Where Are Your Papers? Photo Identification as a Prerequisite to Voting

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I. Introduction.

We have all seen the movie. Richard Attenborough or William Holden is slowly walking down misty, Parisian streets, the collar of his trench turned up, the brim of the fedora pulled low. A black sedan screeches around the corner and screams to a stop in front of him, before he has time to react. Soldiers bound from the car, pistols drawn. In the next scene, he sits in a dark, windowless room, lit only by a single desk-top banker’s lamp. Behind the tidy desk, a thin, menacing looking officer with stiff collar buttoned tight, pulls on a cigarette, opens the file, looks up and says to the prisoner, “Where are your papers?”

When did America become this movie? The U.S. Supreme Court will take up this question this term.¹

The easy answer is, of course, that America became this movie in the aftermath of September 11, 2001,² when Americans became accustomed to showing identification for the purpose of maintaining safety and security at airports and other public places. We have accepted these inconveniences as the price we have to pay to maintain that safety. But, several years later, have these habits dulled our sensitivity to unnecessary, or even ill intended, demands that we identify ourselves to government officials?

While we are certainly a long way from the jack-booted soldiers from the old war movies, Americans must now identify themselves more often than ever before. This article explores five recent state laws, from Indiana, Arizona, Georgia Michigan and Missouri requiring citizens to present proof of identity, in the form of a government
issued photo ID card, as a prerequisite to voting in a polling place on election day. None of these laws were enacted for the purpose of safety or security, but instead were passed purportedly to combat in-person voter fraud by making it more difficult to impersonate another person and illegally vote on his or her behalf.

Each of these laws faced constitutional challenge on the basis that they disproportionately impacted minorities, the poor and the elderly who are less likely to have a photo ID than the more affluent. In *Crawford v. Marion County Elec. Bd.*, the Seventh Circuit upheld an Indiana election law that required virtually all voters to show a government-issued photo ID in order to vote on election day.\(^4\) Similarly, in *Gonzalez v. Arizona*, the Ninth Circuit upheld the Arizona statute requiring photo identification as a condition of voter registration.\(^5\) On the other hand, in *Common Cause/Georgia v. Billups*,\(^6\) the District Court in the Northern District of Georgia initially enjoined enforcement of the Georgia voter ID requirement for the 2006 election, but recently dismissed the challenge and upheld the law.\(^7\)

At the state level, the Michigan Supreme Court recently issued an advisory opinion, at the request of the House of Representatives, validating the Michigan photo ID law.\(^8\) On the other hand, the Supreme Court of Missouri invalidated that State’s voter identification statute in *Weinshenk v. Missouri*.\(^9\)

To sort out this mess, on September 25, 2007, the Supreme Court granted the petition for a writ of certiorari in *Crawford* and will tackle the issue this term.\(^10\) This article will examine whether these laws are permissible under the First and Fourteenth Amendment and demonstrate why these statutes, although they do not impose a severe burden on the right to vote, should nonetheless be invalidated.\(^11\)

II. The Voter Identification Laws and Their Challenges.
A. The Indiana Voter ID Statute.

In upholding the Indiana law in *Crawford*, the Seventh Circuit ruled that the identification law imposed only a slight burden on a minimal number of potential voters. Indeed, Judge Posner’s opinion begins with the proposition that “the benefits of voting to the individual are *elusive*” because elections are never decided by just one vote. This observation, while certainly correct regarding outcomes, nonetheless seems a striking dismissal of the very foundation of our nation. As the Supreme Court has recognized, “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights…” The benefits of voting arise not from deciding the outcome, but from participating in the process unfettered by the barriers, both real and imagined, that plague elections throughout much of the world.

Judge Posner also seemed impressed that “the plaintiffs who brought this litigation were unable to find anyone interested in being a plaintiff who alleges that he or she would have voted but for the ID requirement.” While lack of a “victim” to step forward is certainly relevant, it is also understandable. If a person is too intimidated by the photo ID requirement to expend thirty minutes to go to the local polling place (undoubtedly only a few minutes from home), it should hardly be surprising that that same person would be reluctant to lend his or her name to litigation that, as it turned out, would have resulted in having their name plastered all over every newspaper in the country.

