to vote as a result of [the voter identification law] or who will have his or her right to vote unduly burdened by its requirements."[46]

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37. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006).

38. *Id.*

39. *Id.*

40. IND. CODE ANN. § 3-11.7-5-2.5(c) (West 2006).

41. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1631 (2008) (Souter, J., dissenting).

42. *Id.* at 1614 (lead opinion). The Indiana Democratic Party and the Marion County Democratic Central Committee filed the first suit and the second facial challenge was brought on behalf of two elected officials and several nonprofit organizations that represented the elderly, disabled, poor, and minority voters. *Id.*

43. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 755, 783–84 (S.D. Ind. 2006).

44. *Crawford*, 128 S. Ct. at 1614.

45. 458 F. Supp. 2d at 784.

46. *Id.* at 783.

On appeal, a divided panel of the United States Court of Appeals for the Seventh Circuit affirmed.[47] Due to the importance of the right at stake, the United States Supreme Court granted certiorari[48] in *Crawford* to determine the constitutionality of the Indiana statute.[49]

B. *Insufficient Evidence: An Examination of Judge Barker's Evidentiary Decisions*

Judge Barker supported her decision to grant the defendants' motion for summary judgment on evidentiary grounds:

> Plaintiffs have failed to submit: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote.[50]

Describing the plaintiffs' claims as "apocalyptic assertions,"[51] Judge Barker found that the plaintiffs had "totally failed to adduce evidence establishing that any actual voters will be adversely impacted by [the voter identification law]."[52] An examination of the record, however, shows that the plaintiffs offered evidence demonstrating that several individuals were adversely impacted when attempting to comply with the Indiana law[53] as well as a statistical study exhibiting the number of registered voters without a driver's license or ID card and their demographic characteristics.[54] Judge Barker's characterization of this evidence trivialized the burdens faced by indigent and elderly voters, and her rejection of the plaintiffs' statistical report left the Supreme Court with no evidence of the number of voters facing these burdens.

With respect to elderly voters, the plaintiffs provided evidence of elderly Indiana residents who have been and will continue to be adversely impacted by the voter-identification law.[55] For instance, Theresa Clemente, a 78-year-old Indiana resident originally from Massachusetts, stated in her affidavit that "after paying $28 to obtain a certified

47. *See* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007).

48. *Crawford*, 128 S. Ct. at 1615 ("Because we agreed with their assessment of the importance of these cases, we granted certiorari.") (citing 128 S. Ct. 33, 34 (2007)).

49. *Crawford*, 128 S. Ct. at 1613 ("At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on election day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government.").

50. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006).

51. *Id.*

52. *Id.* at 820.

53. *See id.* at 797–99.

54. *See id.* at 803.

55. *See id.* at 797–99.

copy of her birth certificate from the State of Massachusetts and making three trips to the [Bureau of Motor Vehicles], she had still not received a photo ID."[56] Additionally, Thelma Ruth Hunter, an 85-year-old Indiana resident who has voted in-person her entire life was never issued a birth certificate because "[s]he was born at home in Tennessee"[57] and, despite her efforts, she has been unable "to obtain a 'delayed certificate of birth' from Tennessee."[58] Affidavits from several other elderly voters experiencing similar problems and desiring to vote in-person were also submitted;[59] however, Judge Barker was dismissive concluding that elderly residents were permitted to vote by absentee ballot[60] and the "abrogation of their personal preferences is not a cognizable injury or hardship."[61] Regarding the absentee voting procedure, no evidence was introduced indicating "that voting absentee would be a burden or hardship for any of these individuals."[62]

In addition to evidence of elderly voters affected by Indiana's voter-identification statute, the plaintiffs offered evidence of a homeless individual, Kristjan Kogerma, who stated in his affidavit that he was not able to obtain a photo-identification card because he had no documented address—he was homeless.[63] Judge Barker's rationale for disregarding Kogerma's affidavit is suspect and premised on a questionable assumption—perhaps, that is why her reasoning appears as merely a footnote in

56. *Id.* at 798.

57. *Id.*

58. *Id.*

59. *Id.* at 797–99.

60. When *Crawford* was decided, there were ten enumerated circumstances permitting an individual to vote by absentee ballot. IND. CODE ANN. § 3-11-10-24 (West 2006). Under IND. CODE ANN. § 3-11-10-24(a)(5), all elderly voters are permitted to vote by absentee ballot. Furthermore, elderly "means a voter who is at least sixty-five (65) years of age." IND. CODE ANN. § 3-5-2-16.5 (West 2006).

