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The Supreme Court and Indiana's Voter ID Law

DAVID WILLIAMS

Indiana law requires that in order to vote in-person, Hoosiers must present a photo ID.¹ The Indiana rule is the most restrictive in the country; every other state makes it easier to vote.² For most people, this requirement is, at worst, an inconvenience, but for others—the indigent, and those who have difficulty getting around—it is more of a burden.³ In September 2007, the U. S. Supreme Court agreed to hear two cases involving challenges to the law. In *Crawford v. Marion County Election Board*, handed down in April 2008, the Court upheld the law by a 6 to 3 vote. Although the Court observed that Indiana Republicans had pushed the rule through the statehouse because they calculated that it would discourage mostly Democrats from voting,⁴ the Court nevertheless held that the Voter ID law was constitutional, because it could help to reduce voter fraud—even though that was not the reason that the legislature had adopted it.⁵

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¹See Senate Enrolled Act No. 483, 2005 Ind. Acts p. 2005.

²See *Crawford v. Marion County Election Board*, 553 U.S. __ (2008), Nos. 07-21 and 07-25 (U.S.S.Ct. April 28, 2008), slip op. at 14 n.26 (dissenting opinion of J. Souter), and at 3-5 (dissenting opinion of J. Breyer).

³See *id.* at 15 (opinion of J. Stevens announcing the judgment of the Court).

⁴See *id.* at 20.

⁵See *id.* at 5.

Many citizens find it offensive that the political parties manipulate the electoral law to their own advantage in this way. In this view, politicians are “rigging the system.” A fair electoral scheme should be neutral, designed to allow the people to express their will, rather than to favor one party or another. Indiana citizens in particular may find it discomfiting that the *Crawford* case puts their state’s partisan wrangling on display to the nation. Some Hoosiers may be even more disturbed that the Supreme Court casually upholds such maneuvering. But both the maneuvering and the Court’s acceptance of it have been going on for a very long time. The *Crawford* case does not make history, insofar as that phrase connotes the creation of something new; rather, it perpetuates an old historical pattern.

The most common way that partisans rig the electoral system is gerrymandering: drawing district lines in such a way as to favor one party. Imagine a simplified hypothetical: a state with four districts, each electing one person to the legislature, and with one hundred voters, thirty-nine Democrats and sixty-one Republicans. Because they won an earlier election, the Democrats control the statehouse and have the power to draw the district lines wherever they like. Using up-to-date demographic information and computer modeling, they create one district with twenty-five Republicans, and three districts with thirteen Democrats and twelve Republicans. As a result, although the Democrats have only 39 percent of the electorate, they control 75 percent of the legislature through the magic of gerrymandering. This example illustrates a technique called “packing”: it crowds so many Republicans into the first district that there are not enough for the other districts.

Hoosier politicians are familiar with gerrymandering. In *Davis v. Bandemer*,⁶ the Supreme Court considered the post-1980 Republican gerrymander of the Indiana state legislature. To quote Justice Lewis Powell’s separate opinion: “As one Republican House member concisely put it, ‘[t]he name of the game is to keep us in power.’”⁷ Nonetheless, a plurality of the Court upheld the scheme against constitutional challenge. It explained that the Constitution forbids only those gerrymanders that “consistently degrade a voter’s or a group of voters’ influence on the political process as a whole”⁸ without explaining how one might estab-

⁶478 U.S. 109 (1986).

⁷*Id.* at 177-178 (dissenting opinion of J. Powell).

⁸*Id.* at 132 (plurality opinion of J. White).

lish such degradation. More recently, the Court has gone further, holding that political gerrymanders are non-justiciable—meaning that they are completely immune to judicial inspection.⁹

Crawford involved a different sort of partisan manipulation: restrictions on the right to vote itself. Gerrymandering divides voters into districts in such a way as to affect the power of their votes. By contrast, restrictions on the right to vote deny some people the franchise altogether. Not all such restrictions are wrong-headed or unfair. In fact, some are necessary to make a fair election possible. For example, to vote, one must generally be older than eighteen, of sound mind, and resident in the district in which the election is occurring. To vote in a primary election, in many states, one must be a member of the party. And so forth.

The State of Indiana defended its Voter ID law on just these grounds: far from frustrating fair elections, it makes them possible by reducing in-person voter fraud.¹⁰ If a voter must present photo identification, it will be harder for him to claim to be someone else. To some extent, Indiana had already increased the risk of voter fraud by failing to update its voter rolls. The state's failure has been so egregious that the federal government accused it in court of violating federal election law, and the state agreed to a consent decree in which the state admitted to violating federal law and promised to come into compliance.¹¹ And because the rolls are so bloated with those who have died or moved out of state, someone inclined to commit fraud could easily find someone to impersonate on election day.