For Judge Posner, the case can be summed up quite simply. First, the vast majority of adults have the identification necessary to satisfy the law and have become accustomed to using it in their daily lives: “try flying, or even entering a tall building such as the courthouse in which we sit, without one.” Second, no one complains (other
than political groups) that the law has actually discouraged him or her from voting. On
the other hand, the purpose of the law is to prevent voter fraud by detecting a person
impersonating another in order to illegally cast his or her ballot, a state interest that the
Supreme Court has long recognized as legitimate.\textsuperscript{17}

In his dissent, Judge Evans pointed out that Indiana already had a criminal law
punishing vote fraud with up to three years in prison and a $10,000 fine, and that “no one
– in the history of Indiana – has ever been charged with violating that law.”\textsuperscript{18} Judge
Posner brushes that aside, attributing the absence of prosecutions not to the lack of
commission of the crime, but instead to the “endemic under enforcement of minor
criminal laws”, and the “extreme difficulty in apprehending a vote impersonator.”\textsuperscript{19}

B. The Arizona Voter ID Proposition.

In the November 2004 General Election, Arizona voters approved Proposition
200, requiring proof of citizenship as a prerequisite to both registration and in-person
voting.\textsuperscript{20} The proof of citizenship permitted included a driver’s license, state issued non-

driving identification, birth certificate, passport or other documents deemed acceptable
under federal immigration laws.\textsuperscript{21} In May, 2006, a group of voters, civic organizations
and Native American groups filed suit seeking an injunction against both the registration
and voting elements of the identification law.\textsuperscript{22}

The plaintiffs appealed the District Court’s denial of a preliminary injunction, and
shortly before the November, 2006 General Election, the Ninth Circuit Court of Appeals
enjoined enforcement of the proposition.\textsuperscript{23} The State sought relief from the Supreme
Court, which, approximately two weeks before the election, vacated the Ninth Circuit
order and remanded the case for further proceedings.\textsuperscript{24}
In reaching its conclusion, the Supreme Court did not address the merits of the voter ID requirements, but instead relied upon the procedural posture of the case. When the District Court denied the preliminary injunction it did not issue any findings of fact or conclusions of law. When the Ninth Circuit effectively reversed the District Court by issuing the injunction, it likewise did not issue a written explanation, but instead issued a “four sentence order” without explanation or justification. The Supreme Court, in vacating the injunction, ruled “[i]t was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court.” Because there was no evidence that the Court of Appeals had done so, the Supreme Court vacated the order.

Upon remand, the Ninth Circuit noted that the plaintiffs “chose not to continue to seek injunctive relief with respect to the in-person voting identification requirement.” In dealing with the ID requirement for voter registration, however, the Court effectively upheld the same requirement for in-person voting. Like Judge Posner’s decision in Crawford, the Ninth Circuit decision began with the presumption that “the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration…” The Court then refused to find that the ID requirement was “at this stage in the proceedings” a severe burden on the Fourteenth Amendment guarantee of the right to vote because the plaintiffs’ evidence consisted of only “four declarations from individuals who are not parties to the litigation.”

C. Georgia’s Voter ID History.

The Georgia legislature first passed a voter identification statute in 1997. That statute allowed Georgia voters to use one of seventeen different forms of identification as a pre-condition to entering a polling place and voting. Voters were not required to show
photo ID and were permitted to use things such as utility bills, bank statements or payroll checks. Moreover, voters completely lacking identification were also permitted to vote by executing an affidavit of eligibility in the polling place.

Because Georgia is a covered jurisdiction under Section 5 of the Voting Rights Act, the statute required pre-clearance by the Department of Justice. The Department granted pre-clearance because the statute contained sufficient safeguards to ensure that “no voters would be turned away if they did not have proper identification.”

In 2005, the Georgia legislature enacted a new law requiring all voters to present a government issued photo ID in order to vote in a polling place on election day. Although the “career staff in the Voting Section of the [Department of Justice]” recommended denial on August 25, 2005, the Department granted pre-clearance the very next day. After that law was enjoined by the District Court, the Assembly re-enacted the voter identification law in 2006. The 2006 statute replaced the 2005 “affidavit of poverty” for obtaining a state ID with a specific “Georgia voter identification card” for those lacking any other acceptable forms of identification. The District Court then took up the question of the constitutionality of the 2006 Act.