61. 458 F. Supp. 2d at 823 n.71. It is important to note that many elderly African Americans were never issued birth certificates because of racial discrimination and oppression. "A particular problem exists for a large number of elderly African Americans because they were born in a time when racial discrimination in hospital admissions, especially in the South, as well as poverty, kept their mothers from giving birth at a hospital." LEIGHTON KU & MATT BROADDUS, NEW REQUIREMENT FOR BIRTH CERTIFICATES OR PASSPORTS COULD THREATEN MEDICAID COVERAGE FOR VULNERABLE BENEFICIARIES: A STATE-BY-STATE ANALYSIS (2006) (analyzing the effects of a provision in the Deficit Reduction Act of 2005 requiring all citizens applying for Medicaid to produce a passport or birth certificate as proof of identification). According to one study, approximately twenty percent of African Americans born from 1939–40 did not have birth certificates. S. SHAPIRO, POPULATION INVESTIGATION COMM., DEVELOPMENT OF BIRTH REGISTRATION AND BIRTH STATISTICS IN THE UNITED STATES 98 (1950), *available at* http://www.jstor.org/stable/2172242. Presumably, under Judge Barker's reasoning, elderly African Americans' inability to vote in-person because of prior discrimination and oppression would merely be an "abrogation of their personal preferences [and] not a cognizable injury or hardship." *Ind. Democratic Party*, 458 F. Supp. 2d at 823 n.71.

62. 458 F. Supp. 2d at 823 n.71.

63. *Id.* at 823 n.70.

her seventy-page opinion. Judge Barker's reasons for discounting Kogerma's affidavit were the following:

> First, there is no indication that Mr. Kogerma is registered to vote in Indiana or has any intention to do so. Second, assuming Mr. Kogerma is registered to vote in Indiana, his voter registration card can serve as proof of his Indiana residency. Third, if Mr. Kogerma is indigent, as his homeless status would suggest, he is explicitly exempted from the photo identification requirement of [the Indiana law].[64]

Judge Barker's first reason for disregarding Mr. Kogerma's affidavit is unconvincing at best. By attempting to obtain acceptable photo identification under the Indiana law, Kogerma demonstrated his intent to vote. Similarly, Kogerma's participation in the lawsuit exhibited his intent to vote. Registering to vote is effortless compared to obtaining proper photo identification under the Indiana statute—"there are a host of ways individuals may register to vote at various venues and offices including registering by mail. There is no requirement that identification be shown when one is registering in-person to vote."[65] Kogerma's effort to fulfill the most difficult voting requirement, obtaining acceptable photo identification under the Indiana law, and his participation in the lawsuit demonstrated his intent to vote and, contrary to Judge Barker, *is an indication* that Kogerma intended to register or was already registered to vote.

In concluding that Mr. Kogerma was not burdened by the Indiana statute, Judge Barker assumed that the provisional-voting procedure mandated by the indigency exception is not itself an appreciable burden for homeless individuals. In fact, unlike the United States Supreme Court, not once in her seventy-page opinion did Judge Barker recognize the additional burdens associated with provisional voting. For instance, indigent voters must "travel to the county seat *every time* they wish to exercise the franchise, and they have to get there within 10 days of the election."[66]

In addition to evidence of individuals personally affected by Indiana's voter identification law, the plaintiffs introduced statistical evidence demonstrating the number of individuals in Marion County that did not possess the required form of photo identification as well as the

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64. *Id.*

65. *Id.* at 785.

66. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1640 (2008) (Souter, J., dissenting) (emphasis added). The fact that 82% of Marion County's provisional ballots were not counted in the 2004 general election and approximately 85% of all provisional ballots were not counted statewide suggests that some individuals did not return to the circuit court within the required time because it was too burdensome. *See Ind. Democratic Party*, 458 F. Supp. 2d at 788.

demographic characteristics of those voters.[67] The plaintiffs' expert, Kimball W. Brace, recorded his statistical findings and analysis in the "Brace Report."[68] Brace concluded that "at least 51,000 registered voters and as many as 141,000 registered voters in Marion County . . . [did] not currently possess a BMV-issued driver's license or photo identification."[69] Further, Brace concluded "that registered voters who reside in census block groups with a median household income of less than $15,000 are more than twice as likely not to possess photo identifications as are registered voters who reside in census block groups with a median household income of more than $55,000."[70]

While lacking "the time and space to discuss the numerous flaws in Brace's report" Judge Barker proceeded to "highlight the report's most significant failings."[71] According to Judge Barker, Brace's significant failings included: "(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."[72] In light of these failings, Judge Barker concluded that the analy-

67. 458 F. Supp. 2d at 803–09.

68. *Id.* at 803. The purpose of the Brace Report "was to determine how many registered voters had a driver's license or ID issued by the BMV, as well as to determine the characteristics of the registered voters who apparently do not have such licenses or IDs." Kimball W. Brace, *Report on the Matching of Voter Registration and Driver's License Files in* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (No. 1:05-CV-0634-SEB-VSS), 2005 WL 3536382 [hereinafter Expert Report of Kimball W. Brace].

69. 458 F. Supp. 2d at 803. To determine the number of registered voters that did not currently possess an Indiana driver's license or ID card, Brace employed several techniques to match the names appearing on Indiana's voter registration rolls with the names appearing on the Bureau of Motor Vehicles' records. Expert Report of Kimball W. Brace, *supra* note 68. A range of 51,000 to 141,000 registered voters without a driver's license or ID resulted from the various matching criterion Brace employed during the study, i.e., the "stringent match criteria" and "loosened match criteria." *Id.*

70. 458 F. Supp. 2d at 803.

