The Role of State Constitutions in Protecting Voting Rights: Voter Identification Laws

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THE ROLE OF STATE CONSTITUTIONS IN PROTECTING VOTING RIGHTS: VOTER IDENTIFICATION LAWS

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ABSTRACT: Photo identification state laws, requiring registered voters to show photo identification in order to have their vote counted, raise civil rights concerns over the disenfranchisement of elderly, indigent, and minority voters. The U.S. Supreme Court has upheld at least one such state law, essentially closing the door to those who would seek to protect voting rights under the U.S. Constitution. Yet, several state appellate courts have struck down such laws under their state constitutions. As a result, state constitutions provide an avenue for relief to disenfranchised voters. This Note calls attention to the ability of state constitutions to protect voting rights through two mechanisms unique to state constitutions. First, equal protection clauses in many state constitutions trigger more robust review than under the Fourteenth Amendment of the U.S. Constitution. While the federal constitution applies a sliding scale of review, many state courts review voting restrictions under a strict scrutiny analysis. Second, where a state constitution establishes the exclusive list of requirements necessary to vote, identification laws create an impermissible substantive change to these constitutionally-enshrined requirements. Such laws would be invalid without being passed as constitutional amendments. These distinct elements in state constitutions highlight the opportunity for voting rights advocates to successfully challenge voter identification laws in state courts.

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INTRODUCTION

In 2006, voting rights advocates filed suit in federal court claiming that Indiana’s new law requiring voters to present government-issued photo identification at the polls violated the U.S. Constitution. Over the course of the next few years, Indiana’s law was upheld by a federal district court,\(^1\) a three-judge panel of the Seventh Circuit,\(^2\) and finally, a 7-2 decision by the U.S. Supreme Court.\(^3\) The plaintiffs next took their case to the Indiana state courts. In September 2009, an Indiana Court of Appeals struck down the law under the Indiana state constitution.\(^4\) The Governor and Attorney General of Indiana immediately vowed to appeal the case to the Indiana Supreme Court.\(^5\) Indiana’s Supreme Court now stands poised to take a stand in the latest generation of voting rights litigation.\(^6\)

The constitutionality of voter identification laws represents one of the latest civil rights battle for voting rights advocates. Such laws are also the newest flashpoint in the partisan contest for voter support. These laws most directly affect those registered voters who, for various socioeconomic reasons, do not have government-issued photo identification.\(^7\) These voters tend to be the indigent, elderly, and minorities;\(^8\) in other words, voters who tend to vote

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2. Crawford v. Marion County Election Bd., 472 F. 3d 949 (7th Cir. 2007).
5. See Editorial, Last Word on Voter ID? Not Likely, THE INDIANAPOLIS STAR, Sept. 18, 2009, at 12A (“Daniels and Secretary of State Todd Rokita, Indiana’s chief elections officer, have promised to appeal the ruling to the state Supreme Court.”); Bill Ruthhart & Jon Murray, Voter ID Decision Resurrects Debate, THE INDIANAPOLIS STAR, Sept. 18, 2009, at 1A (“Less than an hour after the ruling, [Indiana Governor Mitch] Daniels called it ‘preposterous’ and immediately vowed an appeal to the Indiana Supreme Court.”); Charles Wilson & Mike Smith, Indiana Voter ID Law Upended, SOUTH BEND TRIBUNE, Sept. 18, 2009, at A1. (“Indiana Attorney General Greg Zoeller said he would appeal the ruling.”).
6. On October 19, 2009, Secretary of State Todd Rokita filed an appeal with the Indiana Supreme Court, Appellants’ Petition to Transfer, League of Women Voters of Ind., Inc. v. Rokita, (Oct. 19, 2009) (No. 49A02-0901-CV-00040), available at: http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-PetitiontoTransfer-11-9-09.pdf. The Indiana Supreme Court has not yet granted or denied this petition. The Supreme Court of Missouri is the only other state that has struck down its voter identification law. See Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).
7. Some of those affected include persons born at home or in an Indian reservation, and therefore were never issued an official birth certificate. Getting government identification usually also requires some sort of fee, such as the cost of obtaining an official copy of a birth certificate or some other basic document needed before one can get an identification card. Elderly and disabled voters who cannot travel to an agency to obtain proper identification would also suffer a burden on their voting rights under voter identification laws. In Missouri, it’s Supreme Court said it was “undisputed that between 3 and 4 percent of the population, some 169,00 to 240,000 Missourians...currently do not possess the type of photo ID required by [the state’s photo identification law] to obtain a regular ballot to vote.” Weinschenk, 203 S.W. 3d at 215. See also Richard L. Hasen, The Untimely Death of Bush v. Gore, 60 STAN. L. REV. 1, 20 (2007) (“Poor people tend to drive less (meaning they are less likely to have a driver’s license, which is the most common form of identification), and they may not have the money to secure certified copies of documents, such as birth certificates, necessary to obtain a state-issued voter identification.”).
8. Richard Taylor Atkinson, Underdeveloped and Overexposed: Rethinking Photo ID Voting Requirements, 33 J. LEGIS. 268, 277 (2007) (“A University of Wisconsin study found that race, class, and age minorities would disproportionately shoulder the burden of satisfying a photo ID requirement. The study found that nearly 100,000 Wisconsin residents between thirty-five and sixty-four have no photo ID.”).
Democratic. \(^9\) Hotly contested, and beyond the scope of this Note, is the question of whether these laws are deliberately intended to disenfranchise these groups and thus afford Republicans an advantage in the polls. \(^10\)

States began to enact voter identification laws soon after the voting fiasco of the Bush/Gore presidential election of 2000. As a result of the lengthy litigation and administrative failures of that election, Congress established the National Commission on Federal Election Reform, which issued a final report to Congress on July 21, 2001. \(^11\) Based upon that report, Congress enacted the Help America Vote Act (HAVA) which mandated basic voter identification requirements. \(^12\) However, HAVA left “substantial room for states to engineer their own reforms.” \(^13\) Subsequently, many states have taken up this banner, with voter identification laws currently in effect, or being debated, in five U.S. states. \(^14\)

When voting reform laws are enacted by individual states rather than by the federal government, the strictness of those laws will vary from state to state. By strictness, I refer to how much proof of identity voters are required to show—ranging from merely signing their names in an official poll book to having to show an unexpired identification card issued by the state or federal government that contains a photo of the voter. \(^15\) The ease of exercising voting rights will thus vary from state to state, depending upon the extent to which each state’s constitution allows for these laws.

Civil rights claims under state constitutions have been a lightning rod since the 1970’s when the highest state courts of New York and California began to issue their own interpretations of their states’ constitution. \(^16\) These states were the early demonstrators of how a state constitution can better protect important civil rights. \(^17\) In deriving their own interpretation of their constitution, these state courts were the first to engage in “‘pure’ independent interpretation,” \(^18\) that is, independent of the U.S. Constitution. State courts’ interpretations of

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\(^9\) Even Judge Posner, who wrote the Seventh Circuit opinion upholding Indiana’s voter identification law candidly admitted that “[n]o doubt 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.” Crawford, 472 F.3d at 951 (2007).

\(^10\) Though recognizing this controversy in voter identification legislation, this Note will not attempt to resolve this partisan divide. Instead, this Note will focus exclusively on the role of state constitutions in developing this area of voting rights legislation. But see infra, Part I for a brief review of the opposing positions surrounding voter identification laws.


\(^13\) Atkinson, supra note 8, at 270. See also, Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. Rev. 689, 696 (2006) (“It is within the states, therefore, that some of the most important election reform battles have taken place.”).


\(^15\) These two extremes describe Indiana’s original identification requirement and its newer photo identification requirement enacted in 2005.


\(^17\) Johanson, supra note 17, at 297.

\(^18\) Id. at 305.
their own constitutions provided “an alternative forum for the development of constitutional doctrine.”19 To be sure, the legal reasoning of the U.S. Supreme Court enlightened and influenced state court interpretations of state constitutions, but state courts are recognized as the highest authority on the interpretation of their own state’s constitution.20

Today, the highest courts of each state routinely engage in independent interpretation, especially in the area of elections. Because of the local nature of election administration,21 state courts are particularly suited to decide the constitutionality of voter identification laws. A state court can best gauge the level of burden that a voting regulation may impose, and ensure that such regulations are appropriate to their ends. The U.S. Supreme Court has already upheld the validity of the strictest voter identification laws under the federal Constitution,22 while leaving an opportunity for state constitutions to provide voting rights protections. Moreover, in Crawford v. Marion County Election Bd., the U.S. Supreme Court noted the important role of state legislatures and courts in creating and monitoring state election procedures.23

State constitutions, not the U.S. Constitution, establish the requirements that its citizens must meet to be eligible to vote.24 While state regulations governing the time, place and manner of elections are allowed,25 additional requirements that voters must meet to be eligible to vote must pass muster under the constitution of the state in which they are created.26 For those states that specify in their constitutions what requirements a citizen must meet in order to be eligible to vote, any change to those requirements, such as requiring photo identification, may have to be enacted as an amendment to the state constitution. State courts’ interpretations of voter identification laws are critical—if they interpret them as administrative regulations, the laws will likely be upheld. Opponents to voter identification laws will have to find ways in state court to characterize these laws as more than mere electoral regulations.

In addition, state constitutions often contain an equal protection or privileges and immunities clause which opponents to voting rights identification laws can use to their

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19 Id. at 321 (arguing that “state constitutions deserve their own independent interpretation and that state courts are obligated to provide it.”).
21 Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (quoting Smiley 285 U.S. 355, 366 (1932)) (holding that “the Elections Clause grants to the States ‘broad power’ to prescribe the procedural mechanisms for holding congressional elections […] encompasses matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’”). See also, Oregon v. Mitchell, 400 U.S. 112, 117-18 (1970) (“Congress can fix the age of voters in national elections, such as congressional, senatorial, vice-presidential and presidential elections, but cannot set the voting age in state and local elections.”); Smith v. Allwright, 321 U.S. 649, 657 (1944) (“A state is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution.”).
22 See Crawford, 128 S. Ct. 1610. Also discussed further infra in Part II.
23 Thomas Basile, Inventing the “Right to Vote” in Crawford v. Marion County Election Board, 32 HARV. J.L. & PUB. POL’Y 431, 447 (2009) (“Crawford is in some respects a shift toward renewed deference by the judiciary to the States’ constitutional prerogative of regulating voter qualifications and elections…”).
24 See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (“[T]he States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.”).
26 See infra, Part II, which discusses how state courts take these two paths in their constitutional analysis and the corresponding effects on the validity of voter identification laws.
advantage. These laws can be triggered when absentee voters are not subject to the same voter identification requirements as in-person voters. Voters who cast absentee ballots do not have to show identification, and often do not even have to sign a statement swearing that they are who they claim to be on their ballot. This unequal application of voter identification laws on registered voters may not be allowed under a state’s constitution. State supreme courts, therefore, play a critical role in determining how much these constitutional clauses protect voting rights.