As with the Indiana statute in Crawford, Georgia officials had not received any complaints of in-person voter fraud since the statute was first enacted in 1997. Moreover, the Court found that “the possibility of someone voting under the name of a deceased person has been addressed by [the Secretary of State’s] monthly removal of recently deceased persons from the voter roles.” Unlike the Indiana litigation, however, in Billups a number of “would-be voters” Georgia voters presented evidence that they did not have the requisite identification and “have no need for them in their day-to-day lives” and would be affected by the voter ID statute. As result, the Court concluded that the
2006 statute was “not narrowly tailored to the State’s proffered interest of preventing voter fraud.”

The Georgia statute applied only to in-person voting, but the Court found that the “evidence addressed fraud in the area of voter registration and absentee voting, rather than in-person voting.” The Court further recognized that the State had less restrictive alternatives to the 2006 Act, such as criminal statutes penalizing vote fraud and the identification requirement of the 1997 law, which no one had ever been accused of violating. As a result, the Court enjoined enforcement of the 2006 law for the 2006 election.

After a long and somewhat torturous procedural history, the Court held a three-day bench trial in August, 2007. On September 6, 2007, the Court dismissed the case after finding that none of the plaintiffs had standing to bring the action. Nonetheless, the Court went on to discuss the merits and concluded that it would have upheld the statute because the “Plaintiffs simply have failed to prove that the character and magnitude of the asserted injury to the right to vote is significant.” In particular, the Court noted that each of the named plaintiffs testified that they would have obtained the necessary identification without much inconvenience if the statute were upheld.

The Court also took solace in the voter education efforts the State had undertaken to inform citizens about the law and ultimately concluded that the “Plaintiffs simply have not presented sufficient admissible evidence to show that the Photo ID requirement severely burdens the right to vote.” As a result, the Court refused to apply the higher threshold for strict scrutiny and concluded that the statute was rationally related to the state’s interest in preventing voter fraud.

D. The Michigan Voter ID Law.
The Michigan Supreme Court tackled the issue of that state’s photo ID law after the House of Representatives requested its opinion pursuant to the Michigan Constitution. The Michigan legislature passed a law in 1996 requiring all would-be voters to show photo ID as a precondition to voting in a polling place on election day, but the law has never been enforced on election day because the Attorney General, in 1997, issued an opinion that the law violated the Fourteenth Amendment. The Michigan legislature subsequently re-enacted the voter ID provisions in 2005 and sought the Supreme Court’s opinion.

The Michigan Supreme Court ruled that the voter ID requirement was constitutional because it did not impose a severe burden on voters’ rights. The Court, in particular, stressed “the statute explicitly provides that an elector without photo identification need only sign an affidavit in the presence of an election inspector before being ‘allowed to vote.’” The Court then concluded that ‘the affidavit alternative to the photo identification requirement imposes less of a burden than is imposed on those voters who are required to execute a sworn statement before casting a provisional ballot.” As a result, “[t]here is simply no basis to conclude that requiring an elector to sign an affidavit as an alternative to presenting photo identification imposes a severe burden on the right to vote.”

As in the other cases, the Michigan Supreme Court was not presented with any evidence that in-person voting fraud had ever occurred in Michigan. That absence did not long occupy the Court, which instead concluded, “there is no requirement that the Legislature ‘prove’ that significant in-person voter fraud exists before it may permissibly act to prevent it.” In other words, the legislature need not be constrained to solving
existing problems, but as long as they are all there in the Capitol anyway, why not also take a stab at non-existent problems as well.

E. Missouri’s Voter Identification Law.

In 2006, the Missouri legislature enacted a statute requiring voters to present federal or state issued identification in order to cast ballots on election day. A group of voters sued, claiming that the law adversely impacted “low-income, disabled or elderly” citizens by violating their right to vote and denying them equal protection under the Missouri constitution. The Supreme Court of Missouri prefaced its consideration by noting that the rights to vote and equal protection protected by the Missouri constitution were “even more extensive than those provided by the federal constitution.” Nonetheless, in striking down the statute, the Missouri Court conducted the same analysis as the federal courts in Crawford, Gonzalez, and Billups.