> [T]o determine the demographic characteristics of individuals on either the BMV or the registered voter lists, we have taken their street address and geo-coded the census block upon which they live. The geo-coding process is a procedure where an individual's street address is matched to the appropriate street and street address range, which in turn is associated with the census block on one or the other side of the street. In much the same way that demographic and list maintenance companies perform their work, we have subscribed the attributes of the census block to the individuals living there, on the basis of the demographic percentages coming from the 2000 Census.

Expert Report of Kimball W. Brace, *supra* note 68.

71. 458 F. Supp. 2d at 803.

72. *Id.* Judge Barker relied on the expert report of Jonathan N. Katz in finding that Brace failed to qualify his statistical estimates based on socioeconomic data. *Id.* at 806. Katz found, among other things, that the Brace Report suffers from aggregation bias and fails to indicate whether "the socioeconomic results are statistically significant" or if "any generally accepted estimates of significance or uncertainty" were performed. *Id.*

sis and conclusions in the Brace Report were "utterly incredible and unreliable"[73] and, therefore inadmissible under Federal Rule of Evidence 702.[74]

In summary, Judge Barker claimed that the plaintiffs had failed to prove that the Indiana law adversely impacts voters.[75] However, there were numerous affidavits signed by elderly and homeless voters attesting to their difficulties in obtaining the photo identification required by the statute.[76] Judge Barker dismissed these claims on grounds that exceptions applied to these particular individuals; however, Judge Barker did not address the potential burdens associated with these exceptions.[77] Regarding the plaintiffs' statistical evidence, Judge Barker rejected the Brace Report which left the United States Supreme Court with no evidence pertaining to "the number of registered voters without photo identification,"[78] thereby facilitating the possibility for disenfranchisement.

IV. ANALYSIS: THE DISENFRANCHISED MUST WAIT

A. *A Judgment but No Clear Standard*

In *Crawford*, although a majority concurred in judgment,[79] the Court was split on the applicable standard. This disagreement stemmed from different interpretations of *Burdick v. Takushi*.[80] The lead opinion, authored by Justice Stevens,[81] was premised on the notion that *Burdick* endorsed and adhered to the flexible balancing test set forth in *Anderson v. Celebrezze*.[82] According to Justice Stevens, the Court must "weigh the asserted injury to the right to vote against the 'precise interests put for-

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73. 458 F. Supp. 2d at 803.

74. Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

75. *Ind. Democratic Party*, 458 F. Supp. 2d at 820.

76. *Id.* at 797–99, 823.

77. *See id.* at 822–23.

78. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1622 (2008) (lead opinion).

79. *Id.* at 1615 (affirming the District Court's and Seventh Circuit's conclusions that the evidence in the record was not sufficient to support a facial attack on the validity of Indiana's voter identification law).

80. 504 U.S. 428 (1992).

81. Chief Justice Roberts and Justice Kennedy joined Justice Stevens in the lead opinion.

82. *Crawford*, 128 S. Ct. at 1616 n.8.

ward by the State as justifications for the burden imposed by its rule.' "[83] The burden, however slight, "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.' "[84]

In his concurrence, Justice Scalia,[85] however, was adamant that the *Burdick* Court did not adopt *Anderson*'s balancing test. Instead, "*Burdick* forged *Anderson*'s amorphous 'flexible standard' into something resembling an administrable rule" with a "two-track approach."[86] Under Justice Scalia's reasoning, the applicable standard is a "deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote."[87]

When reexamining *Burdick*, it is clear that the two-track standard advocated in Justice Scalia's concurrence was a significant departure from precedent.[88] Justice Scalia's support for the two-track standard consisted of examples the *Burdick* Court used merely to clarify the proper application of *Anderson*.[89] To be clear, the *Burdick* Court never set forth a two-track standard, in fact, the Court was explicit in endorsing and applying *Anderson*'s balancing test: "The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*. Applying that standard, we conclude . . . ."[90] Due to Justice Scalia's departure from precedent in *Crawford*, the Court lacked a clear majority holding with respect to the applicable standard for evaluating election law challenges.[91]

B. *Assessing the Burden: A Divergence of "Views"*

Although a majority did not apply the same standard, a majority of the Court did conclude that the burden imposed by Indiana's voter-identification law was minimal. As this section will demonstrate, however, the lead and concurring opinions differed on how they assessed the burden and proceeded on questionable assumptions and flawed premises.

When analyzing the burdens imposed by the Indiana law, Justice Stevens emphasized the fact that the photo-identification cards were free; otherwise, the statute would be unconstitutional under *Harper*.[92]

83. *Id.* at 1616 (quoting *Burdick*, 504 U.S. at 434).

84. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

85. Justices Thomas and Alito joined Justice Scalia's concurring opinion.

86. *Id.* at 1624 (Scalia, J., concurring).

87. *Id.* (quoting Burdick v. Takushi, 504 U.S. 428, 433–34 (1992)).

88. *See Burdick*, 504 U.S. 428 (holding that election laws prohibiting write-in voting do not violate a voter's rights under the First and Fourteenth Amendments).

89. *Crawford*, 128 S. Ct. at 1624 (citing *Burdick*, 504 U.S. at 434).