In short, then, some restrictions on the right to vote are entirely appropriate, even inevitable. The Supreme Court's task is to distinguish between those restrictions that help to create fair elections and so are constitutional, and those that make elections unfair and so are unconstitutional. In legal terms, the Court needs a standard by which to measure these restrictions so as to sort the wheat from the chaff. That is the issue on which *Crawford* turned.

As is typical of the Court these days, the justices could not agree on the correct analysis, and the divisions between them were somewhat

⁹See *Vieth v. Jubilerer*, 541 U.S. 267 (2004).

¹⁰See *Crawford*, slip op. at 7 (opinion of J. Stevens announcing the judgment of the Court).

¹¹See *id.* at 12-13.

byzantine. Six thought that the law was constitutional, and three thought the contrary. The six in the majority, however, were divided into two camps. On the one hand, Justice John Paul Stevens, joined by Chief Justice John Roberts and Justice Anthony Kennedy, held that restrictions on the right to vote should be judged by a contextual balancing test. In this view, the Court should “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.’”¹² In Justice Stevens’s view, the voter ID law placed only a light burden on voters, but the state’s interest in blocking fraud was heavy. As a result, he deemed the statute constitutional.¹³ The three Justices in dissent agreed that the balancing test was the correct standard but in their view, the burden on the right to vote was potentially very heavy, and the State’s interest in avoiding voter fraud through the Voter ID law was unsubstantiated.¹⁴

The other three Justices in the majority—Justices Antonin Scalia, Clarence Thomas, and Samuel Alito—would have preferred a two-track approach. In their view, the Court should apply “strict scrutiny” to “severe burdens” on the right to vote, meaning that such burdens will be upheld only if they serve a truly compelling state interest in the least burdensome possible way. By contrast, the Court should treat with deference those “[o]rdinary and widespread burdens” that are “merely inconvenient.”¹⁵ In the real world, of course, a burden may be much more severe to some people than to others. For example, the Voter ID law will be, to most people, annoying at worst, but to the poor and immobile, the burden may prove greater. But in Justice Scalia’s view, in measuring the severity of a burden, the Court should consider only the experience of the generality of people. In other words, the Court should ignore the fact that some might encounter the law as a formidable obstacle.¹⁶ Ergo, because the law did not pose a severe burden to the typical voter, Justices Scalia, Thomas, and Alito voted to uphold it.

¹²*Id.* at 6 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), which in turn was quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

¹³*See id.* at 20.

¹⁴*See Crawford*, slip op. at 1-2 (dissenting opinion of J. Souter); 1-2 (dissenting opinion of J. Breyer).

¹⁵*Crawford*, slip op. at 2 (opinion of J. Scalia concurring in the judgement).

¹⁶*See id.* at 3-6.

In applying any of these tests, the Court must consider the evidence so as to assess the degree of burden on the voter and the strength of the state interest. Unfortunately, neither side could muster much evidence to support its claims. On the one hand, it makes sense in the abstract that the law would fall especially hard on voters without money and without mobility. Getting a photo ID can be a bothersome process. Indiana offers free photo IDs, but only when the voter presents a form of “primary identification” such as a passport or birth certificate, documents which can be costly and complicated to obtain.¹⁷ Voters who do not have photo ID typically have limited resources and feel little able to navigate the labyrinth of government regulations. They are easily discouraged and their will to vote is limited. Many will not bother to obtain photo ID because they are busy coping with too many other problems. Indigent voters may cast a provisional ballot without ID, but they must travel to the county courthouse to file an affidavit within ten days—again, difficult for those with limited resources. Truly determined voters might overcome all these obstacles, but those without resources are unlikely to be so determined, believing that they have a limited stake in a system that is clearly not working for them. If this scenario is accurate, the law must have blocked some people from voting, and yet the challengers could not point to a single person who wanted to vote but did not because of the law.¹⁸

On the other hand, it makes sense that requiring a photo ID will prevent people from trying to vote under someone else’s name. But the state was unable to point to a single instance of in-person voter fraud in Indiana’s history, so it seems that the old system of voter identification—comparing the voter’s signature on the spot with the signature provided at registration—must have been doing a good job of blocking fraud, without the additional burdens levied by the new law. Indeed, if this law were necessary to deter fraud, one would expect other states to follow Indiana’s lead, but they have not. Indiana’s law remains the most burdensome in the country.¹⁹

In short, for all the evidence shows, the law neither prevents a large group of people from voting, nor circumvents voter fraud. If the

¹⁷See *Crawford*, slip op. at 3 (dissenting opinion of J. Breyer).

