NOTE

LESSENING CUMULATIVE BURDENS ON THE RIGHT TO VOTE: A LEGISLATIVE RESPONSE TO *CRAWFORD V. MARION COUNTY ELECTION BOARD*

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Many scholars and commentators expected the Supreme Court's decision in Crawford v. Marion County Election Board *to settle the debate over the constitutionality of mandatory photo identification laws for prospective voters. While the Court's splintered plurality decision upheld the Indiana law at issue in the case, it did not resolve this larger substantive debate; rather, the decision has exacerbated the confusion in the lower courts surrounding the constitutional analysis of strict voter identification laws.*

This Note considers the path forward for voting rights advocates in the aftermath of the Crawford *decision. This Note analyzes the fractured voting of the Justices in* Crawford *and considers the prospects for future legal challenges to strict voter identification laws. Ultimately, this Note argues that a litigation strategy will not be sufficient on its own to vindicate the right to vote for vulnerable voting populations, and recommends that voting rights advocates pursue a legislative response at the federal level as a complement to the ongoing legal challenges to possibly unconstitutional voter identification schemes.*

The policy proposals this Note advances—broader opportunities for voter registration, and universal voter registration—would not directly remedy the flaws of strict voter identification laws, but, to different degrees, each policy would help alleviate the cumulative burdens such laws impose on the right to vote for the most vulnerable voting populations in the nation.

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INTRODUCTION

As the Supreme Court prepared to hear oral arguments in *Crawford v. Marion County Election Bd.*,[1] expectations were high for what some legal commentators anticipated would be the "most important elections case since *Bush v. Gore*."[2] Barely seven years after it arguably decided

[1] 128 S. Ct. 1610 (2008).

[2] *See, e.g.*, Justin Levitt, *Supreme Court Preview: The Most Important Elections Case Since* Bush v. Gore, http://www.acslaw.org/archive/200801?page=5 (Jan. 9, 2008, 8:30 EST) [hereinafter Levitt, *Supreme Court Preview*] ("The Court's opinion is likely to have an impact

one of the closest presidential elections in history, and in the middle of what many considered the most important presidential campaign in a generation, the Court was on the verge of deciding the constitutionality of one of the most controversial election law responses to *Bush v. Gore*[3]—an Indiana law requiring all in-person voters to present government-issued photo identification in order to cast a ballot.[4]

As of the 2000 presidential election, only eleven states required all in-person voters to present some form of identity verification before they cast ballots.[5] While allegations of partisan voter fraud and the use of election laws as a means of manipulating the electorate have a storied history in American politics,[6] calls from some groups for stricter voter identification laws reached a crescendo in the aftermath of the disputed presidential election of 2000.[7] Congress responded to the myriad election problems that were manifest after the 2000 election with the Help America Vote Act of 2002 (HAVA)[8]—a wide ranging piece of legislation that reflected a series of compromises between congressional Democrats interested in improving voter-access to the polls and Republicans focused on fraud prevention.[9] Among its provisions, HAVA included a requirement that all first-time in-person voters in a federal election pre-

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far beyond Indiana. It will refine the standard determining what states must show in order to justify a direct burden on the ability to cast a valid vote. And in so doing, it will set the ground rules governing which eligible American citizens will be able to exercise their right to vote, and which eligible citizens will not, in 2008 and beyond.").

3 *See* Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 745–46 (2008).

4 *See* IND. CODE § 3-11-8-25.1 (2006).

5 ELECTIONLINE.ORG, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T AND WHY: 2000–2006, at 16 (2006), http://www.pewcenteronthestates.org/uploadedFiles/2006.annual.report.Final.pdf (describing voter identification requirements in each state in 2000).

6 *See, e.g.*, ANDREW GUMBEL, STEAL THIS VOTE: DIRTY ELECTIONS AND THE ROTTEN HISTORY OF DEMOCRACY IN AMERICA (Nation Books 2005); Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 9–12 (2009) (surveying the history of federal efforts to address frauds in the electoral system); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 638–39 (2007) (describing Richard Nixon's "Operation Eagle Eye," an "anti-fraud" campaign designed to suppress turnout in the 1960 presidential election); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 456–61 (2008) [hereinafter Tokaji, *Voter Registration*] (surveying the history of voter registration laws and their frequent use as tools of disenfranchisement); *see also* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1036–50 (2009) (arguing that many of the restrictions on voter eligibility are a means to prevent people of lower socioeconomic status from voting).

7 *See* Overton, *supra* note 6, at 638; Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, http://www.slate.com/id/2136776.

8 Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

9 Overton, *supra* note 6, at 639; *see also* Tokaji, *Voter Registration*, *supra* note 6, at 470.

sent some form of identification at their polling location.[10] While HAVA's voter identification requirement is limited in scope—it only applies to voters registering by mail, and those who have not previously voted in the state[11]—its passage, and the conditioning of much federal funding on meeting its requirements,[12] put election reform at the top of many state legislative agendas.[13]

The states responded—by 2008, thirty-four states had enacted some type of voter identification law, most of which went beyond HAVA's minimum requirements.[14] Calls for mandatory photo identification laws had intensified after such laws were partially endorsed by the Carter-Baker Commission,[15] a bi-partisan task force established to assess weaknesses in election systems across the country and to recommend legislative remedies.[16]

However, the constitutionality of photo identification requirements remained in doubt in early 2008.[17] Voting rights advocates had challenged photo identification statutes in numerous states,[18] and had been successful in enjoining their enforcement in three states.[19] These advocates claimed that, in addition to violating state constitutions and federal statutory law, such statutes were unconstitutional becuase they consti-

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10 *See* 42 U.S.C. § 15483(b)(2)(A) (2006); Overton, *supra* note 6, at 639; Tokaji, *Voter Registration*, *supra* note 6, at 473.

11 *See* 42 U.S.C. § 15483(b)(2)(A); Overton, *supra* note 6, at 639; Tokaji, *Voter Registration*, *supra* note 6, at 473.

12 *See* Benson, *supra* note 6, at 11.

13 *See* Langholz, *supra* note 3, at 747–48.

14 *See id.* at 748–49 & nn.92–96 (listing the states and their respective requirements); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, REQUIEMENTS FOR VOTER IDENTIFICATION (2008), http://www.ncsl.org/LegislaturesElections/ElectionsCampaigns/StateRequirementsforVoterID/tabid/16602/Default.aspx (last visited Oct. 1, 2009) (listing current requirements).

15 *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–21 (2005) [hereinafter "CARTER-BAKER REPORT"], *available at* http://www.american.edu/ia/cfer/report/full_report.pdf; *see also* Overton, *supra* note 6, at 634. *But see* Overton, *supra* note 6 (explaining why Professor Overton, a Commission member, dissented from Carter-Baker Commission's endorsement of photo identification requirements).

16 *See* Overton, *supra* note 6, at 633.

17 *See* Bryan P. Jensen, Comment, Crawford v. Marion County Election Board*: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of* Burdick, 86 DENV. U. L. REV. 535, 544 (2009) (stating that prior to the Supreme Court's decision in *Crawford*, of five identified lower court cases specifically addressing the constitutionality of voter ID laws, three courts upheld the laws while two courts struck them down as unconstitutional); Langholz, *supra* note 3, at 755.

18 *See* Langholz, *supra* note 3, at 755–56 (surveying legal challenges to voter identification laws in Arizona, Colorado, Georgia, Indiana, Michigan, Missouri, New Mexico, and Ohio).

19 *Id.*; Jensen, *supra* note 17, at 544; *see* Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (per curiam); Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); ACLU v. Santillanes, 506 F. Supp. 2d 598 (D. N.M. 2007), *rev'd,* 546 F.3d 1313 (10th Cir. 2008).

tuted a modern poll tax under the Twenty-fourth Amendment and an improper burden on the right to vote under the First and Fourteenth Amendments to the federal Constitution.[20] It was in this charged atmosphere that the Supreme Court heard *Crawford*.

However, the decision in *Crawford* did not settle the ultimate question over the substantive constitutionality of mandatory photo identification laws.[21] Instead, the Indiana law survived after six Justices voted to uphold it, but with the three concurring Justices disagreeing with the constitutional analysis of the lead opinion,[22] and the three dissenting Justices all finding the law unconstitutional.[23] Crucially, the lead opinion hinged on the holding that the plaintiffs did not present sufficient evidence to support their facial challenge to the law's constitutionality.[24] While the ruling on these grounds severely limits the avenues available for voting rights advocates to challenge such laws,[25] the Court did not completely foreclose challenges to strict voter identification laws by future plaintiffs who could present evidence of specific harms or burdens on their right to vote.[26] Indeed, after the *Crawford* decision, challenges to the constitutionality of photo identification laws continued across the country.[27]

This Note considers the path forward for voting rights advocates in the aftermath of *Crawford*, particularly in light of how the Justices' votes structured the decision. This Note highlights how the fractured plurality decision has severely hampered litigation efforts by voting rights advocates to alleviate the burdens that strict voter identification laws impose on vulnerable voting populations, and recommends voting rights advocates complement these efforts by attempting to secure passage of federal legislation that would help alleviate the cumulative burdens on these voters' right to vote. Part I presents a brief introduction to strict voter identification laws in the United States, the policy debate surrounding their enactment, and their role as one of the most divisive issues confronting advocates of broad election reform. Part II discusses the *Crawford* decision and the effects of how the Supreme Court Justices voted, particu-

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20 *See* Langholz, *supra* note 3, at 755; *see also* Jensen, *supra* note 17, at 545 (discussing the consolidated complaints in *Crawford*).

21 *See infra* Part II.D.