Part I of this Note contextualizes the voter identification law debate, describing the competing concerns on each side. This Part presents not only the partisan divide animating the debate, but also scholarly analysis of the empirical support that each side claims. Part II describes how the federal courts, including the U.S. Supreme Court, have interpreted one of the strictest voter identification laws in light of the doctrinal tools available under the U.S. Constitution. The lack of concrete evidence that these laws had actually deterred registered voters from voting led the federal courts to uphold the laws against a facial attack. Part III considers how appellate courts in three states have interpreted these laws under their own state’s constitutions. These decisions reveal that state constitutions have been more protective of voting rights than has the U.S. Constitution.

Challengers to photo identification laws have found success through two distinct arguments: 1) where the state constitution explicitly guarantees voting as a fundamental right, requiring photo identification violates the equal protection clause because not all voters are equally burdened (for example, absentee voters are usually not required to show photo identification); and 2) because the authority of the state constitution stems from its citizens, substantive changes to the qualifications necessary to vote require a constitutional amendment. The success of these arguments will naturally depend upon the language of a state’s constitution, but the cases in this Part show how opponents of photo identification laws might pursue their claims in the state courts.

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27 In some state constitutions, the distinction between the rights available under the equal protection and the privileges and immunities clause can be critical in litigating these claims. For example, in Indiana, the equal privileges and immunities clause, IND. CONST. art. 1, §23, has often been misinterpreted as an equal protection clause. See American Legion Post #113 v. State, 656 N.E.2d 1190, 1192 n.1 ("Although Section 23 is commonly referred to as the equal protection clause of the Indiana Constitution, the court in Collins emphasized that Section 23 is a privileges and immunities clause and was not enacted to assure citizens equal protection of the laws."). Thus the League of Women Voters framed their arguments around the lack of uniformity of the law, rather than making an equal protection argument. See Brief of Petitioner-Appellant, League of Women Voters v. Rokita, 49D02-0806-PL-027627, at *30-41 (Marion County Sup. Ct. 2009), available at: http://moritzlaw.osu.edu/electionlaw/litigation/documents/Rokita-Brief-3-2-09.pdf.

28 Am. Civil Liberties Union of New Mexico v. Santillanes, 546 F.3d 1313, 1320 (10th Cir. 2008) (citing Rokita, 458 F.Supp 2d at 830-31) ("Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures.").

29 See Samuel P. Langholz, Fashioning a Constitutional Voter-Identification Requirement, 93 IOWA L. REV. 731, 792 (2007). ([S]tate constitutions likely pose the most significant impediments to state legislatures’ efforts to successfully craft voter-identification laws that will be upheld by the courts.").

30 If more convincing evidence could be shown, an as-applied challenge under the U.S. Constitution may succeed where the facial one did not. However, opponents of these laws have had difficulty in determining the number of such voters. Even the Indiana plaintiffs in Crawford were unable to find such a voter to serve as the named plaintiff. See Crawford, 128 S. Ct. at 1622-23. And in Georgia’s voter identification case the state Supreme Court never even reached the merits because the state law allowed the plaintiff to cast a provisional ballot. The case was dismissed for lack of standing. Perdue v. Lake, 282 Ga. 348, 349 (Ga. 2007).

31 See Ruthhart, supra, note 5 (quoting Indiana University School of Law-Indianapolis Professor Michael Pitts: “This decision sends the signal that the state courts are the place to take the photo identification battle. I think you’ll see opponents go from court system to court system in states to fight this.”).
I. A Primer on Voter Identification Laws

States have enacted a varying range of law regulating what types of identification registered voters must show in order to have their votes counted. Eighteen states require voters to show some form of identification (ID), but do not require that the ID contain a photo of the voter.\textsuperscript{32} Seven states “request or require” that the ID have a photo of the voter.\textsuperscript{33} The opposing camps in the voter ID controversy have generally split along party lines, with Republicans supportive of the photo requirements and Democrats critical of them.\textsuperscript{34} At its most basic level, the diametrically opposed views stem from concern over the “integrity” of elections and “access” to the ballot by minority, indigent, and other voters.\textsuperscript{35} Republicans argue that requiring voters to show photo identification at the polls protect against the serious threat of fraud and corruption in elections.\textsuperscript{36} Democrats, on the other hand, worry that requiring photo identification places unnecessary and undue burdens on indigent and minority voters who may struggle to acquire such identification.\textsuperscript{37} The following sub-Parts will further address the electoral concerns on each side of the debate.

A. Voter Fraud

The strongest policy reason cited in favor of the need for voter identification laws is to protect against voter fraud. Voter fraud can occur either in person or through absentee, mail-in ballots. Because they are cast without any official monitoring or verification of identity, there is wide consensus among voting experts that absentee ballots have the “greatest potential for fraud.”\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} Nat’l Conf. of State Legis., Requirements for Voter Identification, Tbl. 1. (Oct. 17, 2009), available at \url{http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/StateRequirementsforVoterID/tabid/16602/Default.aspx}.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} See Richard L. Hasen, \textit{Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess}, SLATE, Feb. 22, 2006, \url{http://www.slate.com/id/2136776}. \textit{See also} Hasen, \textit{supra} note 7, at 19 (“With the exception of Arizona,…every state that has enacted or tightened its requirements for voters to show identification at the polls has done so through the support of a Republican-dominated legislature.”); Dahlia Lithwick, Grandma Got Carded, SLATE, Jan. 9, 2008 (describing the context in which Indiana’s voter ID law was passed: “A Republican-controlled legislature passed Indiana’s law on a party-line vote, and then a Republican governor signed it.”). In reaction to the Indiana Court of Appeals ruling that struck down Indiana’s voter identification law, Governor Mitch Daniels “said the decision—by judges all appointed by Democratic governors—was ‘transparently’ partisan and an act of ‘judicial arrogance.’” Ruthhart, \textit{supra}, at note 5.
\item \textsuperscript{35} See Hasen, \textit{supra} note 7, at 18. \textit{See also}, Crawford, 474 F. 3d at 956 (Evans, J., dissenting) (“I recognize that there is, and perhaps there may always be, a fundamental tension between claims of voter fraud and fears of disenfranchisement.”).
\item \textsuperscript{36} Hasen, \textit{supra} note 7, at 18; Atkinson, \textit{supra} note 8, at 270 (“Republicans have commonly emphasized the need to secure the electoral system from fraud, styling their reform as necessary to ensure election integrity.”).
\item \textsuperscript{37} Hasen, \textit{supra} note 7, at 19-20 (“But Democrats and civil rights organizations see these laws as a way of gaining partisan advantage, because the poor, who are more likely to vote Democratic, have a more difficult time securing voter identification.”).
\item \textsuperscript{38} \textit{Id.} at 22 (2007) There is widespread consensus among those who study voter fraud that the greatest potential for fraud—and certainly the most reported cases of such fraud—involves absentee ballots that are cast outside the presence of election officials.”)
\end{itemize}
In-person, voter fraud can occur when a person either votes twice, or votes under the name of another person (often a deceased, but still registered, voter). Voter fraud can occur through mail-in ballots when a person votes under the name of another person. Only voter identification laws are capable of preventing in-person fraud because mailed-in ballots do not generally require any sort of photo identification, nor even an affidavit that a person swears to be who they claim to be.\textsuperscript{39} Thus, the most serious concerns for voter fraud arise in the context of mail-in absentee ballots.

Proponents of photo-identification laws fear that voter fraud leads to a dilution of legitimate votes and puts in question the validity of election results.\textsuperscript{41} The U.S. Supreme Court has been sympathetic to this argument, indicating its concern with voter fraud in \textit{Crawford v. Marion}.\textsuperscript{42} There the court noted the importance of ensuring that elections are perceived as legitimate, because voter fraud “drives honest citizens out of the democratic process and breeds distrust of our government.”\textsuperscript{43} More recently, the U.S. Supreme Court recognized that a state has a legitimate interest in “counting only the votes of eligible voters.”\textsuperscript{44}

However, opponents of voter identification laws argue that the problem of voter fraud is vastly overstated.\textsuperscript{45} They point to the fact that there is a small and limited number of actual cases of voter fraud,\textsuperscript{46} and that most of these cases involved unintentional violations.\textsuperscript{47} Even in oral arguments for \textit{Crawford v. Marion} before the Seventh Circuit, Indiana’s Solicitor General “conceded that he knew of no documented attempts to vote using false identification”\textsuperscript{48} in Indiana. In contrast to voter fraud cases, opponents of voter ID laws estimate that “administrative” problems are responsible for “more miscounted ballots than fraud by a factor of

\textsuperscript{39} Weinschenk, 203 S.W.3d at 217 (“...the only type of voter fraud that the Photo-ID Requirement prevents is in-person voter impersonation at the polling place. It does not address absentee voting fraud or fraud in registration.”).

\textsuperscript{40} Cite?

\textsuperscript{41} See Hasen, \textit{supra} note 7, at 19; Atkinson, \textit{supra} note 7, at 273; Longholz, \textit{supra} note 7, at 734-41; Dahlia Lithwick, \textit{Grandma Got Carded}, SLATE, Jan 9, 2008, http://www.slate.com/id/2181781/ (“When Indiana adopted its voter-ID law in 2005—requiring voters to present a government-issued photo ID before casting a ballot—the state purported to be beating back the malodorous tide of vote fraud that was ostensibly sweeping the nation.”).