¹⁸See *Crawford*, slip op. at 17-18 (opinion of J. Stevens announcing the judgement of the Court).

¹⁹See *Crawford*, slip op. at 18-23 (dissenting opinion of J. Souter).

law has so little effect either way, one might wonder why the legislature bothered to pass it. The answer is that the Republican legislature passed this law because it thought that the act would discourage Democrats from voting. (To avoid the appearance of partisanship, I should add that Indiana Democrats resisted the law for the same reason.) Elections are sometimes won by a margin of only a few votes. If the law keeps even a few Democratic voters from voting, it might swing a few elections to the Republicans. All the Republicans in both houses of the General Assembly voted for the measure, and all of the Democrats, except for three who were excused, voted against it.²⁰

Although partisan advantage was clearly the reason for the law, that fact carried no weight in any of the *Crawford* Court's four opinions, even those that found the law unconstitutional. Three opinions—those authored by Justices Scalia, Souter, and Breyer—do not even mention the partisan origins of the law, although Justice Souter does object that “it targets the poor and the weak.”²¹ By contrast, Justice Stevens's opinion openly recognizes that “the litigation was the result of a partisan dispute that had ‘spilled out of the state house into the courts.’”²² And yet Justice Stevens upholds the law on the grounds that “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.”²³ In other words, even if the real motive for the law is partisan advantage, the Court will nevertheless uphold it so long as it also serves legitimate non-partisan goals.

But if the Court was aware of the law's real motive of partisan advantage, one might have expected the Justices to look with a jaundiced eye on the state's claim that the statute is critical to prevent voter fraud. The Justices might have required the state to show that it is not merely using concern about voter fraud as a cover. And to that end, the Court might have demanded clear and convincing evidence that the

²⁰See *Crawford*, slip op. at 20 n.21 (opinion of J. Stevens announcing the judgment of the Court).

²¹*Crawford*, slip op. at 29 (dissenting opinion of J. Souter).

²²*Crawford*, slip op. at 20 (opinion of J. Stevens announcing the judgment of the Court) (quoting Judge Barker's district court opinion, *Crawford v. Marion County Election Board*, 458 F. Supp. 2d 775, 783 (SD Ind 2006)).

²³*Id.*

voter ID law is the best way to deal with a pressing problem of voter fraud. But as we have seen, there is no evidence that in-person voter fraud has ever occurred in Indiana, and no other state has felt the need to adopt such a restrictive rule, even though in some of these states in-person fraud has been a problem.

In cases of this sort, where little evidence exists on either side, the Court inevitably makes its decisions based on background presumptions and burdens of proof. The Court could presume the statute to be unconstitutional unless the state convinces it otherwise. Instead, the Court presumes the statute to be constitutional unless the challenger convinces otherwise—a puzzling approach for the Crawford case, because the law’s partisan nature would seem to be reason for suspicion.

The fact most relevant to the politicians and the voters—that this law will help Republicans—has no significance for the Court. Indeed, at one point, Justice Stevens seems to forget that fact: as we have seen, he explains that a “nondiscriminatory law” is not automatically unconstitutional just because “partisan interests may have provided one motivation for the votes of individual legislators.”²⁴ But in what sense is the voter ID law nondiscriminatory? Facially, it treats everyone the same; all voters—rich or poor, Republican or Democrat—must show photo ID. But by Justice Stevens’s own admission, everyone in the legislature understood that the law would in practice discriminate against Democratic voters, and the supporters of the law clearly intended that discrimination.

Perhaps the gerrymandering cases provide the solution to this puzzle. In America, the majority party has traditionally adopted electoral laws in its own favor, and this Court has been reluctant to do anything about it. This long-standing state of affairs may have substantial historical consequences. Americans have become cynical about the political system because they see it as a forum only for the pursuit of narrow partisan advantage. This cynicism has already done damage to our democracy, and in the future, it may do much more. Sitting outside the political struggle, the Court might have functioned as a neutral umpire to prevent partisan manipulations of the electoral system itself—the very “rules of the game.” But the Justices have declined the invitation, and our future will apparently be more of the same.



²⁴*Id.*