22 *See infra* Part II.C.2.b.

23 *See infra* Part II.C.2.c.

24 *See infra* Part II.C.2.a.

25 *See infra* part II.E.

26 *See id.*

27 *See* Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 475–76 (2008); Amanda Bronstad, *Voter ID Challenges to Continue Across U.S.*, LAW.COM, May 27, 2008, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202421704685 (quoting one challenging attorney: "[T]here's no question that *Crawford* changes the landscape. But we simply don't think it impacts the essential issues that are inherent to the challenges to the Albuquerque ordinance.").

larly in light of the emerging disfavor the Roberts Court has shown for facial constitutional challenges, and how legal challenges to strict voter identification laws are severely hamstrung by *Crawford* and other recent Roberts Court decisions. Part III proposes that while voting rights advocates need not abandon litigation strategies, advocates should devote energy and resources to securing a policy response whereby new federal legislation addressing voter registration could help lessen the cumulative burdens on the right to vote, particularly for those voters most affected by strict voter identification laws.

I. THE RISE OF MANDATORY PHOTOGRAPHIC VOTER IDENTIFICATION

A. *From Voter Registration to Voter Identification*

The history of voter registration and identification requirements largely tracks the expansion of suffrage, and its complications, in the United States.[28] After independence, when the right to vote was limited to land-owning white males, those who qualified to vote were generally allowed to do so without any registration or identity verification.[29] As suffrage expanded and the number of qualified voters grew, calls for voter registration rose,[30] and the debate over voter registration—and in particular the complaints of fraud and disenfranchisement—entered the public realm.[31] States enacted voter registration laws, and for various purposes—in the North to combat fraud by urban political machines and also to prevent immigrants from voting; in the South, first to prevent former Confederates from voting, then, alongside voter "qualification" laws, to disenfranchise African-American voters.[32] These goals—the prevention of fraud and the suppression of disfavored groups—were largely met.[33]

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28 For more detailed examinations of the history of voter registration laws, see Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 370–88 (1991); Ellis, *supra* note 6, at 1036–45; Tokaji, *Voter Registration*, *supra* note 6, at 456–61; Langholz, *supra* note 3, at 741–53.

29 *See* Cunningham, *supra* note 28, at 373; Ellis, *supra* note 6, at 1037–38; Langholz, *supra* note 3, at 741–42.

30 *See* FRANCIS PIVEN & RICHARD CLOWARD, WHY AMERICANS DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY 37 (Beacon Press 2000); Tokaji, *Voter Registration*, *supra* note 6, at 456–58; Langholz, *supra* note 3, at 742.

31 *See* Tokaji, *Voter Registration*, *supra* note 6, at 456–58.

32 *See* Cunningham, *supra* note 28, at 374–85; Ellis, *supra* note 6, at 1041–44; Tokaji, *Voter Registration*, *supra* note 6, at 457–61; Langholz, *supra* note 3, at 742.

33 *See* Tokaji, *Voter Registration*, *supra* note 6, at 458–59 (citing ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 157 (Basic Books 2000), for the proposition that "registration laws reduced fraudulent voting [and] kept large numbers (probably millions) of eligible voters from the polls").

Voter registration laws remained largely the domain of state law until the federal Civil Rights and Voting Rights Acts outlawed the discriminatory use of registration requirements to disenfranchise African-American voters.[34] Apart from these federal mandates, and the Warren Court's interventions,[35] for much of the twentieth century states differed wildly in their threshold registration and identification requirements for voting.[36]

The federal government intervened again in state voter registration law with the National Voter Registration Act of 1993 (NVRA),[37] otherwise known as the "Motor Voter Law" due to its provision requiring states to permit voters to register when applying for a driver's license.[38] Enacted in light of widespread declines in voter turnout, Congress promulgated the NVRA with the goal of increasing registration among all voters, not just racial minorities.[39] In addition to establishing a nationally-accepted, uniform registration form,[40] and regulating how the states could maintain voter registration lists,[41] the NVRA greatly expanded the opportunities for eligible citizens to register to vote.[42] Complementing the driver's license provision, the NVRA mandates that state offices that provide public assistance or disability services also offer voter registration opportunities and assistance in completing these forms to those receiving such services.[43] After the NVRA's passage, registration numbers of voters in lower socioeconomic positions rose strongly.[44]

However, proponents of stricter voter eligibility requirements criticized the NVRA for limiting states' ability to remove registered voters from the voter rolls due to a period of non-voting;[45] for requiring states to attempt to contact inactive voters, and giving such voters a grace pe-

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34 *See* Cunningham, *supra* note 28, at 388–89; Tokaji, *Voter Registration*, *supra* note 6, at 461–66; Langholz, *supra* note 3, at 742–43.

35 *See, e.g.*, Harper v. Virginia, 383 U.S. 663 (1966) (abolishing the poll tax); Ellis, *supra* note 6, at 1047–50.

36 *See* Langholz, *supra* note 3, at 742–43.

37 Pub. L. No. 103–31, 107 Stat. 77 (codified as amended at 42 U.S.C. §§ 1973gg–1973gg-10 (2006)).

38 *See* 42 U.S.C. § 1973gg-3; Tokaji, *Voter Registration*, *supra* note 6, at 468; Langholz, *supra* note 3, at 743.

39 Tokaji, *Voter Registration*, *supra* note 6, at 467.

40 *See* 42 U.S.C. §§ 1973gg-4a, 1973gg-7; Tokaji, *Voter Registration*, *supra* note 6, at 468.

41 *See* Tokaji, *Voter Registration*, *supra* note 6, at 469; *infra* notes 45–48 and accompanying text.

42 Tokaji, *Voter Registration*, *supra* note 6, at 467–69.

43 42 U.S.C. §§ 1973gg-5(a)(2), 1973gg-5(a)(4) (2006); Tokaji, *Voter Registration*, *supra* note 6, at 468.

44 Tokaji, *Voter Registration*, *supra* note 6, 469–70.

45 *See* 42 U.S.C. §1973gg-(6)(b); Tokaji, *Voter Registration*, *supra* note 6, at 469; Langholz, *supra* note 3, at 743.

riod, before removing them from the voter rolls;[46] for requiring states to accept mail-in registration;[47] and for allowing voters who recently moved within a state to vote in either the precinct of their old or new address.[48] Critics claimed these provisions caused voter lists to become "bloated" and presented an opportunity for persons to show up at polling places and vote in the name of someone else—either because that person moved, died, committed a felony, or never existed in the first place.[49] These critics claimed that a photo identification requirement at the polls would prevent this from occurring.[50]

As part of the Help America Vote Act of 2002 (HAVA),[51] Congress required each state to update its voter registration systems by creating a centralized statewide database of registered voters, the accuracy of which was to be ensured by regular maintenance by the state and the sharing of information among various state agencies and with the federal government.[52] In addition, HAVA added the aforementioned voter identification requirement for all first-time voters in a federal election in a state,[53] and increased the threshold identification needed for registration under the nationwide registration guidelines.[54]

As the states implemented HAVA's requirements, many enacted voter identification laws that exceeded HAVA's minimum standard.[55] Professor Spencer Overton has classified these restrictions under five broad categories: no documentary identification required; documentary identification requested, not required; photo identification requested, not required; documentary identification required; and photo identification as an absolute condition to voting.[56] In states that require no documentary evidence at the polls beyond HAVA's requirements for first-time voters, poll workers may verify voters' identities by myriad methods; poll workers may require a voter to sign an affidavit of identity, swear an oath,

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46 *See* 42 U.S.C. §1973gg-6(c)–(d); Tokaji, *Voter Registration*, *supra* note 6, at 469; Langholz, *supra* note 3, at 743.

47 *See* 42 U.S.C. §1973gg-4; Tokaji, *Voter Registration*, *supra* note 6, at 468; Langholz, *supra* note 3, at 743–44.

48 *See* 42 U.S.C. §1973gg-6(e); Tokaji, *Voter Registration*, *supra* note 6, at 469; Langholz, *supra* note 3, at 743–44.

49 *See* Overton, *supra* note 6, at 638; Langholz, *supra* note 3, at 744; *see also* Benson, *supra* note 6, at 10–11.

50 Overton, *supra* note 6, at 638.

51 Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

52 *See* 42 U.S.C. § 15483(a)(2)–(5) (2006); Tokaji, *Voter Registration*, *supra* note 6, at 471; Langholz, *supra* note 3, at 745–46.

53 *See* 42 U.S.C. § 15483(b)(2)(A); *supra* notes 10–11 and accompanying text.

54 *See* 42 U.S.C. § 15483(a)(5); Benson, *supra* note 6, at 11.

55 *See* Langholz, *supra* note 3, at 748–49 & nn.92–96 (listing the states and their respective requirements); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 14.

56 *See* Overton, *supra* note 6, at 639–41. For an alternative classification of state voter identification laws, see Langholz, *supra* note 3, at 748–51 and accompanying footnotes.

recite her birth-date and address to poll worker, or sign a poll-book with the signature compared to the signature on the voter's file.[57] In states where a poll worker may request documentary identification, but where it is not required, a voter can substantiate her identity through the production of numerous kinds of documentation, ranging from a driver's license with a photograph to a utility bill.[58] If the voter does not have such documentation, she can attest to her identity using one of the aforementioned methods.[59] The same general rule applies in states where polls workers may request photographic identification, but where it is not required, but often with a higher standard of secondary verification, however.[60] In those states that require documentary identification, acceptable identification usually includes any of the kinds of documentation that would suffice to satisfy HAVA's minimum requirement, but as applied to all voters.[61] At the time *Crawford* was heard, Florida, Georgia, and Indiana were the only states that required photo identification from all in-person voters.[62]

B. *The Policy Debate: Protecting or Suppressing the Vote?*

Strict voter identification laws, and mandatory photo identification laws in particular, have been the subject of intense public and scholarly debate in recent years. Even on the predicate definitional point, proponents and opponents of such laws disagree as to how to define "voter fraud."[63] Proponents define the term broadly to include all manner of illegal activity surrounding the casting and counting of votes.[64] Opponents assert that this is an intentional conflating of problems—including cases of clerical error, innocent mistake, or simple negligence—by proponents of such laws in an attempt to raise alarm in voters as to the

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57 Overton, *supra* note 6, at 640.