\textsuperscript{42} 127 S.Ct. 5 (2006).

\textsuperscript{43} \textit{Id.} at 7.

\textsuperscript{44} \textit{Crawford}, 128 S.Ct. at 1619.


\textsuperscript{46} Posting of Project Vote to Pam’s House Blend Blog, \textit{After 2008 Elections, Some States Want to Make Voting Easier: Others Determine to Make it Harder}, http://www.pamshouseblend.com/diary/8346/ (Nov. 20, 2008, 17:20 EST) (“A four year investigation by the federal government found only 24 instances of voter fraud out of more than 214 million votes cast.”); \textit{see also}, Hasen, \textit{supra} note 7, at 41 (“As in \textit{Purcell}, the \textit{Crawford} court takes assumptions about voting behavior and turns those assumptions into matter of ‘fact,’ without so much as a single citation to evidence to support such assertions.”).

\textsuperscript{47} Such cases involved “voter fraud” where a person dropped off another person’s absentee ballot in the mail without going through proper procedures. CITE?

\textsuperscript{48} Atkinson, \textit{supra} note 8, at 275. TRY TO FIND ANOTHER CITE FOR THIS?
about 18,000.” Additionally, opponents question whether voter identification laws properly resolve voter fraud issues since such laws do not address the more prominent voter fraud that is perpetuated through absentee voting.

Beyond preventing voter fraud, proponents of voter identification laws are concerned with the impact of the fear that fraud may have upon voter confidence that the election results are legitimate. The Supreme Court has also held that the impact of this fear is a real threat to voter participation in elections. Motivated by this concern, the Court held that “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” Consequently, a state’s need to instill confidence in the validity of its elections was itself a proper reason for enacting voter-identification laws.

In response to the Court’s holding in Crawford, Political Science professors Stephen Ansolabehere and Nathaniel Persily conducted an empirical study examining the effect of this fear upon voter participation rates. They found that there was no correlation between a voter’s fear of voter fraud and the likelihood of that voter turning out to vote. Moreover, Ansolabehere and Persily found that requiring photo identification before voting had no effect upon voter confidence in the validity of election results. As a result, these professors caution against judicial decisions based upon these arguments, writing that “…causal assertions about popular beliefs should not substitute for the difficult balancing of the constitutional risks and probabilities of vote fraud and vote denial.” Other researchers have argued that the “existing science regarding vote suppression [is] incomplete and inconclusive.” But even in the face of admittedly limited empirical information, these researchers note that the potential of “millions of

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50 Hansen, supra note 7, at 22 (2007) (“One reason to suspect that those legislators who support voter identification laws are not taking the concerns about fraud all that seriously is the fact that such laws tend to exclude from the identification requirements votes cast by absentee ballots.”).

51 Crawford, 128 S. Ct. at 1620.

52 Id.

53 Id. See also, Disarming our Demons, supra note 41 (“[Justice] Stevens was not concerned by the fact of rampant vote fraud but the fear of it.”). By contrast, the Missouri Supreme Court held that mere perception of voter fraud was not enough to uphold a significant burden on the fundamental right to vote. Weinschenk, 203 S.W.3d at 218 (“While the State does have an interest in combating these perceptions [of voter fraud], where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement.”).


55 Id. at 1754-1758.

56 Id. at 1760 (”The use of photo identification requirements bears little correlation to the public’s belief about the incidence of fraud. The possible relation of such beliefs to participation appears even more tenuous.”).

57 Id. at 1759.

58 Robert S. Erikson & Lorraine C. Minnite, Modeling Problems in the Voter Identification-Voter Turnout Debate, 8 ELECTION L.J. 85, 98 (2009). These researchers point out the reason for the dearth of empirical research on the topic—in 2003, only eleven states required identification at the polls. That number has since risen to twenty-four states. Id. at 86. Erickson and Minnite point out the three most common methods researchers employ to estimate how these laws have influenced voter turnout: 1) creating statistical models describing the relationship between the strictness of identification laws and any disproportionate effect on different classes of voters; 2) using surveys to determine whether any socioeconomic patterns emerge from the types of registered voters that lack appropriate identification; and 3) conducting surveys to determine public support for these laws and how voter identification laws affect voter confidence in elections. Id. For a longer discussion of the challenges and limitations of the first of these research methods, see id. at 86-88.
citizens lacking government-issued photo ID should raise red flags for policy-makers and voting rights advocates alike that these laws could prevent eligible voters from voting. 59

Unfortunately, the lack of quantitative evidence as to the number of citizens who do not have photo identification has proven to be a stumbling block for voting rights advocates seeking to challenge these laws in federal court.

B. Voter Disenfranchisement

Opponents of photo-identification laws frame the debate of voter identification laws as a part of the “steady struggle between those who wish to constrain or restrict the vote by raising the cost and those who wish to make the vote more accessible by lowering the costs.” 60 These detractors argue that these laws will impose disproportionate and unnecessary burdens upon elderly, indigent and minority voters. 61 These marginalized groups are less likely to have government-issued photo identification, and face more substantial burdens in gathering the necessary documents to apply for such identification. 62 In its 2001 study, the National Commission on Federal Election Reform concluded that the burden of requiring photo identification “would fall disproportionally on people who are poorer and urban.” 63 And Political Science researchers using exit poll data to measure the effects of these laws found that, "voter identification laws could immediately disenfranchise many Latino, Asian and African American citizens.” 64 These researchers have filed amicus briefs before the Indiana Supreme Court for the appeal of League of Women Voters. 65 As a result, a not insignificant number of eligible voters would be unable to have their ballots counted in an election. 66

59 Id. at 98.
61 See Adam Gregg, Note, Let’s See Some ID – A New Proposal for Voter Identification in Iowa, 57 DRAKE L. REV. 783, 810; Ellis, supra note 55, at 1054 (describing this as “the issue of embedded socioeconomic bias against voters within the electoral system.”); Disarming our Demons, supra note 41 (“the crusade to end imaginary vote fraud will result in real vote suppression.”).
62 Gregg, supra note 56, at 810; see also, Hansen, supra note 7, at (“Of special concern are those voters, including the poor, some of the elderly, and some born on some Native American reservations, who may have special difficulty securing documents such as birth certificates necessary to obtain the state-issued identification required for voting.”).
66 Atkinson, supra note 8, at 276-77 (citing Nat’l Comm’n on Election Reform, 1 TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS, at 60-66 (2001) (“six to ten percent of adult Americans lack state-issued identification and would not be able to satisfy the photo ID requirement.”).
According to the National Conference of the State Legislatures, no voters will be turned away for failure to present identification because every state has a “fail-safe” provision by which a voter can still cast a ballot. However, whether or not that ballot will get counted as a vote is another question. In some states, a voter can only cast a provisional ballot, and in order to have that vote counted, the voter must visit another government office within a limited number of days and present identification.67 This double-trip requirement poses an additional hurdle for voters who not only want to vote, but also want their vote to count. In addition, it may require voters who do not have appropriate identification to jump through a series of bureaucratic hoops to acquire one.68 Opponents of voter identification laws point to these burdens as examples of how the “fail-safe” provisions, in fact, fail to prevent voter disenfranchisement.

Opponents also argue that it’s no coincidence that the voters most likely to be disenfranchised by these laws tend to vote with the Democratic party.69 They view photo identification laws as subtle efforts by Republicans to shift the electorate away from voters who would support Democratic candidates.70 Writing in dissent from the Seventh Circuit’s ruling in Crawford, Judge Terence T. Evans made this point bluntly: “Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”71 Like the partisan divide over the alleged upsurge of voter fraud, concerns about voter disenfranchisement stemming from voter identification laws also split along party lines.

The dissenters in Crawford explained in some detail how elderly, poor and disabled voters would bear heavy costs in the form of additional travel and fees necessary to obtain valid government identification from Indiana state agencies such as the Bureau of Motor Vehicles (BMV).72 Even before a voter travels to the BMV and pays for identification, he would need to pay fees to get basic documents such as a birth certificate or U.S. passport.73 Accordingly, the dissenters held that a proper constitutional analysis of these laws must take into account that “the travel costs and the fees are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile.”74

Even before the Crawford dissent, at least one state supreme court had also expressed concerns for how photo identification laws disproportionately burden certain categories of voters. These arguments were a central part of the Missouri Supreme Court’s decision to strike...
down the state’s photo identification law. In *Weinschenk v. State of Missouri*, the state supreme court held that a photo identification requirement was a burden upon the fundamental right to vote because it required that voters 1) incur financial costs and 2) possess the time and ability to navigate state bureaucracies in order to acquire appropriate photo identification. The court drew from a Georgia federal district court decision on photo identification laws that “‘many voters who are elderly, disabled, or have certain physical or mental problems simply cannot navigate that process or any long waits successfully.’”

In response to these arguments, supporters of the photo ID laws note that the vast majority of eligible, registered voters already have a valid photo identification that they could use to vote. The lack of empirical or comprehensive data on the numbers of registered voters who do not have photo identification posed serious problems for opponents of these laws. The problem stems in part from the lack of reported data from county election boards. Several federal courts critiqued *Crawford’s* evidentiary record on this point for its failure to demonstrate just how many registered voters might not have acceptable photo identification. In the district court’s ruling in *Crawford*, Judge Sarah Evans Barker rejected as “utterly incredible and unreliable” an expert’s report that almost one million of the registered voters in Indiana did not have either a driver’s license or other acceptable photo identification. The rejection of that report, and the general flimsiness of the evidentiary record, dealt a mortal blow to the plaintiffs’ case.