Unlike Crawford, the Missouri plaintiffs lacked the requisite identification necessary to vote but were all otherwise eligible to vote. As a result, in order to be eligible to vote in the 2008 election, each of the plaintiffs would be required to obtain the necessary identification. Because the process of obtaining the identification required both the expenditure of money and time, the voter identification system imposed a “substantial burden” on the right to vote, the Court subjected the statute to strict scrutiny.

The Court next concluded that the state had a “significant, compelling and important” interest in combating voter fraud. With that established, however, the Court went on to conclude that the statute was not necessary to achieve that compelling interest and that it was not “narrowly drawn to address the compelling interest at stake.” The statute was not necessary because “[n]o evidence was presented that voter impersonation
fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicated that voter impersonation fraud is not a problem in Missouri."\textsuperscript{72} The only “specific instance of possible vote fraud” involved an attempt by a person who had already voted absentee to vote in-person, an instance that the photo ID requirement would not have addressed.\textsuperscript{73}

Because the photo ID requirement “could only prevent the particular type of voter fraud that the record does not show existing in Missouri”, the statute was not narrowly tailored to achieve the State’s compelling interest and therefore violated the equal protection clause of the State constitution.\textsuperscript{74}

III. Measuring the Constitutionality of Election Related Laws

The fact that there is no evidence that voter impersonation ever occurs does not necessarily lead to the conclusion that the photo ID requirements are unconstitutional. These laws raise a conflict between two competing interests: (1) deterring unlawful impersonation of a voter, and (2) access for all eligible voters. Justice Stevens, in concurring that \textit{Gonzalez} should be remanded, described the issues as: “two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements.”\textsuperscript{75}

There can be little dispute that the photo ID requirement imposes a burden upon the right to vote. This is so because the law requires the potential voter to do something (open their wallet and present ID) that they previously were not required to do.\textsuperscript{76} Ordinarily, a statute will survive challenge if it is rationally related to the accomplishment of a legitimate state interest.\textsuperscript{77} If, however, the challenged statute implicates a fundamental right it must satisfy strict scrutiny by being narrowly tailored to achieve a
state’s compelling interest. The Supreme Court has recognized voting as a fundamental right in *Reynolds v. Sims*, which should lead to the application of strict scrutiny.

In evaluating election related laws, however, the Supreme Court has concluded that neither simple rational basis review nor strict scrutiny are appropriate because “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” Rational basis review is not appropriate because it would in all likelihood result in undue burdens on the right to vote being upheld. Likewise, strict scrutiny is too stringent a standard that would result in virtually all voting regulations being invalid due to the existence of a less restrictive alternative. For example, virtually every state requires prospective candidates to file a nominating petition signed by a number of eligible voters in order to qualify for the ballot. The purpose of this requirement is to limit the ballot to those candidates who have demonstrated a sufficient modicum of support amongst the electorate. If such laws were subject to strict scrutiny, then all such laws would be invalid because no matter how low the state may set the signature threshold, a less restrictive alternative would always be available until any signature requirement greater than one would be impermissible.

Indeed, the Supreme Court has specifically concluded that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest … would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State’s system ‘creates barriers…tending to limit the field of candidates from which voters might choose…does not itself compel strict scrutiny.’”
Recognizing this difficulty, the Supreme Court has articulated a balancing test for cases involving regulations of elections and voting. In reviewing such laws, the Court has directed reviewing courts to undertake the following analysis:

[A 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.

The “rigorousness” of this inquiry depends on the “extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” “Severe” restrictions must be narrowly drawn to advance a state’s interest of “compelling importance.” On the other hand, “when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”

The irony of these voter ID cases is that the statutes are designed to prevent a crime that no one seems to be committing, based upon the lack of evidence of such crimes in the records before the courts. On the other hand, the laws do not appear to discourage many (or in the case of Indiana, any) people from voting. This realization, of course, begs the question: what gives? If this law discourages few voters and prevents no crimes, why on earth is it pending before the Supreme Court?

IV. The Politics of Voter ID Laws.

“Let’s not beat around the bush”, begins Judge Evans’ biting dissent in Crawford. ‘The Indiana voter ID law is a not-too-thinly-veiled attempt to discourage election-day
turnout by certain folks believed to skew Democratic.”  Even Judge Posner recognized that “most people who don’t have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates.” Indeed, the District Court specifically recognized that “this litigation is the result of a partisan legislative disagreement that has spilled out of the state house into the courts.” The fact that the Indiana Democratic Party was the lead plaintiff says enough about which side won that legislative battle.