58 *Id.*

59 *See id.* at 640–41.

60 *See id.* at 641.

61 *See id.*

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

63 *See, e.g.*, JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 4 (2007), http://truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf ("There are many such problems that are improperly lumped under the umbrella of 'voter fraud.'"); *see also* Benson, *supra* note 6, at 4–7 (discussing "[t]he absence of a clear legal definition of election fraud"); *id.* at 4 n.21 (citing U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 11–12 (2006) (stating there is no uniform definition of election fraud)). For one proposed reformulation of these definitions, see *Benson*, *supra* note 6 (distinguishing between "voter-initiated" fraud and "voter-targeted" fraud).

64 *See, e.g.*, Langholz, *supra* note 3, at 735 & n.20 ("[J]ust as consumer fraud need not be committed by consumers, but rather is focused on fraud *against* consumers, so too should voter fraud include all conduct directed toward defrauding lawful voters of the weight of their votes—whether committed by another voter, an election official, or a campaign worker.").

alleged prevalence of misconduct in the election system.[65] In contrast, opponents use the more precise definition of the term to encompass only "the intentional corruption of the electoral process by voters."[66] Opponents of strict voter identification laws are also clear to distinguish between in-person voter fraud and other forms of voter fraud, the former being the only kind that photo identification laws address.[67]

Substantively, the disagreements only worsen. Opponents of mandatory photo identification laws, in particular, forcefully challenge the primary asserted justification for such laws—to combat in-person voter fraud—by citing the lack of evidence of widespread in-person voter fraud.[68] Concededly, proponents of mandatory photo identification laws are able to produce examples of *voter registration fraud*—where persons turn in false or fraudulent registrations for persons who do not exist—but evidence of these fraudulently registered identities actually *voting* is virtually non-existent.[69] Indeed, the best evidence available of fraudulent in-person voting is anecdotal at best.[70] In response, proponents of mandatory photo identification laws claim that this lack of evidence of in-person voter fraud is a result of there being no effective means for detecting and combating such conduct, especially in jurisdictions that do not require identification of putatively registered voters at polling locations.[71]

Furthermore, opponents of mandatory photo identification laws cite the suppressive effect these laws have on voter turnout, especially among potential voters who are low-income, minority, disabled, or elderly, and

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65 *See, e.g.*, LEVITT, *supra* note 63, at 4, 7–11 (arguing that allegations of voter fraud are widely exaggerated, divert attention from more pressing problems with elections, and are used to justify policies that disenfranchise voters); Overton, *supra* note 6, at 645–46 (recounting how a widely touted instance of "double voting" in Milwaukee in 2005 resulted in zero indictments for voter fraud by the Republican-appointed United States Attorney, because the discrepancies were actually caused by clerical errors and individuals with similar names).

66 LORRAINE C. MINNITE, PROJECT VOTE, THE POLITICS OF VOTER FRAUD 6 (2007), http://projectvote.org/images/publications/Policy%20Reports%20and%20Guides/Politics_of_Voter_Fraud_Final.pdf.

67 *See, e.g.*, LEVITT, *supra* note 63, at 6; Overton, *supra* note 6, at 649–50.

68 *See, e.g.*, Benson, *supra* note 6, at 7 & n.31 (citing U.S. ELECTION ASSISTANCE COMM'N, *supra* note 63, at 15; Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1); Overton, *supra* note 6, at 649–50; LEVITT, *supra* note 63; MINNITE, *supra*, note 66, at 3.

69 *See* Overton, *supra* note 6, at 649–50; Tokaji, *Voter Registration*, *supra* note 6, at 495. In the 2008 presidential election, much was made about the false voter registrations turned in by workers for the nonprofit ACORN, who were paid a set amount for each voter they registered. *See* Michael Falcone, *ACORN Replies to Questions About Role with Voters*, N.Y. TIMES, Oct. 14, 2008, at A24; Joe Mandak, *7 PA. ACORN Workers Facing Voter-Form Charges*, ASSOC. PRESS, May 7, 2009 ("[S]even have been charged with either forging, illegally soliciting or illegally filling out voter-registration cards in the lead-up to the 2008 election.").

70 *See* Overton, *supra* note 6, at 644–50.

71 *See id.* at 653–54.

less likely to possess acceptable identification.[72] Yet, proponents respond to these charges by stating that there is no credible evidence that mandatory photo identification laws actually suppress voter turnout in these groups.[73] This conflicted empirical record[74] creates problems for voting rights advocates beyond the public policy debate.[75]

Suffused throughout these debates are outright allegations by each side that its opponent is intentionally manipulating the electoral system for purely partisan ends. The primarily Democratic opposition notes that the groups most affected by photo identification requirements lean Democratic, and claim that Republican-lead efforts to enact such laws are merely an attempt to suppress Democratic turnout.[76] Indeed, the sharp

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72 *See, e.g.*, Ellis, *supra* note 6, at 1026 (arguing that the economic costs such requirements place on certain voters will structurally exclude lower socioeconomic voters); M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RES. 555 (2008); Matt A. Barreto, Stephen A. Nuno & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* (Sept. 1, 2007), *available at* http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf (examining exit polls to find that immigrants and minority voters were less likely to be able to provide identification at the polls); Timothy Vercellotti & David Andersen, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout*, *available at* http://www.brennancenter.org/page/-/d/download_file_50903.pdf (finding suppressive effect of stricter voter identification laws, especially among racial minorities); Daniel P. Tokaji, *Voter ID and Turnout*, EQUAL VOTE, Feb. 22, 2007, http://moritzlaw.osu.edu/blogs/tokaji/2007/02/voter-id-and-turnout.html ("The exclusionary effect of some ID laws arises from the fact that a significant number of citizens don't have government-issued photo ID. Previous research suggests that some groups of voters—including people of color, poor voters, and elderly voters—are likely to be disproportionately affected, since they're less likely to have driver's licenses."). *But see* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L. J. 85, 87 (2009) (discussing critiques of the Vercellotti study).

73 *See, e.g.*, Richard L. Hasen, *Bob Pastor Responds to my Cater-Baker Op-Ed Criticism*, http://electionlawblog.org/archives/010177.html (Feb. 4, 2008, 22:23 EST) (quoting Carter-Baker Commission Executive Director Robert Pastor as stating that "advocates of voter ID have had problems in finding cases of voter impersonation, and the critics of voter ID have had a similar problem finding cases of people who were denied the right to cast a ballot because they did not have photo IDs"); DAVID B. MUHLHAUSEN & KERI WEBER SIKICH, THE HERITAGE CENTER FOR DATA ANALYSIS, NEW ANALYSIS SHOWS VOTER IDENTIFICATION LAWS DO NOT REDUCE TURNOUT, *available at* http://www.heritage.org/research/legalissues/upload/cda_07-04.pdf (finding no statistically significant suppressive effect of voter identification laws on turnout in a state-by-state comparison).

74 *See* Erikson & Minnite, *supra* note 72; Lorraine C. Minnite, *Finding Election Fraud—Maybe*, 8 ELECTION L. J. 249 (2009); Pitts, *supra* note 27 (finding inconclusive evidence of suppression under the Indiana law).

75 *See infra* Part II.E.

76 *See, e.g.*, Jim Vertuno, *Texas Senate Advances Voter ID Bill*, HOUS. CHRON., Mar. 11, 2009, *available at* http://www.chron.com/disp/story.mpl/metropolitan/6305054.html ("Sen. Leticia Van de Putte of San Antonio, leader of the [Texas] Senate Democrats, said the [photo identification] measure is designed to shave about 3 to 4 percentage points off of Democratic vote totals in Texas just as the party begins to improve its statewide performance."); *see also* Jonathan Alter, *'Jim* Crawford*' Republicans*, NEWSWEEK, Sept. 11, 2008, *available at* http://www.newsweek.com/id/158392; Art Levine, *The Republican War on Voting*, THE AMERICAN

partisan divide over photo identification laws is manifested in the fact that nearly every photo identification law passed since 2000 has been on an almost purely party line vote,[77] with reviewing judges frequently voting according to party affiliation as well.[78]

C. *Legal Challenges to Photo Identification Laws*

The bitter divide over the merits and effects of strict voter identification laws is mirrored in the inconsistent treatment such laws receive in the courts.[79] Of the five courts that ruled upon the constitutionality of photo identification laws before the Supreme Court decided *Crawford*, three upheld the state law at issue, while two stuck the law down.[80] In reaching their decisions, the lower courts frequently applied different standards of constitutional review.[81] This inconsistent approach is unsurprising given the Supreme Court's often contradictory analysis in many cases premised on a claimed burden on the right to vote, including those beyond the election fraud context.[82] While *Crawford* presented the Court with the opportunity not just to settle the question over the substantive constitutionality of mandatory photo identification laws, but also to clarify much election law jurisprudence,[83] the Court's limited and fractured response only appears to have exacerbated the legal and policy debates over strict voter identification laws.