At the U.S Supreme Court, the majority opinion critiqued the evidentiary record before them as saying “virtually nothing about the difficulties faced by either indigent voters or voters

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75 *Weinschenk*, 203 S.W.3d at 212-15.
76 *Id.* at 215 (citing Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1347 (N.D. Ga. 2006)).
77 Atkinson, *supra* note 8 at 272 (“Photo ID requirements have common sense appeal – people already need government-issued photo IDs to board airplanes, buy alcohol, or cash checks.”)
78 *Id.* at 278 (“the debate over photo ID requirements has been likened to a ‘religious argument,’ based on impressions, with neither side offering convincing data to support its position.”). After the U.S. Supreme Court had already handed down *Crawford*, the New York University Brennan Center for Justice published a report containing empirical numbers on how many of Indiana’s voters were prevented from voting by the law, and how many voters in Indiana and across the nation lack appropriate photo identification. See JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, FAST FACTS ON THE IMPACT OF PHOTO ID: THE DATA, Aug. 2008, available at: http://lwvin.org/elibrary/Fast%20Facts%20on%20Impact%20of%20Photo%20Voter%20ID%20April%202008.pdf.
79 Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification at Indiana’s 2008 General Election*, 6, JOURNAL OF LAW AND POLIXICS (forthcoming), available at http://ssrn.com/abstract=1465529 (“Unfortunately, there is currently no federal or state mandate to collect and make publicly available this data. While [Indiana] counties are required to report to the Secretary of State the total number of provisional ballots cast and the total number of provisional ballots counted, there is no requirement that counties report the reasons why provisional ballots were cast (e.g., voter not on registration list, voter lacked photo identification, etc.) and the reasons why provisional ballots were not counted.”).
80 See *Crawford*, 128 S.Ct. at 1622-1623; *Crawford*, 472 F.3d at 952 (“The principal evidence on which the plaintiffs relied to show that many voters would be disfranchised was declared by the district judge to be ‘totally unreliable’ because of a number of methodological flaws; and we accept her finding.”); *Ind. Democratic Party*, 458 F. Supp. 2d at 803. See also, Gonzalez v. Arizona, 2006 WL 3627297 *1, *7 (D. Ariz. Sept. 11, 2006) (“ Plaintiffs presented some evidence that hundreds, possibly thousands, of individuals will not be able to secure the requisite identification to enable them to vote. But at best these numbers represent less than 3% of the voting population, and it is not clear what percentage of these individuals wish to vote but are actually unable to obtain identification.”).
81 *Rokita*, 458 F. Supp. 2d at 803. The U.S. Supreme Court deferred to Judge Barker’s findings, noting that “[m]uch of the argument about the numbers of such voters [without identification] comes from extrarecord, postjudgment studies, the accuracy of which has not been tested in the trial court.” *Crawford*, 128 S. Ct. at 1622.
with religious objections to being photographed.\"\n
Without empirical data to demonstrate how certain voters are being disenfranchised, opponents to voter identification laws have weak grounding for their arguments. Expanding upon this problem will be a central component of the next Part, which will discuss how the federal courts have analyzed Indiana’s voter ID law.

II. Crawford v. Marion County: The Limits of the U.S. Constitution

Before Indiana’s voter identification law was passed, Indiana voters who cast their ballots in person only had to sign a poll book at the polling place; the polling staff would then compare the signature with a photographic copy that was kept on file. Once the identification law was enacted, in-person voters were required to present an identification that 1) has been issued by the federal government or the state of Indiana, 2) included an expiration date and has not expired and, 3) contained a photograph of the voter. All voters who desired to cast a ballot in a primary or general election had to present photo identification that met these requirements. There are two notable exceptions to the photo identification requirement: neither absentee voters nor voters who reside in a state-licensed care facility and cast their ballots at a poll located there were required to present photo identification.

A voter who failed to present an identification that satisfied the above three criteria was allowed to cast a provisional ballot. This provisional ballot would be found invalid, however, unless the voter personally appeared before the circuit court clerk or the county election board and 1) presented photo identification or 2) executed an affidavit that the voter is indigent and cannot obtain appropriate identification without the payment of a fee or has a religious objection to being photographed. As each county only has one location where the voter could have fulfilled this requirement, they would have had to personally travel to their county office in order to have their provisional ballot counted in the elections. Thus, if these voters wanted their ballot to be counted, they would have had to travel once to the polling place to cast a provisional ballot, and then again to the county office to execute an affidavit.

Recent research on how many provisional voters successfully navigated these steps suggests that it was more difficult than the Indiana legislature had imagined. According to researchers at Indiana University School of Law:

[O]ut of the roughly 2.8 million persons who cast ballots at Indiana’s 2008 general election, 1,039 arrived at the polls without valid identification and then cast a provisional ballot. Of those 1,039 persons without valid identification who cast a provisional ballot, 137 ultimately had their provisional ballot counted.
As these researchers note, such stark figures should raise an alarm about the disenfranchising effect of Indiana’s voter identification law. It also highlights the need for further empirical research into the effects of voter identification laws. As the next sub-Part will show, challengers to these laws have struggled in the courts because they do not have hard facts that show how many registered voters are kept from voting by these laws.

A. Litigating Indiana’s Voter Identification Law in Federal Court

Challengers to Indiana’s voter identification laws first took their battle to the federal courts. The politics behind the law were not lost on the judges, with District Judge Sarah Evans Barker describing the litigation as “the result of a partisan legislative disagreement that has spilled out of the state house into the courts.” The appellate courts were equally unsympathetic to what they described as the politicized claims of the plaintiffs.

The appellate courts refused to apply strict scrutiny in reviewing the law, based upon their discretionary powers under the Anderson v. Celebrezze and Burdick v. Takushi line of cases. Under Burdick, election regulations that impose some burden upon voters do not automatically receive strict scrutiny. Instead, the regulation is subject to a sliding scale of scrutiny, with the reviewing court balancing the “character and magnitude” of the burden to the voter against the state’s interests for the regulation. Under the federal doctrine on states’ electoral regulations, the courts would apply stricter scrutiny to a law depending on how much the law burdened voters’ voting rights. A law which had large disenfranchisement effects would require a more compelling state interest than a law that had minimal disenfranchisement effects.

The burden in Crawford fell upon registered voters who did not have appropriate photo identification and would have to acquire one in order to vote. The plaintiffs needed to quantify how many of these ID-less voters would not vote because of the photo identification requirement. On the other side of the balance was Indiana’s interest in preventing voter fraud.

From the beginning of the Crawford case, the plaintiffs’ Achilles heel was the failure to show evidence “of a single, individual Indiana resident who will be unable to vote as a result of [the Indiana law] or who will have his or her right to vote unduly burdened by its requirements.” This evidence was necessary for the plaintiffs to show that the law’s disenfranchisement effect on voters (the cost) was larger than the reduction of voter fraud (the benefit). Based on scant evidence of how many voters might actually be disenfranchised by the law, both the Seventh Circuit and the U.S. Supreme Court held Indiana’s interest in preventing

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92 Id. at 2-3.
93 See Adam Liptak, Fear but Few Facts in Debate on Voter IDs, N.Y.Times, Sept. 24, 2007, at A12 (describing how the courts have struggled to adjudicate voter identification cases because of the absence of reliable facts).
94 Ind. Democratic Party, 458 F. Supp. at 783. See also, Crawford, 472 F.3d at 951 (“[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.”)
96 Id. at 433-34. Strict scrutiny only applies where the law imposes “severe” burdens upon the right to vote. Id. at 434.
98 Id.
voter fraud outweighed the burdens upon what appeared to be a very small class of voters who did not have photo identification.\textsuperscript{99} Ultimately, the limited empirical evidence of the disenfranchisement effects failed to support a facial challenge to overturn the Indiana law.\textsuperscript{100}

Below, I briefly present how the federal courts analyzed the voter ID issue under the U.S. Constitution, highlighting the evidentiary hurdle that blocked the plaintiffs’ path. Without more evidence on how many voters would actually be disenfranchised by photo identification laws, the Supreme Court’s ruling in \textit{Crawford} keeps opponents to these laws from obtaining relief in the federal courts.

1. The Seventh Circuit Found a Strong State Interest in Preventing Voter Fraud

Writing for the three-judge panel, Judge Posner upheld the constitutionality of Indiana’s voter ID law despite a candid admission that at least some unidentified voters would be deterred from voting by the photo ID requirement.\textsuperscript{101} In considering the burden that the photo ID law posed upon voters, the court found it significant that none of the plaintiffs to the suit actually claimed that the Indiana law would deter them from voting.\textsuperscript{102} The absence of any identified plaintiffs whom the law would deter from voting led the court to determine that the law only had a “slight” effect in “inducing eligible voters to disenfranchise themselves.”\textsuperscript{103}

Following the \textit{Burdick} and \textit{Anderson} line of cases, the court had to balance the harm caused by the law against the benefits accrued by the law. The smaller number of voters whom that the law would keep from voting, the more easily the benefits of the law would outweigh the costs.\textsuperscript{104} The plaintiffs’ key piece of evidence that a large number of voters would be disenfranchised had already been rejected at the trial court level as “totally unreliable” due to “methodological flaws,” a characterization that the Seventh Circuit deferred to in its opinion.\textsuperscript{105}

On the other hand, Indiana argued that voter fraud itself was an impairment of the right to vote, since voter fraud dilutes the votes of legitimate voters.\textsuperscript{106} Even though the State admitted at oral argument that “no one—in the history of Indiana—had ever been charged with violating” the criminal statute against voter fraud,\textsuperscript{107} the court found this could be explained away as an instance of the “endemic underenforcement of minor criminal laws…and [by] the extreme difficulty of apprehending a voter impersonator.”\textsuperscript{108} Without more evidence specifying how many voters the law would deter from voting, the state’s voter fraud interest was the winner by default.

\textsuperscript{99} \textit{Crawford}, 128 S. Ct. at 1623 (“[O]n the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”); \textit{Crawford}, 474 F.3d at 952 (“The fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer.”).

\textsuperscript{100} \textit{Crawford}, 128 S. Ct. at 1615.

\textsuperscript{101} \textit{Crawford}, 472 F. 3d at 951 (“So some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and 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, rather than go home and get the ID and return to the polling place.”).

\textsuperscript{102} \textit{Crawford}, 472 F. 3d at 952. The plaintiffs satisfied standing on other grounds.

\textsuperscript{103} \textit{Id}.

\textsuperscript{104} \textit{Id}.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} \textit{Id} (citing Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006)) (“Voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote.”).

\textsuperscript{107} \textit{Id} at 955 (Evans, J., dissenting).