90. *See Burdick*, 504 U.S. at 438.

91. *See Crawford*, 128 S. Ct. 1610.

92. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State

When assessing the burden imposed by a poll tax in *Harper*, the Court held that it is unconstitutional to make the "payment of *any fee* an electoral standard."[93] To obtain a free photo-identification card under the statute, however, a person must first present required documentation, such as a birth certificate or U.S. passport.[94] Since obtaining the required documentation itself costs money,[95] "voters must pay at least one fee to get the ID necessary to cast a regular ballot."[96] Justice Stevens failed to elaborate on the required document fee, thereby implying that a fee, one step removed, satisfies *Harper*'s clear mandate.

Justice Stevens assessed the alleged burdens from two different perspectives—a statewide standpoint and a narrower focus on the poor, elderly, homeless, and those with religious objections.[97] From the broader perspective, the burden of acquiring a photo ID was merely an inconvenience, not a substantial burden on the right to vote.[98] Mindful of a potentially disparate impact on the poor, elderly, homeless, and individuals with religious objections to being photographed,[99] Justice Stevens then analyzed the burdens imposed by the statute on these groups separately.

While recognizing that the poor and elderly may have more difficulty obtaining the required documents,[100] Justice Stevens reasoned that those eligible to cast provisional ballots will mitigate the severity of that burden.[101] Although Justice Stevens did not find the additional requirement placed on provisional voters (traveling to the circuit court clerk's office within ten days of the election to execute the required affidavit) especially burdensome,[102] empirical data suggested otherwise.[103] For example, in the 2007 municipal elections in Marion County, Indiana, only two out of the thirty-four provisional voters made it to the county

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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.").

93. *Harper*, 383 U.S. at 666 (emphasis added).

94. *Crawford*, 128 S. Ct. at 1621 n.17 (lead opinion).

95. *Id.* at 1631 (Souter, J., dissenting) ("Indiana counties charge anywhere from $3 to $12 for a birth certificate" and "[t]he total fees for a passport, moreover, are up to about $100.").

96. *Id.* at 1631.

97. *See id.* at 1620–21 (lead opinion).

98. *Id.* at 1621 ("For most voters who need [photo IDs], 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.").

99. *Id.*

100. *Id.* Again, Justice Stevens does not address the fee required to obtain the necessary documents with respect to *Harper*'s clear mandate prohibiting the payment of any fee as an electoral standard. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

101. *Crawford*, 128 S. Ct. at 1621.

102. *Id.*

103. *Id.* at 1632 (Souter, J., dissenting).

clerk's office within 10 days to execute the required affidavit, i.e., only two of the thirty-four provisional votes were counted.[104] Furthermore, one class of voters permitted to vote by provisional ballots, the indigent,[105] is less likely to drive or even own a car, and twenty-one counties in Indiana had no public transportation system at all.[106] In light of this, Justice Stevens concluded that based on the evidence in the record it was not possible to quantify "the magnitude of the burden on this narrow class of voters."[107]

In his concurrence, Justice Scalia, unlike Justice Stevens, refused to make an additional assessment of the burden imposed on a particular class of voters under the premise that "our precedents refute the view that individual impacts are relevant to determining the severity of the burden"[108] imposed by "generally applicable, nondiscriminatory voting regulation[s]."[109] The voting restrictions in the three cases Justice Scalia cited to support this sweeping statement,[110] however, are easily distinguishable and far less onerous than Indiana's voter-identification law. For example, the law challenged in *Timmons* "prohibit[ed] a candidate from appearing on the ballot as the candidate of more than one party"[111]—that law in no way burdened an individual's fundamental right to vote like the Indiana statute. Even more damaging to Justice Scalia's broad pronouncement is the Court's own precedent, particularly *Lubin v. Panish*.[112] In *Lubin*, a generally applicable, nondiscriminatory California voting law required a filing fee from all candidates.[113] The Court assessed the burden imposed by this voting law on the indigent petitioner individually,[114] as well as on the general class of indigent citi-

104. *Id.*

105. IND. CODE ANN. § 3-11.7-5-2.5(c) (West 2006).

106. *Crawford*, 128 S. Ct. at 1630 n.15 (citing Indiana Public Transit: Annual Report 2006, p. 29, http://www.in.gov/indot/files/INDOT_2006.pdf). Moreover, the American Public Transportation Association suggests that 13 additional counties in Indiana lack any form of public transportation. *Id.*

107. *Id.* at 1622 (lead opinion). As mentioned *supra* Part III.B, Judge Barker's exclusion of the Brace Report left the Court with practically no evidence to assess the magnitude of the disparate impacts the Indiana statute imposed on certain classes of voters.

108. *Id.* at 1625 (Scalia, J., concurring).

109. *Id.*

110. *See* Clingman v. Beaver, 544 U.S. 581 (2005) (challenging Oklahoma's election law creating a semi closed primary); Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (challenging Minnesota's election law prohibiting candidates from appearing on a ballot as a candidate in more than one political party); Burdick v. Takushi, 504 U.S. 428 (1992) (challenging Hawaii's election law prohibiting write-in votes).

111. *Timmons*, 520 U.S. at 354.