PROSPECT, Apr. 1, 2008, *available at* http://www.prospect.org/cs/articles?article=the_republican_war_on_voting.

77 *See* Brief of Amici Curiae of Historians and Other Scholars in Support of Petitioners at 28, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (Nos. 07-21, 07-25) (stating that between 2005 and 2007, on ten Republican-introduced voter identification laws, 95% of Republican state legislators voted in support while only 2% of Democratic state legislators did); *see, e.g.*, Jensen, *supra* note 17, at 556 (citing pure party-line vote on Indiana's voter identification law).

78 *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 646–47 (2008).

79 *See* Benson, *supra* note 6, at 5 ("In the absence of an objective, uniform formula to determine the amount of deference to a legislature that is appropriate, courts tend to an inconsistent review of election fraud.")

80 Jensen, *supra* note 17, at 544; *see* Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (per curiam); Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); ACLU v. Santillanes, 506 F. Supp. 2d 598 (D. N.M. 2007), *rev'd,* 546 F.3d 1313 (10th Cir. 2008); *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007).

81 *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 171–72 (2008) [hereinafter Douglas, *Right to Vote*]; Jensen, *supra* note 17, at 544.

82 *See* Thomas Basile, *Inventing the "Right to Vote" in* Crawford v. Marion County Election Board, 32 HARV. J. L. & PUB. POL'Y 431, 445 (2009) ("The right to vote is a judicial creation possessing as much force as the Court chooses to accord it in any given case."). *See generally* Douglas, *Right to Vote*, *supra* note 81 (arguing that despite the common rhetoric, the Supreme Court does not always treat the right to vote as fundamental).

83 *See* Levitt, *Supreme Court Preview*, *supra* note 2.

II. *CRAWFORD V. MARION COUNTY ELECTION BOARD*

A. *The Statute: Indiana's Voter ID Law*

Enacted in 2005, the statute at issue in *Crawford* is among the most stringent in the nation, as it requires all registered voters in Indiana to present government-issued photographic identification before voting in-person.[84] A voter who does not present photo identification at the polling place is allowed to cast a provisional ballot under the law, but such ballots are to be counted only if, within ten days of the election, the voter travels to the local state circuit court to execute an affidavit stating that she is indigent and unable to obtain proper identification, or presents such identification at the circuit court and affirms that she cast the provisional ballot.[85]

The Indiana Voter ID Law, as it is commonly known, applies only to in-person voters, not those who vote absentee by mail, or voters living in state-licensed facilities such as nursing homes.[86] Under Indiana law, voters are not required to show photo identification in order to register to vote, but the state does offer photo identification without charge through the Bureau of Motor Vehicles for Indiana residents who wish to obtain one in order to vote and who can establish their residence and identity.[87]

As in almost every other debate over voter identification laws, Indiana's Voter ID Law was passed on a pure party line vote, with all Republicans voting in favor and all Democrats voting against.[88]

B. *The Parties' Arguments*

After the passage of the Voter ID Law, the plaintiffs—the Indiana Democratic Party and Marion County Democratic Central Committee, two publicly elected officials, and numerous nonprofit organizations that work on behalf of elderly, disabled, low-income, and minority voters—filed two suits against the state officials responsible for the enforcement

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84 *See* IND. CODE § 3-11-8-25.1(a) (2006); 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS, §2.99 (3d ed. 2008); Benson, *supra* note 6, at 17; *Photo Identification Requirement for In-Person Voting*, 122 HARV. L. REV. 355, 356 (2008). .

85 *See* IND. CODE §§ 3-11-7.5-2.5, 3-11-7.51, 3-11-8-25.1(d); Basile *supra* note 82, at 432; *Photo Identification Requirement for In-Person Voting*, *supra* note 84, at 356.

86 *See* IND. CODE § 3-11-8-25.1(e); Crawford v. Marion County Election Bd. 128 S. Ct. 1610, 1613 (2008); Basile, *supra* note 82, at 431–32; Ellis, *supra* note 6, at 1056.

87 *See* IND. CODE § 9-24-16-10(b); Basile *supra* note 82, at 432; L. Paige Whitaker, *The Constitutionality of Requiring Photo Identification for Voting: An Analysis of* Crawford v. Marion County Election Board, Cong. Res. Service (May 19, 2008). Indiana added the provision providing for photographic identification free of charge at the same time the Voter ID Law was passed in order to avoid what would be an almost explicit constitutional violation by conditioning the ability to vote on the payment of a fee. *See Crawford*, 128 S. Ct. 1610, 1620–21 & n.4.

88 *See Crawford*, 128 S. Ct. at 1623 & n.21; *Photo Identification Requirement for In-Person Voting*, *supra* note 84, at 356; *see also supra* note 77 and accompanying text.

of the law.[89] The consolidated suits argued that the Voter ID Law was unconstitutional because it substantially burdened the fundamental right to vote in violation of the Fourteenth Amendment; it was neither a necessary nor appropriate means of preventing election fraud; it arbitrarily disenfranchised voters without the requisite photo identification who otherwise would be qualified to vote; and it placed an improper burden on voters who were unable to obtain the requisite identification.[90] These arguments largely tracked the historic charges by election law experts and civil and voting rights advocates against the enactment of strict voter identification laws.[91]

The State of Indiana defended the law against these pre-enforcement challenges on the grounds that legitimate legislative concerns for in-person voter fraud justified the law, and that it was a reasonable exercise of the State's constitutional power to so regulate elections.[92] The State's arguments essentially tracked the arguments made by those in favor of more restrictive voter identification laws.[93]

C. *The Courts' Responses*

1. Lower Court Decisions

In *Indiana Democratic Party v. Rokita*, the District Court granted summary judgment for the State upholding the Voter ID Law.[94] Rejecting the plaintiffs' facial constitutional attack, the court held that the State's claimed interest in preventing voter fraud provided sufficient justification for the law and the burdens it imposed on certain voters.[95] The District Court found that the plaintiffs had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Voter ID Law] or who will have his or her right to vote unduly burdened by its requirements."[96] Although the plaintiffs had supplied expert testimony that up to 989,000 registered voters in Indiana did not possess a driver's license or other acceptable photo identification that would satisfy the law's requirements,[97] the District Court dismissed this

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89 *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006); Basile *supra* note 82, at 432; *Whitaker, supra* note 87, at 1–2.

90 *See Crawford*, 128 S. Ct. at 1614; Basile *supra* note 82, at 432; Whitaker, *supra* note 87, at 2.

91 *See supra* Part I.B.

92 *See Rokita*, 458 F. Supp. 2d at 784; Basile *supra* note 82, at 432.

93 *See supra* Part I.B.

94 *See Rokita*, 458 F. Supp. 2d at 784; *Photo Identification Requirement for In-Person Voting*, *supra* note 84, at 356.

95 *See* Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 821–26 (S.D. Ind. 2006).

96 *Rokita*, 458 F. Supp. 2d at 783; *see* Whitaker, *supra* note 87, at 2.

97 *See Rokita*, 458 F. Supp. 2d at 803.

assertion "as utterly incredible and unreliable."[98] Instead, the District Court estimated that as of the date of the law's passage, approximately 43,000 Indiana residents did not possess suitable government-issued photo identification.[99] To the District Court, this burden on the population at large was insignificant and, coupled with the fact that the plaintiffs had not identified specific voters who the law would preclude from voting or unduly burden, was not substantial enough to justify enjoining the enforcement of the law.[100]

The Court of Appeals for the Seventh Circuit affirmed the District Court's decision.[101] Judge Richard Posner, writing for the Seventh Circuit panel, acknowledged that the law may cause certain harms, but characterized these as purely political and logistical concerns for the plaintiff Democratic organizations, not cognizable constitutional injuries.[102] Indeed, Judge Posner stated that "no 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,"[103] but minimized the harm this would cause,[104] and impugned the reasons the plaintiffs challenged the law as purely political.[105]

Judge Posner rejected the plaintiffs' contention that the law burdened a fundamental right, and thus should be evaluated using strict scrutiny, instead holding that under the balancing test laid out in *Burdick v. Takushi*,[106] the slighter the burden imposed by the law, the less substantial the reasons the State must provide as justification for the law.[107] While Judge Posner acknowledged that the law would deter some voters from voting due to the identification requirement and the related costs of complying, he reasoned that the law's overall burden was "slight," and that therefore, Indiana's asserted interest in preventing voter fraud, while supported by no evidence of actual occurrences of such fraud in the state, justified the law.[108]

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98 *Rokita*, 458 F. Supp. 2d at 783; *see* Whitaker, *supra* note 87, at 2.

99 *Rokita*, 458 F. Supp. 2d at 807; Whitaker, *supra* note 87, at 2.

100 *See Rokita*, 458 F. Supp. 2d at 821–26.

101 *See* Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007); *Photo Identification Requirement for In-Person Voting*, *supra* note 84, at 357.

102 *See Crawford*, 472 F.3d at 954.

103 *Id.* at 951.

104 *Id.*; *see also* Amitai Etzioni, *Supreme Court Tilts Election, Big Time*, TALKING POINTS MEMO, http://tpmcafe.talkingpointsmemo.com/2008/05/02/supreme_court_tilts_election_b/ (May 2, 2008, 14:24 EST).

105 *See Crawford*, 472 F.3d at 952 (claiming that the plaintiffs' "motivation for the suit is simply that the law may require the Democratic Party to work harder to get every last one of their supporters to the polls"); *see also* Whitaker, *supra* note 87, at 2.

106 504 U.S. 428 (1992).

107 *See* Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

108 *See id.* at 952–53.