\textsuperscript{108} \textit{Id} at 953.
In dealing with the weakness of the evidence on how many voters would actually be disenfranchised, Circuit Judge Evans believed that the real concern from the law was not the percentage of voters affected, but the disadvantaged nature of these voters. He dissented from the Seventh Circuit’s decision, expressing serious concern for those voters who did not have appropriate photo identification because they “lack any real maneuverability at all.” In contrast to the disenfranchisement effects on these voters, Evans described Indiana’s interest in preventing voter fraud as the “fig leaf of respectability providing the motive behind this law.”

In its attempt to combat voter fraud, Judge Evans argues that Indiana’s photo identification law “tips too far in the wrong direction.” Even under Burdick’s flexible standard, he would have applied strict scrutiny or something close to it, and struck down the law.

Finally, the Seventh Circuit noted that the U.S. Constitution gave states the primary authority to regulate the “times, places and manners of holding elections,” and that applying strict scrutiny to such minor regulations as Indiana’s photo identification law could “hamper the abilities of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.” The Seventh Circuit thus recognized the important role that states have in determining their own electoral regulations, suggesting that state courts might be a more appropriate venue for litigating these issues.

2. U.S. Supreme Court Denies Strict Scrutiny and Upholds the Voter ID Law

The U.S. Supreme Court affirmed the lower court’s ruling that there simply was not enough evidence in the record of the disenfranchisement effects of Indiana’s law to warrant overturning the law on a facial challenge. Again, the weakness of the plaintiffs’ evidentiary showing lowered the state’s need to show a compelling interest. Following the analysis of Burdick and Anderson, the Court first stated there was no “litmus test” for determining how much a state’s electoral regulation burdens voters, and then launched into a discussion of Indiana’s various interests in favor of the law.

First, the Court recognized Indiana’s interest in preventing voter fraud, describing the photo identification law as a “neutral” and “nondiscriminating” administrative policy to achieve that goal. The Court pointed to Indiana’s “inflated voter rolls” and a 2003 voter fraud incident in a mayor’s race as justifications for Indiana’s serious need to protect against voter fraud. The Court neglected to recognize the fact that the 2003 fraud had been perpetuated using

109 Id. (“The real problem is that this law will make it significantly more difficult for some eligible voters—I have no idea how many, but 4 percent is a number that has been bandied about—to vote. And this group is mostly composed of people who are poor, elderly, minorities, disabled, or some combination thereof.”)

110 Id. at 956.

111 Id. at 955.

112 Id. at 956.

113 Id.

114 Id. at 954 (citing U.S. Const. Art. I, Sec. IV.)

115 Id. (citing Clingman v. Beaver, 544 U.S. 581 (2005)).

116 Crawford, 128 S. Ct. at 1615.

117 Id. at 1616.

118 Id. at 1623.

119 Id. at 1619 (The inflated voter rolls were described in the record in a newspaper article that described how “Indiana’s list of registered voters included the names of thousands of persons who had either moved, died or were not eligible to vote because they had been convicted of felonies.”) (citing Theobald, Bogus Names Jam Indiana’s Voter List, INDIANAPOLIS STAR, Nov. 5, 2000, App. 145.).
absentee ballots, which were not covered by Indiana’s photo identification law. The Court also did not seem to mind that there was no evidence that in-person fraud (the only kind that Indiana’s law protected against) had “actually occur[ed] in Indiana at any time in its history.” Merely the “flagrant examples of such fraud in other parts of the country…documented throughout this Nation’s history” bore witness to Indiana’s serious interest in preventing voter fraud. While the plaintiffs’ evidentiary support was weak, the Court was more than willing to overlook similar evidentiary weaknesses in the State’s argument.

But the Court did not stop there. It also held that preventing voter fraud supported a closely related state interest of encouraging voting by maintaining “public confidence in the electoral process.” The Court reasoned that voters would opt out of participation if there were no mechanisms in place to ensure that fraudulent votes would not dilute their own vote. However, since Crawford was issued, scholars have questioned whether such a causal relationship exists. At best, the empirical studies of such a cause-and-effect are inconclusive.

The Supreme Court did not seem to consider whether the number of voters that photo identification laws will disenfranchise cancels out the number of voters that will vote because of their enhanced confidence in the electoral process. In reality, these laws are more likely to deter voters who lack identification than to encourage voters who simply gain more confidence that less fraudulent voters are being cast. All things being equal, voters will respond more to an individualized burden (e.g., navigating the necessary bureaucracy to acquire appropriate photo identification) than to a generalized “perception” that the elections are slightly more protected from fraudulent votes.

After a consideration of the state’s interest behind the law, the Court reviewed the burden that Indiana voters would bear under the law. Following federal doctrine in the Anderson line of cases, the Court was unable to hold that Indiana’s law imposed “‘excessively burdensome requirements’” on voters. Although the Court admitted that it was “not possible to quantify…the magnitude of the burden” that the law imposed, the Court assessed that the burden would only fall on a “small” and “narrow class of voters.” For the Court, the opportunity for voters to cast a provisional ballot and the availability of free photo identification cards at Indiana BMVs softened the disenfranchisement effect. And Indiana voters as a whole, most of whom had appropriate photo identification, would only be burdened in a “limited” and “precise” manner. Without more evidence of how many of Indiana’s voters were disenfranchised by the law, federal doctrine on electoral procedures offered Indiana an easy pass.

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120 Id. (citing Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2006)).
121 Id.
122 Id.
123 Id. at 1620.
124 For a thorough discussion of this debate, see supra, Part II.A.
125 See Erikson and Minnite, supra note 53, at 43.
126 Id. (citing Storer v. Brown, 415 U.S. 724, 738 (1974)).
127 Id. at 1622.
128 Id. at 1620-21. Only in a footnote did the Court acknowledge that while the BMV card is free, voters had to show a “primary” document such as a birth certificate or passport, which are not free. Id. at 1621 n.17. To have a provisional ballot counted in the election results, the voter must travel to the county’s circuit court clerk’s office (one per county) within ten days and either present appropriate photo identification or execute an affidavit of indigency and an inability to obtain photo identification without paying a fee. See Ind. Code §3-11.7-5-2.5.
129 Id. at 1623 (citing Burdick, 504 U.S. at 439, 434.)
B. The Limits of Federal Doctrine on State’s Electoral Regulations

The litigation of Indiana’s voter identification laws in the federal courts revealed the limited protections of the U.S. constitution in dealing with down photo identification laws. The *Crawford* plaintiffs struggled, and ultimately failed, to garner enough evidentiary support about how much and how many voters Indiana’s law would disenfranchise.\(^{130}\) *Crawford* demonstrates the Court’s balancing analysis under the U.S. Constitution: a weak record on the reach and severity of the burden imposed by Indiana’s voter identification law meant the state’s interests need not be so compelling in order to justify the photo requirement.\(^{131}\) Without more empirical evidence, the state’s purported interest in preventing voter fraud won the day. The plaintiff’s facial challenge to Indiana’s law never got off the ground.

Federal doctrine on electoral regulations requires a balancing between the burden and the state interest—such a balancing necessitated more information about the extent of the burden that ID-less voters would bear. This is one limitation of the US Constitution, which does not explicitly grant the right to vote, as do many state constitutions. *Crawford* showcased the only possible legal analysis that state photo identification laws can receive under the US constitution; plaintiffs are limited in its ability to protect voting rights by established precedent in this area of federal law.

In the next Part, I will describe how state supreme courts have been able to apply a completely different legal analysis to photo identification laws. The ability of state courts to anchor their analysis in the language of the state constitution, rather than in federal electoral doctrine, offers opponents of these laws the ability to pursue different legal arguments. Such interpretations are made possible by the fundamental guarantee of voting rights made explicit in many state constitutions, as well as the role of state constitutions to specify the requirements necessary to be eligible to vote. Unlike the Supreme Court’s analysis under the U.S. Constitution, these arguments are based not on a balancing of voter burdens and state interests, but upon equal protection and the exclusive authority of the constitution to define voting requirements. Opponents of photo identification laws find their strongest positions in these two arguments.

III. The Strength of State Constitutions in Protecting Voting Rights

In addition to the rights granted by the federal constitution, citizens of the U.S. have rights and protections granted by the constitution of their state. Some state supreme courts have held that their state constitution provides even more robust protections and rights than are available under the federal constitution.\(^{132}\) The U.S. Supreme Court recognized this ability of the states in *California v. Ramos*, explaining that “it is elementary that States are free to provide

\(^{130}\) For the importance of this evidence, see Elizabeth D. Lauzon, *Constitutionality of Requiring Presentation of Photographic Identification in Order to Vote*, 27 A.L.R. 6th 541 (2009)(“For constitutional challenges to voter photo identification (ID) statutes, the presentation of empirical data into evidence is crucial in assessing the burdens of a photo ID requirement on voters and the state’s interest in preventing fraud, otherwise judges will likely engage in ad hoc, contestable conjectures about the danger of fraud and the difficulty of obtaining a photographic identification card.”).

\(^{131}\) *Crawford*, 128 S. Ct. at 1622-23 (“Petitioner’s urge us to ask whether the State’s interests justify the burden imposed on voters…[b]ut 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.”)

\(^{132}\) Collins v. Day, 644 N.E.2d 72, *80 (Ind. 1994); Weinschenk*, 203 S.W.3d at 212.
greater protections...than the Federal Constitution requires.”133 One important source for these additional protections resides in a state’s guarantee to its citizens of equal protection under the law, or of the same privileges and immunities as all other citizens.134 These clauses are the state analogues to the Equal Protection Clause of the Fourteenth Amendment in the U.S. Constitution.135 But in several important respects, the state clauses provide broader protections than the Supreme Court has found in the U.S. Constitution.

Missouri and Indiana, the only two states which have struck down voter identification laws, each have clauses in their state constitutions that guarantee their citizens the same rights under the law.136 Both states have interpreted these clauses to provide more protection for its citizens than is available under the federal constitution.137 Such an expansion in voting rights was critical in providing the courts of these states with the authority to strike down their state’s photo identification laws. This authority was especially important in the face of the U.S. Supreme Court’s *Crawford* opinion upholding Indiana’s photo identification law under the U.S. Constitution.