112. 415 U.S. 709 (1974).

113. *Id.* at 710.

114. *Id.* at 714 ("The petitioner stated on oath that he is without assets or income and cannot pay the $701.60 filing fee although he is otherwise legally eligible to be a candidate on the primary ballot.").

zens[115] when determining that the law was unconstitutional.[116]

Relying on this flawed premise, Justice Scalia determined that the Indiana statute imposed a single burden uniformly on all voters,[117] "[t]he burden of acquiring, possessing, and showing a free photo identification,"[118] and refused to address the disparate impacts the law imposed upon particular classes of voters.[119] From a statewide perspective, Justice Scalia concluded that the burden imposed by the statute was "simply not severe, because it does not 'even represent a significant increase over the usual burdens of voting.'"[120]

C. *Justifiable State Interests: We'll Take Your Word for It*

After finding that Indiana's voter-identification law imposed a minimal burden on all Indiana voters, Justice Stevens proceeded to determine whether that burden was "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation'"[121] as required under the flexible balancing standard.[122] Justice Stevens determined that Indiana enacted the statute to pursue several legitimate interests: (1) deterring, detecting, and preventing voter fraud; (2) modernizing its election procedures; and (3) safeguarding voter confidence.[123] Justice Stevens individually analyzed each of Indiana's asserted interests[124] and concluded that they justified the burden imposed by the law.[125] A careful examination of Justice Stevens' analysis and the evidence he relied on, however, casts significant doubt as to (1) whether the State's interests in enacting the voter identification law were legitimate and justified and (2) whether Justice Stevens correctly applied the balancing test.

Although Indiana had a legitimate interest in combating voter fraud, the Indiana statute only addressed one type of fraud, in-person voter impersonation.[126] "The record contains no evidence of any such

115. *Id.* at 718 ("The absence of any alternative means of gaining access to the ballot inevitably renders the California system exclusionary as to *some aspirants*.") (emphasis added).

116. *Id.* ("Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from *an indigent* candidate filing fees *he* cannot pay.") (emphasis added).

117. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1625 (2008) (Scalia, J., concurring) ("what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters").

118. *Id.* at 1627.

119. *See id.* at 1625.

120. *Id.* at 1627 (citation omitted).

121. *Id.* at 1616 (lead opinion) (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

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

123. *Crawford*, 128 S. Ct. at 1617.

124. *Id.* at 1617–20.

125. *Id.* at 1623.

126. *Id.* at 1618.

fraud actually occurring in Indiana at any time in its history."[127] When searching for instances of in-person voter impersonation "documented throughout [our] Nation's history,"[128] Justice Stevens only discovered "scattered instances of in-person voter fraud,"[129] and those instances were rather weak.[130] For example, after a hotly contested election in Washington in 2004, an investigation was conducted confirming only one instance of in-person voter fraud.[131] Additionally, Justice Stevens was persuaded by "Indiana's own negligence" resulting in voter registration rolls that contained thousands of names of individuals who moved, died, or otherwise became ineligible to vote.[132] Nonetheless, Justice Stevens offered no evidence linking Indiana's voter rolls and the voter identification statute to a decrease in in-person voter fraud.[133]

When assessing the State's interest in modernizing its election procedures, Justice Stevens concluded this interest was justified based on two federal statutes[134] and a report from the Commission on Federal Election Reform[135] (the "Carter-Baker Report").[136] Justice Stevens reasoned that by accepting photo identification as a valid means of identification in two federal statutes, Congress indicated that photo identification was "one effective method of establishing a voter's qualification to vote."[137] Justice Stevens' own rationale, however, actually undermines Indiana's justification for enacting the voter-identification law. In the same two statutes, Congress also approved several much less burdensome forms of identification that the Indiana law strictly prohibits[138]—bank statements and paychecks.[139]

Justice Stevens also relied on a portion of the Carter-Baker Report[140] recommending photo-identification requirements for voting as

127. *Id.* at 1619.

128. *Id.*

129. *Id.* at 1619 n.12.

130. *Id.* at 1619 n.11 (citing an example of in-person voter fraud occurring in 1868 in the New York City elections of William (Boss) Tweed).

131. *Id.* at 1619 n.12.

132. *Id.* at 1619–20. The Federal Government actually sued Indiana for its failure to keep its voter registration rolls in compliance with the National Voter Registration Act. *Id.* at 1620.

133. *Id.* at 1620 ("[T]he fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification.").

134. *Id.* at 1618. The two federal statutes Stevens cited were the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA).

135. The Commission on Federal Election Reform, a private, twenty-one member bipartisan body, released the Carter-Baker Report on Sept. 19, 2005. Overton, *supra* note 28, at 633.

136. *Crawford*, 128 S. Ct. at 1618.

137. *Id.* at 1618.

138. *See* IND. CODE ANN. § 3-5-2-40.5 (West 2006).

139. *Crawford*, 128 S. Ct. at 1618.