2. The Supreme Court

A fractured Supreme Court plurality upheld the rejection of the plaintiffs' facial challenge.[109] However, the splintered nature of the decision has produced uncertainty regarding the level of burdens a voter identification law must impose before it will be found to be constitutionally defective.[110]

a. The Controlling Opinion

Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy in *Crawford*'s lead opinion, rejected the plaintiffs' facial challenge to the constitutionality of the law primarily on the basis of insufficient factual evidence of an unconstitutional burden.[111] Justice Stevens found that the plaintiffs' proffered evidence was not enough to justify their facial constitutional challenge against Indiana's asserted interests.[112]

Justice Stevens framed the case in light of *Harper v. Virginia Bd. of Elections*,[113] the landmark Warren Court case that ruled that poll taxes were unconstitutional, and that "a State 'violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.'"[114] Justice Stevens stated that although the general rule that issued from *Harper*—that even rational restrictions on the right to vote were considered invidious, and subject to strict scrutiny, if they were unrelated to voter qualifications—was still good law, this rule had a caveat such that "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*.'"[115] In evaluating such "evenhanded restrictions," courts must "identify and evaluate the interests put forward by the State as justifications for the burden [on the right to vote] imposed by its rule, and then

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

110 *See infra* notes 164–68 and accompanying text; *see also* Justin Levitt, Crawford—*More Rhetorical Bark than Legal Bite?*, BRENNAN CENTER FOR JUSTICE, May 2, 2009, http://www.brennancenter.org/blog/archives/crawford_more_rhetorical_bark_than_legal_bite/ [hereinafter Levitt, *More Rhetorical Bark*]; Richard L. Hasen, *Initial Thoughts on the Supreme Court's Opinion in* Crawford, *the Indiana Voter Identification Case*, Election Law Blog, http://electionlawblog.org/archives/010701.html (April 28, 2008, 8:17 EST).

111 *See Crawford*, 128 S. Ct. at 1616 ("[T]he evidence in the record is not sufficient to support a facial attack on the validity of the entire statute . . . ."); *see also* Ellis, *supra* note 6, at 1057; Levitt, *More Rhetorical Bark*, *supra* note 110.

112 *See Crawford*, 128 S. Ct. at 1623; *see also* Ellis, *supra* note 6, at 1057; Levitt, *More Rhetorical Bark*, *supra* note 110.

113 383 U.S. 663 (1966).

114 *Crawford*, 128 S. Ct. at 1615 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)). *But cf.* Douglas, *Right to Vote*, *supra* note 81, at 154–55 (arguing that the lead opinion misconstrued *Harper*).

115 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

make the 'hard judgment,'" as to the constitutionality of such laws.[116] *Burdick* defined this process to compel courts "evaluating a constitutional challenge to an election regulation [to] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"[117]

As such, Justice Stevens considered the interests Indiana claimed the Voter ID Law advanced—election modernization, prevention of voter fraud, and "safeguarding voter confidence."[118] Justice Stevens considered Indiana's asserted interest in preventing voter fraud by quoting from the Carter-Baker Commission on Federal Election Reform:

> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo identification cards currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.[119]

While the Voter ID Law was intended to address "in-person voter impersonation at polling places,"[120] Justice Stevens admitted that "the record contains no evidence of any such fraud actually occurring in Indiana at any time in its history."[121] Although Justice Stevens attempted to mitigate this fact by claiming that "flagrant examples of such fraud in other parts of the country have been documented throughout the Nation's history," and "that occasional examples have surfaced in recent years," the evidence he cited in support of these propositions was nineteenth century New York in the heyday of Tammany Hall, and one confirmed instance of in-person voter fraud in the 2004 Washington State gubernatorial election.[122] Yet, despite this extremely thin evidentiary record,

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116 *Id.*

117 *Id.* (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

118 *Id.* at 1617.

119 *Crawford*, 128 S. Ct. at 1618 (quoting CARTER-BAKER REPORT, *supra* note 15, at 136–37). The lead opinion's reliance on the Commission and its assertions have raised numerous concerns, not least of which are the often slipshod historical assertions made, such as the quoted portion. *See* Justin Levitt, Crawford—*Just the Facts*, BRENNAN CENTER FOR JUSTICE, Apr. 30, 2008, http://www.brennancenter.org/blog/archives/just_the_facts/ [hereinafter Levitt, *Just the Facts*] ("[T]he Court's Indiana voter ID opinion was grounded not in truth, but in truthiness. If it sounds right in your gut, it must be correct—no matter what the facts actually are.").

120 *Crawford*, 128 S. Ct. at 1618–19.

121 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1619 (2008).

122 *Id.* at 1619 & n.11–12.

Justice Stevens did not scrutinize the State's putative interests.[123] Indeed, Justice Stevens declared that the existence of "inflated voters rolls [provides] a neutral and nondiscriminatory reason supporting the State's decision to require photo identification."[124]

While the Court deferred to Indiana's interests despite a thin evidentiary record of support, on the other side of the balance was the plaintiffs' claimed burdens on the right to vote. After dismissing the burden the photo identification requirement places on "most voters" as insubstantial,[125] Justice Stevens focused on the "somewhat heavier burden" the law placed on those who would have more difficulty in assembling the proper documentation required and going through the necessary procedures for receiving a voter ID—elderly persons born out of state, the low-income, the disabled, the homeless, and "persons with a religious objection to being photographed."[126] Justice Stevens considered the "severity of [this] burden [to be] . . . mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted," even though this would require the voter to then travel to the circuit court to execute the required affidavit.[127]

As the plaintiffs were advancing a facial challenge to the constitutionality of the Voter ID Law, Justice Stevens stated that they "[bore] a heavy burden of persuasion,"[128] one that they were ultimately unable to carry. Specifically, the plaintiffs' challenge was unsuccessful since, according to Justice Stevens, "[based on] 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."[129] The record did include depositional testimony from elderly, indigent, and homeless voters, but Justice Stevens considered this anecdotal evidence to be "limited."[130] Stating that the record did not provide

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123 *See id.* at 1619 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters . . . [and] the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.").

124 *Id.* at 1620. The lead opinion cursorily mentioned the State's asserted interest in "protecting public confidence in the integrity and legitimacy of representative government" as having "independent significance [ ] because it encourages citizen participation in the democratic process." *Id.*

125 *Id.* at 1621; *see also id.* at 1620 ("A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of [the Voter ID Law].").

126 *Id.* at 1621.

127 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621 (2008)

128 *Id.*

129 *Id.* at 1622.

130 *See id.*

concrete evidence as to the number of such burdened voters and the specific burdens that would be imposed on them, he did not examine the "special burden" that the law placed on particular classes of voters for whom obtaining the proper identification would be more burdensome.[131]

Ultimately, Justice Stevens ruled that since the evidence was insufficient to support a claim that the law imposed an improper burden on a specific class of voters, the plaintiffs' facial challenge must be considered in light of the law's "broad application to all Indiana voters."[132] Evaluating the law's impact on all voters, Justice Stevens found the burden imposed to be "limited" and not "substantial,"[133] and therefore the "'precise interests' advanced by the State [were] . . . sufficient to defeat" the plaintiffs' facial challenge to the Voter ID Law.[134]

b. Justice Scalia's Concurrence

Justices Scalia, Thomas, and Alito concurred in the lead opinion's result, but, in a separate opinion by Justice Scalia, approved not only Indiana's law, but also any generally-applicable voter identification law that was passed absent intentional discrimination or a severe and widespread impact on voters.[135] Justice Scalia read *Burdick* as providing a bright line rule in cases asserting a burden on the right to vote but not intentional discrimination—if the Court determined that an asserted burden was "severe," then strict scrutiny should apply in evaluating the law; if the burden was not "severe," then the Court should be deferential in its review.[136] Justice Scalia thought that "ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone are not severe,"[137] and thus should be reviewed with deference to the state. Concluding that the Indiana law was neither intentionally discriminatory nor imposed a severe burden on the right to vote generally, the concurring Justices voted to uphold the statute.[138]

However, Justice Scalia sharply disagreed with the lead opinion's analysis being based on a lack of evidentiary record of the Voter ID Law's individual impact.[139] Justice Scalia believed that courts should

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131 *See id.*

132 *Id.* at 1623.

133 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621, 1623 (2008).

134 *Id.* at 1623.

135 *See id.* at 1624–27 (Scalia, J., concurring); Levitt, *More Rhetorical Bark*, *supra* note 110.

136 *See Crawford*, 128 S. Ct. at 1624–25 (Scalia, J., concurring); *Photo Identification Requirement for In-Person Voting*, *supra* note 84, at 358–59.

137 *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring) (quoting Clingman v. Beaver, 554 U.S. 581, 591 (2005)).