Likewise, although Arizona voters approved Proposition 200 by popular referendum vote, they did so on the same day they were selecting George Bush President by a vote of 54.9% versus 44.5% for John Kerry. Thus, it is fair to say that, at least in November 2004, Arizona was a Republican state.

Similarly, in Georgia, passage of both the 2005 and 2006 voter ID laws was overwhelmingly partisan. In the Georgia House of Representatives, eighty-nine Republicans and two Democrats voted in favor of law. In the Senate, “thirty one Republicans…voted to approve…the Act, while eighteen Democrats and two Republicans voted against it.” The passage of the 2006 Act was equally partisan, with the House Committee on Government Affairs approving the bill on a straight party-line vote on the very first day of session. In the end, the bill passed the Senate by a landslide vote of 32 in favor (all Republicans) and 22 against (21 Democrats and 1 Republican).

Finally, passage of the Missouri law was no less partisan. “The Missouri General Assembly passed the law … in the last week of this year’s legislative session after a contentious Senate debate in which Democrats mounted a filibuster to block the bill. The
Republican-controlled Senate approved a rarely used motion to cut off debate and forced its passage.  

In a related but more ironic development, one federal court has even ordered the implementation of voter identification, for primary elections, but at the behest of the Democrats. In *Mississippi Democratic Party v. Barbour*, the State Democratic Party sued to close its primary by imposing a party registration requirement. The Party sought to exercise its associational rights by limiting participation in its primary elections to pre-registered Democrats, and accordingly disassociating with anyone not so registered. The Court, however, not only allowed the pre-registration, but also implemented a voter identification requirement in order to allow the Party to verify the identity of its members. Needless to say, this is not quite the relief that the Democrats wanted, but their motion for reconsideration was denied.

Of course, the fact that the passage of these voter ID laws is intensely partisan does not render them unconstitutional. Indeed, bills pass or fail along party lines all the time. But when the bill is in the area of elections, it does, however, justify a more skeptical analysis of the proffered reasons for the law. When an election law passes on an overwhelmingly party-line basis, there is almost certainly some partisan advantage, and perhaps it is worth considering whether any other stated reason is pretext.

IV. The Constitutionality of Voter ID Laws.

Under the Supreme Court’s balancing test articulated in *Burdick*, the threshold determination must be the nature of the burden imposed by the voter ID laws. If the burden is “severe”, then the statute must be supported by a compelling state interest. If however, the burden is “reasonable” and “non-discriminatory”, then the statute need only support the state’s “important regulatory” interests.
Are voter ID requirements a “severe” restriction on voting rights? It hardly seems likely as not a single person in Indiana indicated that they were discouraged from voting by the requirement. Similarly, in Georgia, the plaintiffs indicated that they would obtain the necessary documents if the statute were upheld. At best, a handful of voters in all of the states combined came forward to indicate that they would be adversely impacted by the ID requirement. Moreover, the evidence supported the conclusion that each of these people would be able to obtain the identification without much inconvenience. As a result, the Courts’ conclusion that these laws were not severe burdens is supportable.

That does not, however, end the inquiry. Because the voter ID laws do not impose severe burdens, they need not be justified by a compelling state interest. They must, however, be “reasonable and non-discriminatory” methods of supporting an important regulatory state interest.\textsuperscript{104} The voter ID laws are certainly non-discriminatory in that they apply equally to all potential voters. No groups of citizens are exempt from the ID requirement. The plaintiffs in these cases argued that these requirements unduly burdened particular groups, such as the poor, the elderly, and the infirm.\textsuperscript{105} However, all election related laws affect people in different circumstances in different ways. A healthy person can more easily walk to the polling place than a sick or injured person. A driver gets to the polling place more easily than those that must take public transportation. Does that render the polling place system unconstitutional? Because each citizen must go through exactly the same steps to obtain the necessary ID, and can do so under the same conditions as everyone else, the voter ID laws are non-discriminatory.

That leaves the question of whether these laws are “reasonable” to support an important regulatory state interest. At first glance, this appears to be an easy question to answer: who could argue that prevention of voter fraud is not an important state interest?
Indeed, Courts have consistently recognized fraud prevention as a legitimate state interest. But does the voter ID requirement help achieve the goal of fraud prevention?