140. The Carter-Baker Report was a part of the record in these cases. *Crawford*, 128 S. Ct. at

support for Indiana's interest in election modernization.[141] By relying on only two provisions of the Carter-Baker Report in his analysis, Justice Stevens failed to recognize significant differences between the Indiana law and the Carter-Baker Report. For instance, the Report's photo-identification recommendation was expressly conditioned on a phase-in period[142] aimed at reducing the burdens on the right to vote,[143] whereas "[Indiana] conspicuously rejected the Report's phase-in recommendation."[144] More damaging though, was Carter and Baker's statement that Georgia's voting law, which like the Indiana law "required photo identification as an absolute condition to vote,"[145] was discriminatory.[146]

The only evidence Justice Stevens provided in support of Indiana's interest in protecting voter confidence was a statement taken from the Carter-Baker Report: "the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'"[147] While cognizant of Indiana's preexisting safeguards, such as severe criminal penalties for voter fraud,[148] Justice Stevens conducted no analysis to determine whether the additional voter confidence inspired by Indiana's voter-identification law justified the burdens the statute imposed.[149]

In his concurrence, Justice Scalia did not set forth an analysis of Indiana's asserted interests. Instead, after determining that the burden was minimal[150] and the statute was nondiscriminatory,[151] Justice Scalia concluded that Indiana's interests were sufficient to satisfy the "deferential important regulatory interests standard."[152]

1618. The Report contained eighty-seven recommendations addressing the country's "most pressing election problems." Overton, *supra* note 28, at 633.

141. *Crawford*, 128 S. Ct. at 1618.

142. *Id.* at 1644 (Breyer, J., dissenting) ("The Carter-Baker Commission *conditioned* its recommendation upon the States' willingness to ensure that the requisite photo IDs 'be easily available and issued free of charge' and that the requirement be 'phased in' over two federal election cycles.") (emphasis in original) (quoting Carter-Baker Report, at App. 139, 140).

143. *Id.* at 1640 (Souter, J., dissenting).

144. *Id.*

145. Overton, *supra* note 28, at 639.

146. Jimmy Carter & James A. Baker III, *Voting Reform is in the Cards*, N.Y. TIMES, Sept. 23, 2005, at A1.

147. *Crawford*, 128 S. Ct. at 1620 (lead opinion).

148. *Id.* at 1619 ("the Indiana Criminal Code punishing such conduct as a felony"). The Court has previously determined that a State's criminal laws are more than adequate to detect and deter voter fraud. Dunn v. Blumstein, 405 U.S. 330, 353 (1972) ("Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.").

149. *See Crawford*, 128 S. Ct. at 1620.

150. *Id.* at 1624 (Scalia, J., concurring).

151. *Id.* at 1625–26.

152. *Id.* at 1625–27.

V. POST-*CRAWFORD* DEVELOPMENTS

A. *Related Litigation*

After *Crawford*, Indiana's voter-identification law was challenged again in *League of Women Voters of Indiana v. Rokita*.[153] This time, however, there were no allegations of disenfranchisement; instead, the plaintiffs sought a judicial declaration that the voter-identification law violated the Indiana Constitution.[154] The Court of Appeals of Indiana held that the Indiana law violated the Equal Privileges and Immunities Clause of the Indiana Constitution by exempting absentee voters and residents of state-licensed care facilities that are precincts while requiring in-person voters and residents of state-licensed care facilities that are not precincts to comply with the law.[155] In other words, the absentee ballot and nursing home exceptions rendered the Indiana statute void, not the disparate impacts the law imposed on the poor and elderly. Thus, even if the Supreme Court of Indiana affirms this judgment, the disparate impacts on the poor and elderly may persist. Even worse, in passing a new voter-identification law to comply with *League of Women Voters*, the Indiana General Assembly may significantly increase the burdens imposed on elderly voters.

For instance, the Indiana General Assembly may pass a voter-identification law without the absentee ballot and nursing home exceptions. By removing the absentee ballot exception, the law would undermine the rationale in *Crawford* for finding that elderly voters were not burdened.[156] Put differently, by requiring absentee voters to produce photo identification,[157] Judge Barker's "absentee ballot alternative" that eliminated the burdens faced by elderly voters attempting to locate their birth certificates,[158] assuming one was even issued,[159] would no longer exist. These burdens are further amplified when dispensing with the nursing home exception because a larger number of elderly voters would be subject to the photo-identification requirement. Since the *Crawford* Court

153. 2009 WL 2973120 (Ind. App. Sept. 17, 2009).

154. *Id.* at *1. The League of Women Voters of Indiana and the League of Women Voters of Indianapolis filed suit against the Secretary of State of Indiana alleging that Indiana's voter identification law violated Indiana Constitution Article 2, Section 2 and Article 1, Section 23. *Id.*

155. *Id.* at *15. The Equal Privileges and Immunities Clause of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. 1, § 23.

156. *See* discussion *supra* Part III.B.

157. One potential method of implementation is by requiring absentee voters to include a photocopy of their photo identification with their absentee ballots.

158. *See* discussion *supra* Part III.B.

159. *See supra* note 61 (discussing the non-issuance of birth certificates to African Americans due to racial discrimination and oppression that prevented child birth in hospitals).

found that the Indiana law's absentee ballot exception mitigated the burdens faced by elderly voters, it is unclear whether the heavier burdens imposed on the elderly under this potential legislation would be unconstitutional under federal election law.