138 *See id.*

139 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1625 (2008) (Scalia, J., concurring).

always evaluate voting regulations in light of their impact on voters generally.[140] Indeed, Justice Scalia rejected the entire framework the lead opinion used when it balanced the impact of the Voter ID Law against the interests of Indiana in determining what level of scrutiny to apply.[141] He believed that "[t]he lead opinion's record-based resolution of these cases . . . provides no certainty, and will embolden litigants . . . ."[142]

c. The Dissents

Although Justice Souter agreed with Justice Stevens' reading of *Burdick* as requiring a balancing test of burdens and justifications, while Justice Stevens was deferential to Indiana's asserted interests and required the plaintiffs to provide evidence of improper burdens, Justice Souter's dissent, in which Justice Ginsberg joined, stated that the Voter ID Law was unconstitutional, claiming that "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate . . . or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."[143] Because Indiana did not provide such justifications, Justice Souter thought the law was unconstitutional for imposing an additional burden on the right to vote.[144]

Justice Souter began his analysis with an identification of the burdens that would be placed on voters under the law,[145] but did so in the context of the burdens placed on specific classes of voters uniquely burdened by it—the elderly, the disabled, and the indigent.[146] He considered the costs attendant to obtaining photo identification, which he identified as "economic costs" to voting in terms of work time lost and transportation and other costs,[147] to possibly be prohibitive for such voters.[148] In addition, Justice Souter also identified the fees required for obtaining the requisite background materials in order to get a voter ID.[149] Even if these costs would "not be shocking on their face . . . [they] are disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile."[150] Indeed, the relief Indiana pro-

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140 *See id.*
141 *See id.* at 1624.
142 *Id.* at 1627.
143 *Id.* at 1628 (Souter, J., dissenting).
144 *See id.* at 1627–43; *see also* Levitt, *More Rhetorical Bark*, *supra* note 110.
145 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1627–28 (2008) (Souter, J., dissenting).
146 *See id.* at 1628–31; *Photo Identification Requirement for In-Person Voting*, *supra* note 86, at 359.
147 *Crawford*, 128 S. Ct. at 1630 (Souter, J., dissenting).
148 *See id.* at 1628–29.
149 *See id.* at 1630–31.
150 *Id.* at 1631.

vides for the voters unable to comply with the Voter ID Law at the time of voting—namely, the provisional ballot and requisite trip to the circuit court to affirm by affidavit—is burdensome on these voters for the very same reasons.[151] While Justice Souter agreed that the plaintiffs failed to provide an exact count of the number of voters who would be deterred from voting due to the law, he claimed that the "petitioners' case is clearly strong enough to prompt more than a cursory examination of the State's asserted interests."[152]

Thus, in contrast to the lead opinion, Justice Souter evaluated each of the State's asserted interests in detail. On the interests of modernizing election procedures and preventing voter fraud, Justice Souter focused on the fact that there was no "evidence whatsoever of in-person voter impersonation fraud in the State."[153] Indeed, Justice Souter thought that the asserted goal of preventing voter impersonation fraud was, at best, tilting at windmills—there was no evidence of in-person voter impersonation in any other part of the country either.[154] While Justice Souter was willing to stipulate that Indiana has an interest in responding to the risk of in-person voter fraud,[155] in light of the lack of evidence of such fraud and in light of other factors that strongly weighed against Indiana's purported interest in deterring voter fraud,[156] he thought that Indiana's interest should have been accorded modest significance.[157]

While Justice Stevens demanded evidence from the plaintiffs, Justice Souter did so of the State, finding it "simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless 'inherent' in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls."[158] Justice Souter thus thought the law was unconstitutional because Indiana failed to justify the burdens it placed on the right to vote.[159]

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151 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1631–32 (2008) (Souter, J., dissenting).

152 *Id.*

153 *Id.* at 1637.

154 *See id.* (citing Lipton & Urbina, *supra* note 68 ("Five years after the Bush Administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.")).

155 *See Crawford*, 128 S. Ct. at 1639 (Souter, J., dissenting).

156 *See id.* at 1636–40.

157 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1641 (2008) (Souter, J., dissenting). Justice Souter also dismissed the State's asserted interests in offsetting its own inflated voter-lists and in protecting voter confidence in elections systems as being unrelated to the enactment of the Voter ID Law. *See id.* at 1641–42.

158 *Id.* at 1642.

159 *See id.* at 1642–43.

Justice Breyer similarly dissented on the grounds that Indiana offered no defense of its law to justify its restrictions, which were more restrictive than any other in the country.[160] Justice Breyer thought that "the Constitution does not automatically forbid Indiana from enacting a photo ID requirement,"[161] but he thought that the burden the Voter ID Law imposed on voters was not insubstantial, and was indeed disproportionately burdensome for those without a government issued photo identification, thus rendering the law unconstitutional.[162] Justice Breyer's standard of justification appears to be lower than Justice Souter's however, as Justice Breyer favorably cited other states' voter laws, although he was at pains to note that he did not consider them constitutional, per se.[163]

D. *The Result of the Court's Fractured Decision: Constitutional Confusion Continues*

The *Crawford* Court split into three (or four) camps—the three Justices in the lead opinion who believed that more evidence of specific burdens imposed by the law was necessary to invalidate it; three Justices who would always uphold generally applicable voting requirements absent intentional discrimination or a severe burden imposed; and three Justices who thought the plaintiffs presented sufficient evidence of burdens to require the Court to at least scrutinize the asserted interests behind the law, a scrutiny Indiana would not have been able to pass based on the justifications it provided.[164] Six Justices applied some form of balancing test,[165] yet split over how to do so.[166] Only two of the Justices described the right to vote as "fundamental."[167] The result is an unclear standard that has not resolved the substantive constitutional question over mandatory photographic identification and other strict voter identification laws.[168]

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160 *See id.* at 1643–45 (Breyer, J., dissenting); *see also* Levitt, *More Rhetorical Bark*, *supra* note 110.

161 *Crawford*, 128 S. Ct. at 1644 (Breyer, J., dissenting).

162 *See id.* at 1644–45.

163 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1644–45 (2008) (Breyer, J., dissenting).

164 *See* Justin Levitt, *Supreme Court Voter ID Decision More of a Whimper Than a Bang*, ACS Blog, http://www.acslaw.org/node/12360 (May 1, 2008, 10:54 EST); *see also* Douglas, *Right to Vote*, *supra* note 81, at 146 ("[T]he Court issued four different opinions that each described the proper methodology in different ways.").

165 *See* Basile, *supra* note 82, at 447; Douglas, *Right to Vote*, *supra* note 81, at 156.

166 *See* Douglas, *Right to Vote*, *supra* note 81, at 154–55.

167 *Id.* at 157.

168 *See* Basile, *supra* note 82, at 431; Douglas, *Right to Vote*, *supra* note 81, at 154; Pitts, *supra* note 27, at 475–76 ("[I]t may not be an exaggeration to remark that the Court's decision merely served to breathe additional life into the battle over photo identification."); Jensen, *supra* note 17, at 551 ("The decision in *Crawford* . . . did not provide a clear legal standard.

Scholars have criticized the constitutional analysis in the lead opinion for, among other flaws, improperly applying the *Burdick* test,[169] failing to articulate how to measure the burden on the right to vote under *Burdick*,[170] and misconstruing *Harper v. Virginia*.[171]

The best reading of *Crawford* is that the three Justices of the lead opinion and the three dissenting Justices all essentially applied what Professor Christopher Elmendorf has called the "individual rights model of *Burdick*."[172] Under this framework, a voting requirement creates a "severe" burden if it represents a substantial impediment to voting for some citizens but not for others.[173] This flows from the rule that what the Constitution protects is the right to vote on equal terms with others; as such, the right to vote is a personal, individualized right—a state's decision to mandate a specific voting protocol is unconstitutional vis-à-vis any voter for whom compliance would entail unusual hardship due to personal circumstances for which the voter cannot be faulted.[174] Once a plaintiff-voter demonstrates a specific burden, the law can be applied to the voter only if the state can justify the burden.[175] Under this model, the burden the Court should consider is the size of the hurdle the plaintiff-voter faces relative to the size of the hurdle other voters face. Indeed, although they differed in the amount of evidence they required from the state and plaintiff-challengers, the three Justices of the lead opinion and the three dissenting Justices all appeared to believe that the burden of a voting requirement should be assessed from the point of view of those voters whom it affects most harshly,[176] and all adhered to the sliding scale of the *Burdick* test wherein the more severe the burden on these voters' rights, the greater the state's interests must be to justify it.[177] However, because these Justices differed in how they evaluated the burdens and state interests asserted, no coherent standard for how to apply this balancing test emerged.

The Court neither resolved the ambiguity of *Burdick* nor did it provide a test on how to measure a burden on the right to vote."); Levitt, *More Rhetorical Bark*, *supra* note 110; *cf.* Ian McMullen, *Constitutional Burdens on the Right to Vote:* Crawford v. Marion County Election Board, 60 MERCER L. REV. 1007, 1022 (2009) (stating *Crawford* is instructive in that it "illustrates the fine distinctions in an election law challenge and establishes what a plaintiff's burden is in bringing such a challenge").

169 *See* Douglas, *Right to Vote*, *supra* note 81, at 154–55; Jensen, *supra* note 17, at 547, 551–52.

170 *See* Jensen, *supra* note 17, at 551–56.

171 *See* Douglas, *Right to Vote*, *supra* note 81, at 154–55.

172 *See* Elmendorf, *supra* note 78, at 659.

173 *Id.*

174 *See id.* at 659–60.

175 *Id.* at 660.

176 *Cf.* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624–27 (2008) (Scalia, J., concurring) (rejecting this approach).

177 *See also* Elmendorf, *supra* note 78, at 662–63.

Numerous scholars have proposed alternative theories for how the Court decided *Crawford* and how future cases implicating the right to vote should be analyzed by the Court.[178] However, these theories will not be the focus of this Note.

