



An Overview of U.S. Supreme Court's Analysis of Voter Identification Requirements in *Crawford v. Marion*

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As lawsuits attacking North Carolina's voting and election law reforms proceed through the courts, opponents of such reforms will argue that various provisions of the new law are unconstitutional. The voter photo identification argument appears to have attracted the most attention and the lawsuits have raised some concerns about the constitutionality of voter ID requirements. These concerns will be addressed and dispelled by analyzing the U.S. Supreme Court's decision in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), a case challenging Indiana's Voter-ID law. To date, this is the only Voter-ID case that the Supreme Court has considered (however, the Supreme Court heard oral arguments on Arizona's Voter-ID law on March 18, 2013). In a 6-3 decision, the Court refused to strike down Indiana's Voter-ID law.

Indiana's Voter-ID law required voters to present a government issued photo ID when voting in person at a primary or general election. There were exceptions for voters who have a photo ID but are unable to present it at their

polling place, who are indigent, or who religiously object to being photographed. These voters may cast provisional ballots which will then be counted if they travel to the circuit county clerk's office within 10 days of the election and either present their photo IDs or execute affidavits stating they are who they claim to be. *Id.* at 185-86. Indiana law also allows residents to obtain a photo ID without charge at the Bureau of Motor Vehicles.

North Carolina's new law, SL 2013-381 (HB 589) is similar to Indiana's law. When the photo identification requirements take effect in 2016, the North Carolina law will allow voters without ID to cast provisional ballots if they cannot provide a photo ID and those ballots will be counted if the voter returns to the Board of Elections with a photo ID or declares a religious objection to being photographed. SL 2013-381, Sec. 2.8. However, while Indiana allows a provisional ballot to be counted if a person submits an affidavit attesting he cannot afford to obtain documents to get a free photo ID from the state, *Crawford*, 553 U.S. at 186, the North Carolina bill would waive the fees for obtaining a photo ID and the expenses for getting necessary supporting documents like birth certificates from the register of deeds. SL 2013-381, Sec. 3.3.

While Indiana's Voter-ID law was upheld in *Crawford*, the rationale for so doing was mixed. Justice Stevens authored the lead opinion, in which Justice Kennedy and Chief Justice Roberts joined, stating that, on the basis of the record in this case, they could not "conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." *Id.* at 202 (quoting *Storer v. Brown*, 415 U.S. 724,

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738 (1974)). The “evidence in the record is not sufficient to support a facial attack on the validity of the entire statute” *Id.* at 189. Justice Scalia’s concurrence, in which Justices Thomas and Alito joined, would have upheld Indiana’s Voter-ID law not on an insufficient evidence rationale, but on the grounds the premise the plaintiffs’ argument was based on “is irrelevant and that the burden at issue is minimal and justified.” *Id.* at 204 (Scalia, J., concurring in the judgment). Justices Souter, Ginsburg, and Breyer dissented and would have held the Indiana statute unconstitutional.

In analyzing the Indiana law, Justice Stevens applied the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). This test required that in determining the constitutionality of an election law, a court must “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.’” *Crawford*, 553 U.S. at 190 (quoting *Burdick*, 504 U.S. at 434). Therefore, there is no litmus test that the Court should apply; rather it must balance the burden against the State’s interests and then make the “‘hard judgment’ that our adversary system demands.” *Id.*

In contrast, Justice Scalia asserted that *Burdick* requires that for nonsevere, nondiscriminatory restrictions, the Court should apply a deferential standard and only use strict scrutiny for severe restrictions. *Id.* at 204 (Scalia, J., concurring in the judgment). While *Anderson* may have put forth an amorphous balancing test, *Burdick* turned this standard into “something resembling an administrable rule.” *Id.* at 205. Then,

in evaluating the burden imposed by the Indiana law, Justice Scalia noted that it 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.” *Id.* Thus, even though the Indiana law may have a harsher effect on certain people, the Court should only consider the “reasonably foreseeable effect on voters generally.” *Id.* at 206 (citing *Burdick*, 504 U.S. at 436–37). Since the requirements of the Indiana law are reasonable and the burden is minimal, it does not violate the constitution. *Id.* at 209.

While this would end the matter for Justice Scalia, Justice Stevens applied his interpretation of the proper balancing test under *Anderson* and *Burdick*. No matter how minimal the “burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). Justice Stevens then identified the proposed state interests as detecting and deterring voter fraud, election modernization, and safeguarding voter confidence in the electoral process. *Id.*

The next step in the analytical process would be to weigh these interests against the statutorily imposed burdens. However, Justice Stevens ultimately concluded that “on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.” *Id.* at 200. Plaintiffs in this case wanted the Court to employ a “balancing analysis that looks

specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity." *Id.* Justice Stevens noted several reasons why the burden could not be quantified based on the evidence in the record, including: the record did not establish the number of Indiana voters without photo ID, there was no concrete evidence as to the burden that would be imposed on voters without photo ID, and none of the plaintiffs' witnesses expressed an inability to vote under the statute. *Id.* at 200-01. Since there was no specific evidence of the burden to balance against the state's interests, the facial challenge to the statute's constitutionality necessarily failed.

Ultimately, Indiana's Voter-ID law was not struck down. Three justices (Scalia, Thomas, and Alito) would have held the Indiana statute constitutional. Another three justices (Souter, Ginsburg, and Breyer) would have held the statute unconstitutional. The final three justices (Stevens, Roberts, and Kennedy) determined that the evidence in the record was not sufficient to support a facial attack of the statute.

Moving forward it is difficult to predict how the Court would rule on a similar law. Nevertheless, *Crawford* is an important step in the development of Voter-ID jurisprudence. Five key points from *Crawford* are:

- The lead opinion recognized that safeguarding voter confidence in the electoral system is a relevant and legitimate state interest. This interest is related to the State's interest in combating voter fraud

but has "independent significance." *Id.* at 197.

- The lead opinion noted that combating voter fraud was a legitimate state interest even though there was "no evidence of such fraud actually occurring in Indiana at any time in its history." *Id.* at 194.
- The lead opinion refused to ignore valid neutral justifications for the law simply because partisan interests may have been one motivation for the votes of individual legislators. *Id.* at 204.
- The lead opinion and the concurring opinions both refused to apply strict scrutiny, the toughest level of scrutiny and the one used by the Court when reviewing poll taxes. *Id.* at 202-03; 204 (Scalia concurring).
- It further demonstrates that even those Justices who would not have held the law constitutional are not willing to hold it unconstitutional in the absence of specific evidence of an actual, not merely hypothetical, burden on the right to vote. *Id.* at 202.

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