In Indiana, the state Supreme Court has held since 1995 that the Equal Privileges and Immunities Clause of the Indiana constitution does not exhaust the legal protections available to an Indiana citizen.138 In *Collins v. Day*,139 the Indiana Supreme Court held that Indiana’s Equal Privileges and Immunities Clause should provide protection for fundamental rights even beyond the protections of the Fourteenth Amendment of the U.S. Constitution:

This Court anticipates that our independent state privileges and immunities jurisprudence will evolve in future cases facing Indiana courts to assure and extend protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment.140

The rights and protections available under the federal Constitution are merely the minimum guarantees available to Indiana citizens; the Indiana constitution can be interpreted to add more.

Indiana courts have interpreted *Collins* as establishing that “equal privileges and immunities claims ... are to be analyzed separately from claims brought under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”141 Accordingly, the Equal Privileges and Immunities clause of the Indiana constitution provides an independent basis for the claims of Indiana citizens. Not only are these claims to be analyzed

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134 Even though the Indiana Equal Privileges and Immunities Clause is not strictly an equal protection clause, it functions similarly to the equal protection clause of other state constitutions. For purposes of clarity, I will use the term “equal protection clause” throughout this Part to refer to privileges and immunities clauses such as Indiana’s.
135 U.S. CONST., amend. XIV (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
136 IND. CONST. art. 1, § 23; MO. CONST. art. 1, § 2. Indiana’s clause is not exactly an equal protection clause, see supra note 26 and accompanying text.
137 See *Collins*, 644 N.E.2d at 80; *Weinschenk*, 203 S.W.3d at 212.
139 *Collins*, 644 N.E.2d at *80.
140 Id. (italics added).
independently, but the Indiana Supreme Court has sanctioned broad interpretations of the clause that provide more rights than those available under the federal Constitution.\textsuperscript{142}

Missouri’s Supreme Court has similarly recognized the expanded protections available to its citizens under the state constitution as opposed to the federal one. In striking down Missouri’s photo identification law, the state supreme court cited numerous voting rights cases in which the state constitution provided more expansive protections than the federal one: “Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.”\textsuperscript{143}

Opponents to identification laws have challenged them based upon the equal protection clauses found in many state constitutions. They argue that these laws are impermissible because they only require in-person voters to show photo identification, while absentee voters, among others, are not required to do the same.\textsuperscript{144} In both states where photo identification laws have been struck down under the state constitution, the state courts accepted this argument. These courts relied upon the ability of the state constitution to extend beyond the Fourteenth Amendment to the federal Constitution.

In this Part of the Note, I discuss how the unique elements of state constitutions provide protections to voters that are not available under the U.S. Constitution. Challengers to photo identification laws have found success through two distinct arguments: 1) equal protection clauses of state constitutions can provide more extensive protection of voting rights than the Fourteenth Amendment of the federal Constitution; and 2) where the requirements citizens must meet in order to be eligible to vote are established in the state constitution, substantive changes to the qualifications necessary to vote will require the legislature to pass a constitutional amendment.

A. State Equal Protection Clauses Can Provide Stronger Protections than the Federal One

Most state constitutions contain an equal protection clause which guarantees its citizens that they will get to enjoy equal rights and opportunities under the law.\textsuperscript{145} These clauses oftentimes are not only co-extensive with the Fourteenth Amendment of the federal Constitution, but can also offer more robust protections of citizens’ voting rights.\textsuperscript{146} Unlike the U.S. Constitution, many state constitutions explicitly declare the right to vote as a fundamental right, triggering strict scrutiny of any statutes which impinge upon this right. Thus, while the U.S. Supreme Court declined to apply strict scrutiny to Indiana’s photo identification law, state

\textsuperscript{142} Collins, 644 N.E.2d at 80.
\textsuperscript{143} Weinschenk, 203 S.W.3d at 212 (citing State v. Rushing, 935 S.W.2d 30, 34 (Mo. Banc 1996)); State ex rel. J.D.S. v. Edwards, 574 S.W.2d 405, 409 (Mo. Banc 1978).
\textsuperscript{144} Brief of Petitioner-Appellant, League of Women Voters v. Rokita, 49D02-0806-PL-027627, at *30 (Marion County Sup. Ct. 2009).
\textsuperscript{145} Or they have a corresponding privileges and immunities clause similar to Indiana’s, prohibiting a legislative grant of special privileges and immunities, as do at least thirty-three states. See Collins, 644 N.E.2d at 81 n.1.
\textsuperscript{146} The Equal Protection Clause of the Fourteenth Amendment has been increasingly limited in its reach by the U.S. Supreme Court. See ROBERT F WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 29 (Greenwood Press 1990) ("Federal equal protection analysis, as articulated by the U.S. Supreme Court, has evolved into a relatively limited view of enforcement based on the nature of the classification, that is, race, sex, and so forth, or the importance of the right involved, that is, voting, marriage, and so forth.").
constitutions may require that result in state court. Other state constitutions apply this analysis not only to statutes that abridge fundamental rights, but to any statute that does not apply uniformly to all citizens.  

This expansive reach provides protection to voting rights even if the state constitution does not explicitly guarantee the right to vote as a fundamental right.

1. Lessons from Missouri

In 2006, Missouri’s Supreme Court engaged in such an analysis when striking down the state’s voter identification law. The Missouri court noted that while the right to vote is a fundamental right under the federal constitution, this right was created only through “implication, not by express guarantee.” The important consequence is that voting rights doctrine under the U.S. Constitution grants the U.S. Supreme Court great discretion to apply a sliding scale standard of scrutiny to state laws regulating elections. As I described earlier in Part II, under this doctrine, federal courts have applied a low standard of review to voter identification laws.

By contrast, in Missouri the right to vote is a fundamental right, protected by the constitution’s equal protection clause. The result is that laws regulating voting rights will be subject to strict scrutiny. When an equal protection claim is brought challenging a state law, the courts must determine whether the law burdens a fundamental right protected by the state constitution either explicitly or implicitly. If it does, the state court reviews the statute with strict scrutiny to determine whether a compelling state interest justifies the burden and whether the statute is narrowly tailored to advance that interest.

The different standards of scrutiny applied by the U.S. and Missouri Supreme Courts underscores the importance of explicitly guaranteed rights. While the U.S. Constitution implicitly recognizes the right to vote as fundamental, its lack of explicit language results in caselaw that only applies strict scrutiny on a sliding scale basis. To trigger strict scrutiny in a voting case under the existing federal doctrine, requires a strong evidentiary record showing how many voters are burdened by the law. That is, the level of scrutiny a law receives will be in proportion to the burden that challengers can show with concrete evidence. The higher the number of voters whose voting rights will be burdened, the more compelling the state interest

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147 Collins, 644 N.E.2d at 80.
148 Weinschenk, 203 S.W.3d at 211.
149 See Purcell, 127 S. Ct. 5; Burdick, 504 U.S. 428; Anderson, 460 U.S. 780.
150 MO. CONST. art. I, § 25. See also, Weinschenk, 203 S.W.3d at 211 (“The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart.”).
151 Id. art I, § 2 (“[A]ll persons are created equal and are entitled to equal rights and opportunity under the law.”).
152 Weinschenk, 203 S.W.3d at 210.
153 Id. at 210 (citing Komosa v. Komosa, 939 S.W.2d 479, 482 (Mo. App. E.D. 1997) (“In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests.”)).
154 Under the Burdick line of cases, the U.S. Supreme Court applies a “flexible” standard in reviewing laws that restrict voting rights. In dicta, the Missouri Supreme Court mistakenly believed that even under Burdick, the U.S. Supreme Court would review photo identification laws like that of Missouri’s (and later, Indiana’s) with strict scrutiny. Weinschenk, 203 S.W.3d at 216 (“Because, here, the restrictions on the right to vote are severe, strict scrutiny would also adhere under the federal constitutional provision.”). However, two years later in Crawford, the Court applied a balancing approach less rigorous than strict scrutiny. Crawford, 128 S. Ct. at 1616. See also, Crawford, 474 F.3d at 952 (“A strict standard would be especially inappropriate in a case such as this.”).
must be to support the constitutionality of the law. By contrast, the explicit language of the Missouri state constitution mandates the application of strict scrutiny for any burden upon voting rights.\footnote{The Missouri Supreme Court acknowledged that only “reasonable regulations” of voting rights would not be subject to strict scrutiny. \textit{Weinschenk}, 203 S.W.3d at 215-16.} “Reasonable regulation” of voting procedures and registration are permitted, but “heavy” burdens are not.\footnote{\textit{Id.} at 215.} Missouri has no sliding scale approach that depends upon a showing of the number of voters that will be burdened, but only requires a showing that a burden exists.\footnote{Note that these elements are present in all voter identification laws.} Any burden will trigger strict scrutiny.

To determine whether the law created a burden upon the exercise of one’s voting rights, and thus should be subject to strict scrutiny, the Missouri Supreme Court examined the necessary process for obtaining appropriate photo identification. The court held that the state’s voter identification law burdened the fundamental right to vote based on two elements of this process.\footnote{\textit{Id.} at 213-14. The court recognized that these fees were not unconstitutional poll taxes. But the imposition of “any financial burdens on eligible citizens’ right to vote…are impermissible under federal law,” and Missouri’s constitution could not require less. \textit{Id.}} First, requiring photo identification of voters meant that they had to pay fees (albeit indirectly) in order to exercise their right to vote.\footnote{\textit{Id.} at 214.} Even if the identification cards themselves were “free,” Missourian voters still had to spend money to request certified copies of birth certificates or other documents necessary to get an identification card.\footnote{\textit{Id.} at 214 (quoting Common Case/Georgia v. Billups, 439 F.Supp. 2d 1294, 1347 (N.D. Ga. 2006)) (holding that a similar procedure required by the Georgia photo identification law violated the federal constitution)).} Second, voters would have to successfully navigate state bureaucracies in order to get appropriate identification,\footnote{\textit{Id.} at 214-15.} a process that would undoubtedly burden “many voters who are elderly, disabled, or have certain physical or mental problems.”\footnote{\textit{Id.}} The court described the process as “cumbersome,” and one which required “substantial planning in advance of an election.”\footnote{\textit{Id.} at 215.} Each of these elements would disenfranchise voters who did not plan far enough ahead or who had trouble navigating state bureaucracies.\footnote{\textit{Id.} at 215.} Once the court ruled that the photo identification law burdened the fundamental right to vote, the Missouri Supreme Court had to review it using strict scrutiny.\footnote{\textit{Id.} at 215.} The law would be only pass muster if it was weakly balanced against the state's interest in the law.