E. *The Roberts Court and Facial v. As-Applied Constitutional Challenges*

As *Crawford* did not settle the substantive constitutional question over mandatory photo identification laws, perhaps the most important result of the decision is the effect it will have on the nature of the inevitable future legal challenges to strict voter identification laws. The focus of the *Crawford* lead opinion on the facial nature of the plaintiffs' challenges further demonstrated the Roberts Court's hostility to facial constitutional challenges, which, combined with the concurring Justices' threshold requirement of intentional discrimination or a "severe" burden on voters generally, appears to have effectively foreclosed the use of facial challenges to generally applicable elections laws that burden particular voters—historically the most powerful tool for civil rights advocates against unconstitutional and restrictive laws.[179]

While the Supreme Court has not been entirely consistent in its statements about the legal standards governing facial challenges, under the strict view that the Justices have recently endorsed, to prevail on a facial challenge, a plaintiff must prove that a statue is unconstitutional in all of its applications; in an as-applied challenge, the plaintiff must only show that the law is unconstitutional given a certain set of facts and as it is applied to her and other similarly situated persons.[180] In finding a statute facially unconstitutional, a court invalidates the law in its entirety; in finding a statute unconstitutional as-applied, a court's possible responses are generally more limited, including exempting the plaintiff and those similarly situated, or voiding only so much of the statute as was at issue in the case.[181]

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178 *See, e.g.*, Basile, *supra* note 82; Benson, *supra* note 6; Douglas, *Right to Vote*, *supra* note 81; Ellis, *supra* note 6; Jensen, *supra* note 17.

179 *See* David G. Savage, *About Face*, ABA JOURNAL, Jul. 2008, at 21.

180 *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) (discussing the Court's inconsistent application of this test as elucidated in United States v. Salerno, 481 U.S. 739 (1987)); *see also* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1646 (2009).

181 Persily & Rosenberg, *supra* note 180, at 1647 (citing Dorf, *supra* note 180, at 236; KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1081 (16th ed. 2007)).

The *Crawford* decision was part of the Roberts Court's developing trend of rejecting facial constitutional challenges.[182] This disfavor for facial challenges was most clearly expressed in *Washington State Grange v. Washington State Republican Party*, in which the Court denied a facial challenge to Washington's newly enacted ballot law.[183] There, in a crucial passage that is "of particular importance in understanding Justice Stevens' opinion in *Crawford*,"[184] Justice Thomas wrote:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.[185]

In *Crawford*, Justice Stevens stated that this reasoning "applied with added force,"[186] and stated that facial constitutional challenges will rarely prevail.[187]

While the Supreme Court has previously expressed disfavor for facial challenges,[188] this renewed hostility has an acute effect in the con-

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182 *See* Persily & Rosenberg, *supra* note 180, at 1658; Michael Dorf, *The Roberts Court on Facial Challenges*, Dorf on Law, http://www.michaeldorf.org/2008/04/roberts-court-on-facial-challenges.html, (April 29, 2008, 14:43 EST) (citing Gonzales v. Carhardt, 550 U.S. 124 (2007) (partial-birth abortion); Baze v. Rees, 128 S. Ct. 1520 (2008) (death penalty)); *see also* Vikram David Amar, *What the Supreme Court's Recent Decision Upholding Indiana's Voter ID Law Tells Us About the Court, Beyond the Area of Election Law*, FINDLAW'S WRIT, May 8, 2008, http://writ.news.findlaw.com/amar/20080508.html; Savage, *supra* note 179, at 21.

183 *See* 128 S. Ct. 1184 (2008).

184 Jensen, *supra* note 17, at 560.

185 *Wash. State Grange*, 128 S. Ct. at 1191.

186 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1622 (2008); *see* Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1629 (2009); Jensen, *supra* note 17, at 561.

187 *See Crawford*, 128 S. Ct. at 1622–24; Katz, *supra* note 186, at 1629.

188 *See* Dorf, *supra* note 180, at 236 (discussing the Court's disfavor for facial challenges in light of United States v. Salerno, 481 U.S. 739 (1987)).

text of voting rights cases.[189] A de facto requirement for as-applied challenges presents numerous hurdles for litigants seeking to vindicate individual rights.[190] It forces plaintiffs to suffer a constitutional injury before such rights can be vindicated in after-the-fact proceedings.[191] This situation is exacerbated in the context of voting rights cases, and in particular, voter identification cases. In light of the absence of definitive empirical data on the numbers of voters burdened by mandatory photo identification laws,[192] and the disfavor that courts have shown to the data that has been presented by advocates,[193] it is unclear how voting rights plaintiffs would be able to produce broad classes of voters burdened by such laws in order to vindicate their right to vote ex ante. The Supreme Court's dismissal of arguments of indirect costs for lower socioeconomic voters in their attempts to comply with the law, and the difficulty obtaining evidence of widespread burdens caused by such laws' application,[194] may thus lead to the widespread disenfranchising of these voters, as an unconstitutional law may continue to be effective (and excessively burden a particular class of voters) because "no one has brought a successful as-applied suit to challenge that application of the law."[195]

Furthermore, successful as-applied challenges can only bring about constitutional change in a slow, gradual manner, because the relief such challenges produce is often limited to the plaintiffs in the specific case.[196] Under the current Court's approach, this limited range of available remedies may result in no real relief ever being afforded because

189 *See* Persily & Rosenberg, *supra* note 180, at 1658–75; *see generally* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009) [hereinafter Douglas, *As-Applied Challenges in Election Law*].

190 Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 642.

191 *See id.* at 635–36 (citing Richard L. Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially In Danger*, FINDLAW.COM, Mar. 26, 2008, http://writ.lp.findlaw.com/commentary/20080326_hasen.html [hereinafter Hasen, *About Face*]); *id.* at 677 ("[A]ny relief is possible only after voters suffer a violation of their constitutional rights during an election and then can demonstrate the effect of the law as applied to them.").

192 *See supra* notes 72–74 and accompanying text.

193 *See, e.g.*, Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 803 (S.D. Ind. 2006); *supra* notes 97–98 and accompanying text.

194 *See* Ellis, *supra* note 6, at 1064.

195 Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 638.

196 *Id.* at 642, 676.

such as-applied challenges are unlikely to prevail frequently,[197] and when they do, the relief afforded will be limited.[198]

The practical effects of this shift towards only as-applied challenges are significant. The *Crawford* lead opinion's demand for stronger evidence of the burdens strict voter identification laws impose on a specific class as a condition for sustaining a facial constitutional challenge to that law,[199] combined with the concurring opinion's analysis of *Burdick* as requiring a threshold determination of whether a voter identification law imposes a "severe" burden on all voters generally,[200] will hamper future facial challenges to possibly unconstitutional voter identification laws by requiring a level of evidence that is extremely difficult to assemble prior to the enforcement of such laws

In light of this shift, voting rights advocates seeking to remedy the possibly unconstitutional burdens strict voter identification laws place on the right to vote for vulnerable voting populations should reassess their strategies and responses. The remainder of this Note will propose how advocates may do so.

III. THE PATH FORWARD: LEGISLATIVELY ALLEVIATING THE CUMULATIVE BURDENS ON THE RIGHT TO VOTE

In light of the *Crawford* decision, there is a strong possibility that strict voter identification laws that may unconstitutionally burden the right to vote of many vulnerable population groups will not only remain on the books of some states, but will be promulgated in more states as well.[201] The *Crawford* Court's failure to articulate a coherent approach to such laws will only exacerbate the confusion in lower courts adjudging the constitutional merits of strict voter identification schemes. Combined with evidence that the lower courts are following the Roberts Court's burgeoning disfavor for facial constitutional challenges,[202] it ap-

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197 *See* Amar, *supra* note 182 ("[H]ow likely is it that a would-be voter in Indiana who can't afford the money it takes to get a birth certificate (which is necessary to get a government ID) or the money it takes to obtain transportation to the county seat (where she could explain her inability to get a birth certificate) is somehow going to have the money and knowledge to bring suit in federal court instead, to demonstrate the unfairness of the burdens created by the Indiana law as to her? And to do all that well in advance of the election in which she wants to vote? In sum, for some claims and right-holders, it's facial challenge or bust. Thus, in turning away facial challenges in cases like these, the Court may seem to be leaving a path for as-applied challenges, but in practice, it may well be effectively foreclosing any meaningful challenge at all."); Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 676.

198 *See* Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 673–74

199 *See supra* notes 128–131 and accompanying text.

200 *See supra* notes 135–138 and accompanying text.

201 *See* Urbina, *supra* note 62.

202 *See* Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 673–74. *See generally id.*, Part III.

pears that voting rights advocates will face significant hurdles in future attempts to vindicate, ex ante, the right to vote for vulnerable voting populations by relying on a litigation strategy.

For these reasons, this Note will argue that the more propitious path forward for voting rights advocates concerned about the possible suppression of certain voting populations would be an effort to secure a federal legislative response that could help reduce the cumulative burdens imposed on the right to vote. Through federal legislation creating universal voter registration, or at least significantly expanding the registration opportunities for those population groups disproportionately burdened by strict voter identification laws, Congress can do what the Supreme Court failed to do in *Crawford*—proactively protect the right to vote of the most vulnerable population groups. However, absent legislative relief for those voters disproportionately burdened by restrictive voter identification laws, legal challenges to such laws should not be abandoned.

A. *A Refocused Legal Response*

1. Federal Court Challenges

In light of the Roberts Court's disfavor for facial constitutional challenges,[203] and the *Crawford* lead opinion's demand for specific evidence of burdened voters to sustain a facial challenge,[204] the prospects for the success of future facial challenges to burdensome voter identification laws are not promising. The frame of reference for voting rights advocate-litigants challenging burdensome voter identification laws should be the three Justices of the lead opinion who are theoretically open to invalidating voter identification laws based on a finding of unconstitutional burdens on the right to vote of particular voting populations, but who demand rigorous evidence of such laws' actual effects on specific voters.