The single most consistent fact in these cases is the lack of evidence that in-person, election day voter impersonation ever occurs. None of the cases reported even a single instance of someone being charged or convicted with that offense. Judge Posner, in his _Crawford_ decision attributes that to the “endemic under enforcement of minor criminal laws.”

First of all, anyone with my history of parking citations would certainly take issue with Judge Posner’s description of law enforcement’s enthusiasm for enforcing minor crimes. Moreover, why it would be more difficult to apprehend a voter impersonator than, say, a shoplifter, Judge Posner does not say. More importantly, however, that explanation, even if true, would only explain why no one was ever charged or convicted of this crime. These cases also lacked any evidence that anyone had ever witnessed, complained of, or even suspected any in-person voter impersonation.

Instead, Judge Posner himself supplies the reason why voter impersonation does not occur in polling places: because it doesn’t accomplish anything. According to Judge Posner, the benefit to the individual in voting is minimal, or “elusive” to use his word, because an individual vote “rarely has any instrumental value.” That is the case because the individual voter never has the opportunity to cast the deciding vote. If true, why would anyone run the risk of apprehension and prosecution as a “vote impersonator” if there is no chance that the stolen vote would have any impact on the results? Indeed, the only way to be effective at it would be to either become a serial voter impersonator and appear over and over again at multiple polling places throughout election day (the more votes one impersonates, the better the chances of having an impact) or to join
together with like minded individuals and concoct a scheme to snatch the election through strategic impersonations. Either alternative would no doubt greatly increase the risk of detection and apprehension. Surely, even a single instance of serial or schematic voter impersonation would have come to the attention of election authorities in one of these states, regardless of whether the culprits were ever charged with or convicted of anything.

Throw into the mix the intensely partisan nature in which these laws come into being, and their unreasonableness clarifies. In each state legislature, the passage of these bills was overwhelmingly supported by one party, and equally opposed by the other. Arizona voters approved the voter ID law the same day they gave George Bush a landslide victory.\(^{109}\) This alone says nothing about their constitutionality, but does support the conclusion that the stated reason, fraud prevention, was perhaps at least partly pretextual and that partisan advantage was at least an equally important motivation. Did the Democrats who opposed these bills really support commission of vote fraud?

Legislatures certainly should have the right to address problems with foresight, rather than hindsight.\(^{111}\) The Michigan Supreme Court’s prediction that “a State's political system sustain some level of damage before the legislature could take corrective action” and that any such action “would invariably lead to endless court battles over the sufficiency of the ‘evidence’ marshaled by a State…” is certainly overblown.\(^{112}\)

There can be no dispute that these laws, on their face, impose limits on eligibility to vote on election day, because, at a minimum, as Judge Posner recognized, “a few people who have a photo ID but forget to bring it to the polling place will say what the hell and not vote…”\(^{113}\) When a state thus acts to restrict voter participation and does so ostensibly to address a problem, it is not too much to require that the alleged problem in
fact exist, at least to some degree. In his dissent in the Michigan opinion, Judge Cavanagh put it succinctly: ‘[i]t is not reasonable to impose a photo identification requirement when the alleged interest is nonexistent in-person voter fraud, especially when the requirement will significantly impinge upon the rights of thousands of Michigan’s citizens.”

In upholding these photo ID laws, courts appear to treat the Burdick balancing test as an either/or proposition. If a challenged statute imposes severe restrictions on voting, it must survive strict scrutiny. If, on the other hand, a court determines that the burden is not severe, they appear to simply apply rational basis review. Rather than treat Burdick as an either/or analysis, however, courts should view Burdick as an intermediate level of scrutiny that always demands more justification than a statute subject to rational basis review. This conclusion is supported by the Supreme Court’s description of the state interests for various levels of scrutiny: laws subject to strict scrutiny must meet a state’s “compelling” interest; those subject to rational basis review must satisfy a state’s “legitimate” interest; but election laws imposing non-severe burdens on the right to vote must satisfy the state’s “important regulatory” interests. The fact that, in Burdick, the Supreme Court used a term other than “legitimate” when describing the necessary state interest indicates that it intended to apply a different, and heightened, level of scrutiny to even those laws that impose non-severe burdens on the right to vote.