B. *Related Studies*

In addition to the related litigation, *Crawford* spurred empirical studies attempting to measure the disparate impacts the Indiana law imposed on the indigent, minority and elderly voters. Two of these studies, one conducted by Matt Barreto[160] and the other by Michael Pitts,[161] were cited in an amicus brief filed in *League of Women Voters* by a notable group of social scientists.[162] While the results of these studies offer increased proof of voter disenfranchisement, there are still missing links in the evidence needed to satisfy *Crawford*'s mandate.

The Barreto study identified the classes of registered voters that were less likely to have the photo identification required under Indiana's law.[163] To simplify, the study found that indigent, minority and elderly voters were significantly less likely to possess the required identification.[164] It is clear, however, that alone, this evidence fails to satisfy *Crawford* because the Court concluded that the acts necessary to obtain the required identification were not unduly burdensome.[165] Thus, under the Court's reasoning, it does not matter that a larger percentage of indigent, minority and elderly voters must obtain the necessary identification to have their vote count, unless there is additional evidence that these classes of voters face substantial burdens in the process.

Michael Pitts analyzed the 2008 general election results to determine whether the Indiana law disparately impacted the indigent.[166] The study surveyed nearly every county in Indiana and found that approxi-

160. Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111 (2009).

161. Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification at Indiana's 2008 General Election* (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465529.

162. Brief for Lonna Rae Atkeson et al. as Amici Curiae Supporting Appellants, League of Women Voters of Indiana v. Rokita, Appellate Case No. 49A02-0901-CV-00040 (Ind. Nov. 9, 2009).

163. Barreto, *supra* note 160.

164. *Id.*

165. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621 (2008) ("For most voters who need [the required identification], 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.").

166. Pitts, *supra* note 161.

mately 1,039 provisional ballots were cast due to a lack of valid photo identification, but only 137 of those ballots were counted.[167] Even though approximately eighty-six percent of the identification related provisional ballots were not counted, this evidence is insufficient under *Crawford* to prove the magnitude of the burden imposed on the indigent because of two unknowns: the reasons these ballots were not counted, and the number of indigent voters casting these ballots.[168] Thus, the number of identification related provisional ballots not counted because the additional travel requirement was not met is unknown and even if it were known, it cannot be determined which of these provisional voters were indigent.[169] After all, nonindigent individuals that forgot their IDs may also cast provisional ballots and fail to return.

According to the *Amici*, the combined results of the two studies will erode the public's confidence in legitimate elections over time.[170] While this may be true, it is unlikely that the combined results will satisfy *Crawford*'s evidentiary mandate. Although the Barreto study indicates the percentage of registered indigent, minority and elderly voters lacking the required identification, this finding is an insufficient link to the voters casting the identification related provisional ballots that were not counted in Pitts' study. In other words, the probability that certain classes of voters lack acceptable photo identification does not prove that these same voters cast the provisional ballots in Pitts' study.

To satisfy this deficiency, it would be ideal to examine the provisional ballots to determine the reasons they were not counted as well as personal information that could be used to determine whether the voter was indigent.[171] Unfortunately, actually obtaining these ballots has been

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167. *Id.* It should be noted that some voters have been unlawfully denied provisional ballots. For instance, approximately twelve Indiana nuns lacking appropriate photo identification "weren't given provisional ballots [at the 2008 primary election] because it would be impossible to get them to a motor vehicle branch and back in the 10-day time frame allotted by the law." Deborah Hastings, *Indiana Nuns Lacking ID Denied at Poll by Fellow Sister*, Associated Press, May 6, 2008, http://www.breitbart.com/article.php?id=D90GBCNO0&show_article=1. Thus, the results of Pitts' study do not include voters that showed up to their precinct to vote and were denied provisional ballots in violation of the law.

168. In fact, it is almost impossible to determine why these ballots were not counted since "Indiana's provisional balloting materials have been deemed off-limits to the public and legislation that would have provided public access to provisional balloting materials was vetoed by the governor in May of 2009." Pitts, *supra* note 161.

169. Under the reasoning in *Crawford*, determining the number of provisional voters that are elderly is less significant since these voters may also vote by absentee ballot where no form of photo identification is required. *Crawford*, 128 S. Ct. 1610, 1622 (2008).

170. Brief for Lonna Rae Atkeson et al. as Amici Curiae Supporting Appellants, League of Women Voters of Indiana v. Rokita, Appellate Case No. 49A02-0901-CV-00040 (Ind. Nov. 9, 2009).

171. Again, determining the number of provisional ballots cast by elderly voters is less significant under *Crawford*. *See supra* note 169.

problematic not only in Indiana,[172] but also across the country.[173] To complicate matters, the retention period for federal election records is twenty-two months.[174] Thus, in the absence of a lawsuit, this potential evidence of voter disenfranchisement may be destroyed with the passage of time.