In deciding whether the law should survive strict scrutiny, the court considered whether the law “serves a compelling state interest and whether it is necessary and narrowly tailored to accomplish that interest.”\footnote{\textit{Weinschenk}, 203 S.W.3d at 216 (“If the regulations place a heavy burden on the right to vote, as here, our constitution requires that they be subject to strict scrutiny.”).} Without elaboration, the court held that the state had shown a “significant, compelling, and important” interest in combating voter fraud through the new law.\footnote{\textit{Id.}}

The court spent more time analyzing whether the photo identification law was narrowly tailored to prevent voter fraud. Like the U.S. Supreme Court’s decision in \textit{Crawford}, the
Missouri supreme court recognized the state’s interest in fighting the perceptions of voter fraud.\(^{167}\) But unlike the U.S. Supreme Court, Missouri’s court did not believe that this interest was compelling enough to burden the fundamental right to vote.\(^{168}\) It held that the law was not narrowly tailored to this goal because it only prevented in-person voting fraud, a type of fraud which “is not a problem in Missouri.”\(^{169}\) Moreover, the law did not prevent “absentee voting fraud or fraud in registration,”\(^{170}\) the only types of fraud that had been documented in the state.\(^{171}\) Missouri, unlike the U.S. Supreme Court, required the law to prevent the specific type of voter fraud that was a problem, not voter fraud in general.

While the U.S. Supreme Court requires a strong evidentiary showing to trigger strict scrutiny, under Missouri’s state constitution, any burden upon voting rights, no matter how slight, will merit strict scrutiny.\(^{172}\) The Missouri Supreme Court considered only the process that some voters would have to endure in order to get photo identification, not evidence of how many such voters would be disenfranchised. The different focus of analysis under the Missouri constitution allows it to more aggressively protect voting rights because it does not require empirical evidence that has already been shown is difficult to find.\(^{173}\) Under the Missouri constitution, a law that burdens voting rights will need to survive strict scrutiny; the level of scrutiny the law receives will not be dependent upon a showing of how many voters are burdened.

2. Lessons from Indiana

Like the Missouri Supreme Court, the Indiana court of appeals’ 2009 decision striking down the state’s photo identification law also relied upon a distinction between the state constitution and the federal one.\(^ {174}\) In its unanimous ruling, the three-judge panel noted that the Indiana Supreme Court had already distinguished Indiana’s Equal Privileges and Immunities Clause\(^ {175}\) from the Equal Protection Clause of the Fourteenth Amendment.\(^ {176}\) In 1994, the Indiana Supreme Court held that, unlike the federal constitution, Indiana’s clause did not “require an analytical framework applying varying degrees of scrutiny for different protected interests.”\(^ {177}\) Instead, Indiana’s Equal Privileges and Immunities clause applies only one

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\(^{167}\) Id. at 218.

\(^{168}\) Id.

\(^{169}\) Id. (quoting the trial court’s findings in the case).

\(^{170}\) Id.

\(^{171}\) Id. at 218-19 (citing Jo Mannies, Suspect Voter Cards Found, ST. LOUIS POST-DISPATCH, Oct. 11, 2006, at A1).

\(^{172}\) Id.

\(^{173}\) See supra Part I.A for a discussion on the difficulties of determining how many voters are disenfranchised by these laws.

\(^{174}\) League of Women Voters, 2009 Ind. App. LEXIS 1628, *23 (2009) (“Section 23 [Indiana’s Privileges and Immunities Clause] differs from analysis under the equal protection clause of the Fourteenth Amendment of the federal constitution.”).

\(^{175}\) IND. CONST. art. I, § 23 (“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.”).

\(^{176}\) U.S. CONST. amend. XIV.

\(^{177}\) 2009 Ind. App. LEXIS 1628, *23 (2009) (quoting Collins, 644 N.E.2d at *80 (Ind. 1994)); see also, American Legion Post #113 v. State, 656 N.E.2d. 1190, 1192 (Ind. App. 1995) (“Unlike Fourteenth Amendment analysis, the protections assured by Section 23 apply equally to prohibit all improper grants of unequal privileges, and we do not apply varying degrees of scrutiny for claims involving suspect classes or fundamental rights.”).
standard:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.\textsuperscript{178}

The Equal Privileges and Immunities clause was one of the main reasons the Indiana Court of Appeals struck down Indiana’s photo identification law as a violation the state constitution.\textsuperscript{179} Using this two prong standard established in \textit{Collins}, the Indiana court of appeals held that the state could not require photo identification of in-person voters when it did not make an equivalent requirement of absentee voters (eg, requiring an affidavit affirming one’s identity).\textsuperscript{180} This requirement violated the first prong of the standard, because the disparate treatment of these two groups did not support the claimed purpose of preventing voter fraud.\textsuperscript{181} The underpinning of this holding came from an earlier Indiana Supreme Court opinion that recognized that “inherent differences make mailed-in ballots more susceptible to improper influences or fraud” than in-person voting.\textsuperscript{182} Because of this heightened risk, if the Indiana legislature intended its photo identification law to protect against voter fraud, the court reasoned that it should also have applied it to absentee voters as well.\textsuperscript{183} Like Missouri’s application of strict scrutiny, the Indiana constitution demanded a tighter nexus between the goal of reducing voter fraud and restrictions upon voting rights.

In \textit{Crawford}, the U.S. Supreme Court briefly considered the stated purpose of preventing voter fraud, but did not find it problematic that Indiana’s law only addressed in-person voter fraud and, moreover, that no instances of this kind of voting fraud had ever been recorded in Indiana’s history.\textsuperscript{184} The Court held that while there might be debate as to “the most effective method of preventing election fraud,” Indiana had a legitimate and important interest in “counting only the votes of eligible voters.”\textsuperscript{185} Without the higher standard of review mandated under Indiana’s constitution, requiring the state law to be narrowly tailored to its stated purposes, the U.S. Supreme Court accepted on good faith that Indiana’s method was appropriate and effective.

The Indiana court of appeals also reviewed the portion of Indiana’s voter identification law that excused residents of state-licensed care facilities from presenting photo identification if they voted at a poll located in their facility. The court held that this classification violated both prongs of the \textit{Collins} standard. First, the distinction was based upon “arbitrary or unnatural characteristic[s]” which had no appropriate relation to the legislation.\textsuperscript{186} That is, the inherent characteristics of a resident of such a facility did not make them more or less of a risk for voter fraud.

\textsuperscript{178} \textit{Collins}, 644 N.E.2d at 80.
\textsuperscript{179} \textit{League of Women Voters}, 2009 Ind. App. LEXIS 1628 at *25.
\textsuperscript{180} \textit{League of Women Voters}, 2009 Ind. App. LEXIS 1628, *25.
\textsuperscript{181} \textit{Id.} at 24.
\textsuperscript{182} \textit{Id.} at 25.
\textsuperscript{183} \textit{Id.} at 27 (“If it is reasonable to ‘more stringently govern absentee balloting,’ then it follows that a statute that imposes a less stringent requirement for absentee voters than for those voting in person would not be reasonable. This is what the Voter I.D. law does.”).
\textsuperscript{184} \textit{Crawford}, 128 S. Ct. at 1618-19.
\textsuperscript{185} \textit{Id.} at 1619.
\textsuperscript{186} \textit{League of Women Voters}, 2009 Ind. App. LEXIS 1628, *34-35.
fraud. Second, the distinction granted an extra privilege or immunity not available to other similarly situated voters (e.g., residents of other state-licensed care facilities that do not have voting polls).  

By contrast, the U.S. Supreme Court was silent on the lack of uniformity of Indiana’s voter identification law in Crawford. Though it recognized that the law only applied to in-person voters, the Court made little note of the exception for absentee voters and did not even mention the exception for residents of state-licensed facilities. The Seventh Circuit summarily dismissed the argument that the exception for absentee voters made the law “underinclusive,” explaining that there was no workable way to apply the same photo identification standards to absentee voting.

3. Limitations of State Equal Protection Clauses

The recent cases in Missouri and Indiana demonstrate the ability of state constitutions to create broad protections against arbitrary voting regulations. While reliance upon state equal protection clauses provides better doctrinal tools than are available under the federal Constitution, they have limitations of their own. If a state expands voter identification laws to include all voters, including absentee voters, then the equal protection clause is no longer a useful potential remedy. Under such laws, all voters would be required to prove their identity with state-issued identification. The irony is that voting regulations which comply with equal protection clauses will only result in more extensive voting regulations that risk further disenfranchisement.

As the Indiana court of appeals noted, voter identifications laws could be easily applied to all residents of state-licensed care facilities “without destroying the primary objectives of the Law.” Extending the law to absentee voters would be more challenging, but the Indiana court thought this error too “could be cured.” The end result could be that voter identification laws are expanded in such a way that even more voters are burdened—particularly those vulnerable residents of state-licensed care facilities or disabled or elderly voters that rely upon the ease of absentee voting. Such a result would not be desirable to the voting rights advocates who challenge these laws in the first place. They may strategically decide to leave the laws unchallenged rather than give the states an opportunity to expand voter identification laws.