This intermediate level of scrutiny is further justified because any election related statute, regardless of whether or not it imposes a severe burden, could have the effect of restricting the fundamental right to vote. In other words, a state should never restrict the right to vote and get off with simple rational basis review. If the state acts to restrict that
right, even in a manner that is not severe, it should be subject to heightened (but not strict) scrutiny.

That is not to say that the legislature need justify its actions before it acts. Instead, once a plaintiff establishes that an election related law has the facial effect of constricting, rather than expanding, voter participation, the state should be able to demonstrate that the law is a reasonable method to achieving an important state goal.\textsuperscript{118} Under this scenario, as a threshold matter, a plaintiff would be required to demonstrate that the challenged law has the effect of diminishing electoral participation. If the plaintiff makes such a showing, the burden would shift to the state to demonstrate that the law is reasonably tailored to attain its important goals of regulating elections.

In these cases, the plaintiffs have satisfied their burden because these voter ID laws will, as Judge Posner recognized, necessarily result in reduced participation. Based upon the evidence from these five cases, however, the states have not demonstrated that in-person, election day voter impersonation is a real, or even potential problem. Because there is no evidence that in-person voter impersonation is a problem, the laws are not reasonably designed to achieve an important regulatory interest. In short, solving a non-existent problem cannot be fairly described as an important state interest sufficient to support a law restricting voter participation.

V. Conclusion.

Voter ID laws are a solution in search of a problem. The lack of any allegations of voter impersonation compels the conclusion that these laws are not reasonably designed to achieve the states’ interest in preventing vote fraud. Instead, what these laws will accomplish, according to the evidence submitted in these various cases, is to discourage at least some citizens from voting.\textsuperscript{119} Election laws should encourage all
eligible citizens to participate, and laws that will restrict participation should be reasonably designed to help the state administer its elections. When it comes to laws constricting participation in our electoral system, the state cannot reasonably solve a problem that doesn’t exist.

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2 See United States v. Smith, 426 F.3d 567, 570 (2nd Cir. 2005)(“the requirement of showing a photo identification was part of a new policy implemented after the events of September 11, 2001, to protect federal buildings and courthouses.”).

3 See Note 4, supra.

Each of these cases also addressed, at one stage of the litigation, the issue of whether or not the voter ID statute constituted an unconstitutional poll tax in violation of the 24th Amendment to the United States Constitution. Each of the federal courts rejected this argument (Crawford, 472 F.3d at 952; Gonzalez, 485 F.3d at 1049; Billups, 439 F.Supp.3d at 1354). The Michigan Supreme Court likewise rejected the notion that its voter ID was a poll tax. In re Request for Advisory Opinion, 2007 WL 2410868. The Supreme Court of Missouri did not specifically call the voter ID law a poll tax, but did rule that because the exercise of the right to vote was predicated upon the expenditure of money it was unconstitutional. Weinschenk, 203 S.W.3d at 213. This article, due to the unanimity of the federal courts on this issue, will address only the First and Fourteenth amendment issues.