Moreover, obtaining the provisional ballots would not quantify the Indiana law's chilling effect on voter participation—the number of voters without valid identification on the day of the election that decided not to vote provisionally. The empirical studies attempting to measure this effect have generated "substantial differences in the results, and substantial disputes about the validity of each approach."[175] Thus, while the amount and type of evidence needed to prevail under *Crawford* is unclear, it is reasonably certain that the post-*Crawford* studies, to date, remain insufficient.

VI. COMMENT

In view of increasing disenfranchisement litigation[176] and federal courts' inconsistent application of the standard for determining the constitutionality of voter-identification laws,[177] the Court had a perfect opportunity to clarify the confusion by pronouncing a clear application of the standard in *Crawford*. However, the Court failed—a majority did not even agree on the same standard.[178] Moreover, the *Crawford* decision will instill further confusion because the Court took different approaches when assessing the burden.[179] Justice Scalia's broad statement regarding the method for assessing the burden imposed by state

172. There has been an inconsistent disclosure of provisional ballot materials in Indiana. When analyzing the 2008 primary election, Michael Pitts successfully obtained "documents related to provisional ballots . . . from more than half of the counties who reported provisional ballots having been cast." Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 478 (2008). When, however, analyzing the 2008 general election, Michael Pitts was not able to obtain any of the provisional ballot materials. *See* Pitts, *supra* note 161.

173. *See, e.g.*, Advancement Project, *Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchisement* (Sept. 2008), http://www.advancementproject.org/ourwork/power-and-democracy/voter-protection/view.php?content_vp_id=69 (noting that out of the six counties in Ohio where provisional ballot information was requested, three counties refused to provide any information citing HAVA as the reason for nondisclosure).

174. 42 U.S.C. § 1974 (2006).

175. Justin Levitt, Brennan Center for Justice, *Fast Facts on the Impact of Photo ID: The Data* (Apr. 2008), http://www.brennancenter.org/page/-/Democracy/_%20ID-related%20stats.pdf.

176. Ordway, *supra* note 1, at 1175.

177. *Id.*

178. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

179. *Compare Crawford*, 128 S. Ct. 1610 (lead opinion), *with Crawford*, 128 S. Ct. at 1624–27 (Scalia, J., concurring).

election laws[180] was contrary to the Court's precedent.[181] Based on a flawed premise, Scalia's concurrence casts doubt on the proper perspective for assessing the burden imposed by state election laws.[182] Like the applicable standard, the *Crawford* Court failed to provide courts with a clear rule for assessing the burdens imposed by state election laws.

Although Justice Stevens was correct when determining that the flexible balancing standard applied,[183] he administered it improperly. The standard required Indiana to justify the burdens the law imposed on its voters with "relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[184] When administering the balancing test, however, Justice Stevens found that Indiana was justified based on merely abstract interests. The scant evidence Justice Stevens relied upon offered only meager support and actually undermined Indiana's assertions.[185] By finding Indiana justified in the abstract, Justice Stevens departed from the precedential mandate requiring a finding that interests are legitimate and sufficiently weighty. Justice Stevens' departure paves the way for states to pass restrictive election laws purposefully aimed at skewing election results so long as the law is masked in abstract greatness.[186]

The Court specifically limited the holding to facial challenges,[187] thereby leaving the possibility of future as-applied challenges[188] by poor and elderly voters open and expected.[189] Although the *Crawford* Court was not confronted with an as-applied challenge, the Court offered no guidance, in dicta, either on the amount or type of proof necessary to

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180. *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring) ("The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.").

181. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974).

182. *See Crawford*, 128 S. Ct. at 1624–27.

183. *See* Burdick v. Takushi, 504 U.S. 428 (1992). It should be noted that some scholars have argued that these laws are modern day poll taxes thereby suggesting that an analysis under *Harper*, not *Burdick*, is more appropriate. *See, e.g.*, Daniel P. Tokaji, Op-Ed., *Are Voter ID Laws the New Poll Tax?*, L.A. TIMES, Sept. 28, 2007.

184. *Crawford*, 128 S. Ct. at 1616 (lead opinion) (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

185. *See Crawford*, 128 S. Ct. at 1617–21.

186. Election Law Blog, http://electionlawblog.org/archives/010701.html (Apr. 28, 2008, 08:17).

187. *Crawford*, 128 S. Ct. at 1623 (Indiana's interests "are therefore sufficient to defeat petitioners' *facial challenge* to [the Indiana law].") (emphasis added).

188. Channeling election law cases into as-applied challenges has been a recent trend of the Court. *See* Election Law Blog, http://electionlawblog.org/archives/010701.html (Apr. 28, 2008, 08:17 EST).

189. Ian Urbina, *Decision is Likely to Spur Voter ID Laws in More States*, N.Y. TIMES, Apr. 29, 2008, at A11.

succeed in an as-applied challenge to voter-identification laws.[190] Even worse, the Court was silent on the amount or type of proof necessary to succeed in facial challenges to voter-identification laws. This lack of guidance, during a period where more states are passing these laws, will inevitably split the courts as to the amount and type of evidence required to succeed at either a facial or an as-applied challenge.

With the 2008 election then imminent, the Court was clear on at least one point—the disenfranchised must wait.

190. *See Crawford*, 128 S. Ct. 1610.