B. Voter Identification Requirements as a Substantive Change to the State Constitution

However, state constitutions provide voting advocates with another doctrinal tool. State constitutions have exclusive authority as to what qualifications a voter must satisfy in order to be eligible to vote in state elections. These qualifications generally require a voter to be a certain

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187 Id.
188 Crawford, 128 S. Ct. at 1618-19.
189 Crawford, 472 F.3d at 954.
190 League of Women Voters, 2009 Ind. App. LEXIS 1628, * 44.
191 Id.
192 See Oregon, 400 U.S. at 123 (“In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.”); Dunn, 405 U.S. at 336 (“[T]he States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.”); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959) (“The States have long been held to have broad powers to determine the conditions under which the right of suffrage
age, maintain a residency in the state, and so on. Substantive changes to these qualifications, like changes to any part of a constitution, can only be made by an amendment. Constitutions, both state and federal, derive their authority from the state’s citizens. The citizens gave the constitution its power, and they are the only ones who can changes it. The legislature is required to pass a constitutional amendment in order to effect any changes to citizens' rights enshrined in it. If voter identification laws can be characterized as such a substantive change, then they can only be enacted via an amendment. The requirement of such a process would impose a higher bar for the creation of voter identification laws, providing stronger protections against voter disenfranchisement.

Requiring photo identification in order to vote could be characterized as such a change because it adds to the constitution’s list of the requirements that must be met in order to vote. That is, eligible voters must now also present photo identification in order to be able to vote. A citizen eligible to vote in every other respect, but who fails to bring photo identification, would be made ineligible to vote by her lack of identification. Thus, the law is more than a mere regulation of how elections are to be conducted (e.g., at what hours, in what locations), but actually becomes a new qualification for the right to vote. If registered voters fail to satisfy it, they will be unable to vote.

1. Lessons from Georgia

The Georgia Superior Court of Fulton County found such an argument convincing in a challenge to Georgia’s voter identification law. In Lake v. Perdue, a superior court found that the voter identification law disenfranchised otherwise qualified voters in violation of the state’s constitution. By requiring voters to show photo identification before they were allowed to vote, the “legislature ha[d] exceeded its constitutional authority” and had “plac[ed] an additional condition on the right to vote not otherwise authorized by the Constitution.” As in Missouri, the Georgia constitution recognizes the right to vote as a fundamental right. The court noted that under the Georgia constitution, the state legislature is “not allowed to take away the right to vote except as otherwise specifically enumerated.” Such a stark denial of the right to vote converted the law from a mere regulation into a substantive qualification.

Case law from other state courts also instructed the superior court’s interpretation. The court cited Indiana Supreme Court’s decision in Morris that held the state legislature could not

may be exercised.”).

See Morris v. Powell, 25 N.E. 221, 223 (Ind. 1890) (“That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the Legislature can not add an additional qualification is too plain and well recognized for argument, or to need the citation of authorities.”).

However, the Georgia Supreme Court later overturned this ruling based on a lack of standing and did not address the merits. See Perdue v. Lake, 647 S.E.2d 6 (Ga. 2007). The Supreme Court held that the plaintiff in the case in fact possessed a photo identification that would have satisfied Georgia’s voter identification law. Id. at 8.


Id. at *11.

GA. CONST. art. II, §1, para. 2.

Id. at *12 (citing GA. CONST. art. II, § 1, para. 3).

25 N.E. at 223.
add voter qualifications to the constitution.\textsuperscript{200} And the court looked to the Texas Supreme Court for the proposition that the right to vote can only be restricted or changed by a constitutional amendment.\textsuperscript{201}

The Georgia constitution limits the authority of the legislature over voting to two functions—to establish residency requirements, and to provide for voter registration.\textsuperscript{202} The photo identification law overstepped this authority because it did not follow from either of these limited authorizations.\textsuperscript{203} The law was not triggered during voter registration, but rather later at the actual voting booth. The court found that the state constitution established an \textit{exclusive} list of when registered voters may be denied this fundamental right,\textsuperscript{204} and that the voter identification law impermissibly added to this list.\textsuperscript{205} The voter identification law denied registered, and otherwise eligible, voters the right to vote based solely on their failure to present photo identification. Such an exclusion of registered voters was beyond the authority of the legislature.

2. Lessons from Indiana

While the Missouri Supreme Court did not reach the merits of this argument in \textit{Weinschenk},\textsuperscript{206} the Indiana court of appeals analyzed it at length in \textit{League of Women Voters}.\textsuperscript{207} Unlike the Georgia court, Indiana concluded that the state's voter identification law did not add a substantive qualification, but was merely a time, place, manner regulation on voting. The Indiana court likened the voter identification law to the requirement that voters must register—both were intended to prevent voter fraud and both could disenfranchise otherwise eligible voters who failed to comply.\textsuperscript{208} If the state legislature was allowed to require that voters register, the court reasoned they could require them to present photo identification at the polls.\textsuperscript{209}

Although the Georgia superior court found \textit{Morris} persuasive, the Indiana court of appeals held it had been mostly overturned by subsequent cases of the Indiana Supreme Court.\textsuperscript{210} These cases held that voting regulations, such as requiring registration or dictating when polls will open and close, are allowed even if some voters would be disenfranchised by the law.\textsuperscript{211} As long as the regulation was reasonable and applied uniformly to all voters, it would be upheld.\textsuperscript{212}

\textsuperscript{200}\textit{Lake}, No. 2006-CV-119207 at *14.
\textsuperscript{201}\textit{Id.} at *14-15 (citing Kay v. Schneider, 218 S.W. 479 (Tex. 1920)).
\textsuperscript{202}\textit{Id.} at *15 (citing GA. CONST. art. II, §1, para. 2).
\textsuperscript{203}\textit{Id.}
\textsuperscript{204}\textit{Id.} at *15 (“[T]he Constitution limits the grounds on which a Georgia citizen who is registered may be denied the right to vote to those persons who have been (1) convicted of a felony involving moral turpitude, or (2) judicially determined to be mentally incompetent to vote.”).
\textsuperscript{205}\textit{Id.} at *14 (citing Stewart v. State, 98 Ga. 202, 205 (1896) (where the Constitution ‘undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot thereafter enlarge the list.’)).
\textsuperscript{206} \textit{Weinschenk}, 203 S.W.3d at 212 n.16 (“Because it is not necessary to determine whether this requirement constitutes an additional ‘qualification,’ this Court does not finally resolve the issue.”).
\textsuperscript{208} \textit{Id.} at *17-18.
\textsuperscript{209} \textit{Id.} at *21.
\textsuperscript{210} \textit{Id.} at *18 (“[S]ince \textit{Morris}, our supreme court has changed course in its interpretation of whether voter registration is a qualification which requires constitutional provision or merely regulation of otherwise qualified voters.”).
\textsuperscript{211} \textit{Id.} at *20-21.
\textsuperscript{212} The court of appeals did not address the fact that the voter identification law is not a uniform regulation
this was true despite the fact that some qualified voters might be prevented from voting through their failure to comply with the regulation.\textsuperscript{213} Thus, the fact that Indiana’s voter identification law left some voters unable to exercise their voting rights was not enough to classify it as another qualification that voters had to satisfy.

3. The Benefits of Arguing for a Substantive Qualification Interpretation

Convincing a state court to characterize a voter identification law as more than a mere time, place, manner regulation is a serious challenge for opponents of these laws. Only one known state court, the Georgia county court, has made such a finding, and its decision was summarily vacated by the state’s supreme court on other grounds.\textsuperscript{214} There are no clear standards for how courts should distinguish between mere regulations and substantive additions to the constitution’s voter requirements. The distinction is certainly a fine one, and courts could reasonably differ in their interpretations.

However, if these arguments could more successfully gain the acceptance of state courts, the result would be even better protections for voting rights than even state equal protection clauses can provide. If voter identification laws can be characterized as substantive qualifications that must be added to the constitution via an amendment, ostensibly it would be harder to enact these laws. Amending a state constitution requires more political will and widespread debate than merely passing a state law. Such an amendment would also invoke more public awareness and engagement with the issue, perhaps leading to the creation of a law that has less disenfranchisement effects. Requiring a constitutional amendment also ensures that the law reflects the political will of the citizens of the state, thus safeguarding against legislatively-created intrusions upon voting rights. All of these features combined suggest that requiring voter identification laws to be enacted via an amendment to the state’s constitution would be the most effective manner of satisfying the goals of both sides of the debate.

\textbf{CONCLUSION}

Indiana’s supreme court will soon have its chance to weigh in on the voter identification debate that is occurring around the nation in state legislatures and courthouses. Indiana already filed an appeal from the Court of Appeals decision in \textit{League of Women Voters}.\textsuperscript{215} The decision to uphold or strike down Indiana’s voter identification law will certainly lay another brick in the edifice of voting rights law. The \textit{League of Women Voters} case also provides the Indiana supreme court with the opportunity to showcase the ability of Indiana’s constitution to protect important voting rights. Freed from the evidentiary requirements demanded by federal doctrine, the Indiana Supreme Court could impose a stricter standard of review than did the U.S. Supreme Court. Such a review could require a tighter nexus between the identification requirement and the stated purpose of preventing voter fraud. Under this standard, the court should strike down

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\item \textsuperscript{213} \textit{Id.} (citing Blue v. State ex rel. Brown, 188 N.E. 583 (1934)).
\item \textsuperscript{214} Perdue v. Lake, 647 S.E. 2d 6, 8 (Ga. 2007).
\end{itemize}
\end{footnotesize}
the law because it fails to target the type of voter fraud that has actually occurred in Indiana. To protect voting rights even more strongly, the Indiana supreme court should require the voter identification law to be added as a constitutional amendment.

The effectiveness of voter identification laws in preventing voter fraud remains to be documented further, as does the disenfranchising effects of such laws. Deeper empirical research into these results, showing whether or not a causal relationship exists, would significantly aid state courts in their analysis of these laws. The difficulty of gathering data on the effects of voter identification laws currently poses a challenge for researchers, a problem which could be reduced by better reporting from county election boards. But when balancing between such a fundamental right as voting and the prevention of voter fraud, the risk of disenfranchising voters should weigh more heavily on the scale. A voter who is deprived of his right to vote loses not only a portion of the right, but the entire right. Such a loss should not be tolerated without concrete evidence that the law which caused the loss did so in order to prevent a greater evil. The weak evidence on the frequency of voter fraud, particularly in-person voting fraud, does not yet rise to this level. As such, state courts should use the powerful tools found in their state’s constitution to review these laws with a higher scrutiny than the U.S. Supreme Court deigned them to deserve.