12 Crawford, 472 F.3d at 951.

13 Id. (emphasis added)


15 Id. at 952.

16 Id. at 951.

17 Id. at 952.

18 Id. at 955(Evans, J., dissenting).

19 Id. at 953.

20 Gonzalez, 485 F.3d at 1046.

21 Id. at 1047.

22 Id. at 1046.

23 Id.


25 Id. at 7.

26 Id.

27 Id.

28 Id.

29 Gonzalez, 485 F.3d at 1046-47.

30 Id. at 1050.

31 Id.

32 Billups, 439 F.Supp.2d at 1303.

33 Id.

34 Id.

35 Id.

36 42 U.S.C. 1973. Under Section 4 of the Voting Rights Act, any state that maintained a test or device that denied or abridged the right to vote on the basis of color and which had less than a 50% voter registration rate on November 1, 1964 or had less than 50% turnout in the November, 1964 election became a “covered jurisdiction” subject to the preclearance requirements of Section 5.
37 Billups, 439 F.Supp.2d at 1303.
38 Id. at 1303-04.
39 Id. at 1304.
40 Id.
41 Id. at 1298.
42 Id. at 1305.
43 Id. at 1300.
44 Id. at 1350.
45 Id.
46 Id. at 1313.
47 Id.
48 Id.
49 Id. at 1351.
50 Id. at 1361.
52 Id. at 41. This finding is in direct conflict with the Seventh Circuit’s decision in Crawford, which specifically held that the Democratic Party had standing to challenge the Indiana law. Crawford, 472 N.E.2d at 951.
53 Id. at 44.
54 Id.
55 Id. at 45, quoting Rokita, 458 F.Supp.2d at 821-22 (“Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the 2006 Photo ID Act].”)
56 Id. at 48.
58 Id. at 1.
59 Id. at 5.
60 Id. a 6.
61 Id. at 6.
62 Id.
63 Id.
64 Id.
65 Weinschenk, 203 S.W.3d at 204.
66 Id.
67 Id.
68 Id. at 212.
69 Id. at 215.
70 Id. at 217.
71 Id.
72 Id.
73 Id. at 205.
74 Id. at 219.
75 Id. (Stevens, J., concurring).
76 Anderson v. Celebreze, 460 U.S. 780, 788 (1983), (any provision which regulates the selection and eligibility of candidates “inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.”).
79 Reynolds, 377 U.S. at 561 (“the right of suffrage is a fundamental matter in a free and democratic society.”).
81 See 10 ILCS 5/7-10, for example.
82 Munro v. Socialist Workers Party, 479 U.S. 189 (1986)(“an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organizations’ candidate on the ballot.”).
83 Burdick, 504 U.S. at 433.
84 In his dissenting opinion in Crawford, Judge Evans describes this balance as “strict scrutiny light.” Crawford, 472 F.3d at 954 (Evans, J. dissenting).
85 Anderson, 460 U.S. at 789.
86 Burdick, 504 U.S. at 433.
87 Id.
88 Id.
89 Crawford, 472 F.3d at 954 (Evans, J. dissenting).
Id. at 951.
93 Billups, 439 F.Supp.2d at1305.
94 Id.
95 Id.
99 Id. at 1.
100 Id. at 2 (“The reason that requiring voter identification in this instance is a proper exercise of federal power and not mere “judicial legislation”-other than the logical conclusion drawn from the Complaint's own language asking the court to enjoin the State from not “providing a means for the Party to verify who participated in its primary.... -is that the constitutional right asserted in this case, the right to disassociate, presumes the ability to accurately identify voters as those with whom the plaintiffs want to associate and disassociate. This requires party registration and voter identification. As it noted in its June 8, 2007 Opinion, however, the court did not rule that voter identification was required in general elections because general elections are not at issue in this case and such a requirement is not tied to an asserted constitutional right to disassociate.”).
101 Id.
102 See Burdick, 504 U.S. at 433.
103 Id.
106 Crawfrod, 472 F.3d at 953.
107 Id. at 951.
108 See Note 91, infra.
111 Crawford, 472 F.3d at 951.
113 See Billips, 439 F.Supp. at 1345.
115 See Burdick, 504 U.S. at ___.
117 See Crawford, 472 F.3d at 955 (Evans, J., dissenting).
ABSTRACT

WHERE ARE YOUR PAPERS?
I. Photo Identification as a Prerequisite to Voting

Remember the old war movies? Richard Attenborough or William Holden is slowly walking down misty, Parisian streets, the collar of his trench turned up, the brim of the fedora pulled low. A black sedan screeches around the corner and screams to a stop in front of him, before he has time to react. Soldiers bound from the car, pistols draw, and bark “Where are your papers?”

When did America become this movie? The U.S. Supreme Court will take up this question this term. This article explores five recent state laws, from Indiana, Arizona, Georgia, Michigan and Missouri requiring citizens to present proof of identity, in the form of a government issued photo ID card, as a prerequisite to voting in a polling place on election day. In Crawford v. Marion County Elec. Bd., the Seventh Circuit upheld an Indiana election law that required virtually all voters to show a government-issued photo ID in order to vote on Election Day. On September 25, 2007, the United States Supreme Court granted the petition for a writ of certiorari in and will decide the constitutionality of these so-called “voter ID” laws. This article examines these laws under the First and Fourteenth Amendment and concludes that these statutes, although they do not impose a severe burden on the right to vote, should nonetheless be invalidated.