The lead opinion allows a state to assert an interest in preventing voter fraud without actually proving the existence of such fraud, but requires challengers of the law to produce actual voters disenfranchised by the law. It is this predicate—the need to provide voters too poor to afford necessary documentation or otherwise too burdened by the law's requirements—that is the key for future litigants challenging strict voter identification laws.[205] Justice Souter's retirement and replacement by Justice Sotomayor would not seem to change this calculus, as no group

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203 *See supra* Part II.E.

204 *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008) ("[T]he evidence in the record is not sufficient to support a facial attack on the validity of the entire statute . . . ."); *see also supra* notes 125–131 and accompanying text.

205 *See* Hasen, *About Face*, *supra* note 191.

of Justices with whom Justice Sotomayor could join would command a majority of votes.

While the lead opinion dismissed the burdens mandatory photo identification laws place on voters generally,[206] robust data of a certain class (or classes) of voters being sufficiently burdened might convince the Justices of the lead opinion to invalidate a burdensome voter identification law.[207] However, recent attempts to compile such data have been inconclusive.[208] Absent a concerted effort to compile the more reliable empirical data needed to support a pre-enforcement facial charge of unconstitutional burdens in light of *Crawford*, challengers to restrictive and possibly unconstitutional voter identification laws are stuck in the unenviable position of relying on as-applied challenges based on voters who have already suffered an unconstitutional burden on their right to vote.[209]

While the concerns over the shift to only as-applied challenges are serious, perhaps advocates should be relieved that Justice Stevens wrote the lead opinion premised on the distinction between facial and as-applied challenges, which at least leaves the door open for future challenges.[210] Indeed, some commentators have suggested that this was possibly a strategic vote by some of the Justices to allow for future, stronger challenges to strict voter identification laws where plaintiffs could produce hard evidence of the suppressive effects of such laws.[211]

As-applied challenges are more likely to be successful in challenging statutory schemes that portend possible disenfranchisement of vulnerable population groups,[212] and many anticipate such claims will be the next wave of challenges to restrictive voter eligibility laws—challenges which the *Crawford* decision will only encourage.[213] However,

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206 *See Crawford*, 128 S. Ct. at 1621.

207 *See* Persily & Rosenberg, *supra* note 180, at 1671.

208 *See, e.g.*, Erickson & Minnite, *supra* note 72; Minnite, *supra* note 74; Pitts, *supra* note 27.

209 *See supra* note 191 and accompanying text.

210 *See* Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 678; Douglas, *Right to Vote*, *supra* note 81, at 172; Levitt, *Just the Facts, supra* note 119; Levitt, *More Rhetorical Bark*, *supra* note 110.

211 *See, e.g.*, Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 678; Persily & Rosenberg, *supra* note 180, at 1646; Linda Greenhouse, *In Latest Term, Majority Grows To More Than 5 of the Justices*, N.Y. TIMES, at A1 (May 23, 2008) ("So perhaps there was a bit of movement on both sides — not simple liberal capitulation, but liberals using their limited leverage to exact some modest concessions as the price of helping the conservatives avoid another parade of 5-to-4 decisions.").

212 *See* Levitt, *More Rhetorical Bark*, *supra* note 110.

213 *See, e.g.*, Doug Chapin, *Director's Note: The Supreme Court's* Crawford *Opinion: Now What?*, ELECTIONLINE WEEKLY, May 1, 2008, http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Reports/Electionline_Reports/electionlineWeekly05.01.08.pdf; *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1627 (2008) (Scalia, J., concurring) ("The lead opinion's record-based resolution of these cases, which

as noted, as-applied challenges will yield only limited, halting results, even if successful.[214] Even if a voter identification law is found to have unconstitutionally burdened a voter, a court will likely narrowly tailor its response to minimize the impact on a generally applicable voter eligibility law.[215] Furthermore, this strategy will require voters to be unconstitutionally burdened by laws before they are able to bring such claims.[216]

Overlaying all these procedural hurdles is the federal courts' inconsistent protection and analysis of the right to vote generally,[217] and the overall shift by the Roberts Court away from involvement in the minutiae of state election law.[218]

Thus, while legal challenges should not be abandoned, especially in light of the opening the lead opinion left for as-applied challenges to sufficiently burdensome voter identification laws, voting rights advocates should no longer rely on federal courts to vindicate the rights of burdened voter groups.[219] Instead, voting rights advocates should look to legislative responses to this problem.

2. State Court Challenges

Advocates challenging the legality of suppressive voter identification schemes should continue to bring challenges in state courts as well. The main Supreme Court cases that have severely limited the available litigation tools and possible remedies for voting rights advocates—*Washington State Grange* and *Crawford*—"have had very little impact on state courts,"[220] because they "bind state courts only when the courts construe federal law."[221] Indeed, in a subsequent state court case challenging the Voter ID Law that was upheld in *Crawford*, the Indiana Court of Appeals invalidated the law under the Equal Privileges and Immunities Clause of the Indiana Constitution,[222] which differs from the Equal Protection

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neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned.").

214 *See supra* note 196 and accompanying text.

215 *See supra* note 181 and accompanying text.

216 *See supra* note 191 and accompanying text.

217 *See* Douglas, *Right to Vote*, *supra* note 81.

218 *See* Katz, *supra* note 186, at 1626. *But cf.* Daniel P. Tokaji, *Leave It To The Lower Courts: On Judicial Intervention In Election Administration*, 68 OHIO ST. L.J. 1065 (2007) (arguing that the lower courts have "capably" handled the uptick in election law litigation after *Bush v. Gore*).

219 *Cf.* Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 642–45 (describing the Warren Court's role as a bulwark against unconstitutional state election laws).

220 *Id.* at 660.

221 *Id.* at 663; *cf.* League of Women Voters of Indiana, Inc. v. Rokita, No. 49A02-0901-CV-40, 2009 WL 2973120, at *5 (Ind. Ct. App. 2009) ("[I]nterpretation of the Indiana Constitution is an independent judicial act in which federal cases play only a persuasive role.") (citations omitted).

222 *See League of Women Voters of Indiana*, 2009 WL 2973120, at *12.

Clause of the Fourteenth Amendment in that "it does not require an analytical framework applying varying degrees of scrutiny for different protected interests."[223] Specifically, the Indiana Court of Appeals found it "irrational" for the state to "require identification of in-person voters but not require an affidavit affirming the identity of mail-in voters,"[224] and to allow those voters in state-licensed care facilities to vote without photo identification.[225] As "the *Crawford* Court did not make any ruling whatsoever regarding the Voter ID Law and the Indiana Constitution,"[226] the Indiana court was free to engage in this independent state constitutional analysis.

This was not an outlying case. In many states, due to the state's history and tradition, textual differences in the state constitution, or the prevailing state court interpretations, the state constitution is often read more expansively to protect a right than the analogous federal constitutional right is in federal court.[227] Indeed, prominent jurists and scholars have trumpeted state constitutions as avenues for the more vigorous protection of individual rights than the sometimes reluctant or hostile federal judiciary.[228] Thus, voting rights advocates should not forget the availability of state courts as alternative avenues for remedying possibly unconstitutional burdens imposed by state voter identification laws.

However, voting rights advocates should recognize that due to the vast differences in state constitutions, and in the absence of a clear federal constitutional rule, state courts may produce disparate results regarding strict voter identification laws.[229] Furthermore, independent state constitutional law and analysis is not fully developed in many areas of law, and "lock-step" interpretation of constitutional rights with the prevailing federal approach is frequent.[230]

As such, advocates should not just focus on litigation responses in order to alleviate the burdens voter identification laws impose on vulnerable voting populations, but should also focus on policy responses, particularly at the federal level where a more friendly administration and

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223 *Id.* at *8.

224 *Id.* at *9.

225 *See id.* at *15.

226 *Id.* at *4.

227 *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 65 (7th ed. 2009).

228 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

229 *Compare* Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (striking down Missouri's voter identification law on state constitutional grounds) *with In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007) (finding Michigan's voter identification law constitutional).

230 *See* G. Alan Tarr, *The New Judicial Federalism In Perspective*, 72 NOTRE DAME L. REV. 1097, 1116–17 (1997).

Congress might be receptive to providing legislative relief for those voters disproportionately burdened by strict voter identification statutes.[231]

B. *A Proposed Policy Response: Voter Registration Reform as a Means to Alleviate the Cumulative Burdens on the Right to Vote*

Justice Souter identified some of the costs strict voter identification schemes impose on voters as "economic costs."[232] But these are not the only costs placed on voters seeking to exercise the right to vote.[233] The "structural cost" of registration still exists as a threshold hurdle many voters do not overcome.[234] For example, a much cited CalTech/MIT report after the 2000 election estimated that up to three million voters were unable to vote due to registration problems.[235] However, only recently have the problems attendant to voter registration schemes become the subject of scholarly work.[236]

Voter registration issues disproportionately affect and form a barrier to the political participation of lower socioeconomic voters,[237] the same population group disproportionately affected by strict voter identifications schemes. This Note contends that by eliminating the hurdles imposed by voter registration, the elected branches of the federal government could do what the Supreme Court failed to do in *Crawford*—address the cumulative burdens on the right to vote that strict voter identification laws have exacerbated for lower socioeconomic and other vulnerable voting populations.

1. Why a Federal Response?

Congress has the power to regulate federal elections under Article I, Section 4 of the federal Constitution,[238] and given the inefficiencies in

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231 Professor Tokaji is more confident in the judiciary playing an integral part in protecting broader voting rights, including cases of voter identification requirements, *see* Tokaji, *Voter Registration*, *supra* note 6, at 494–95, but he recognizes that litigation alone will not be sufficient to eliminate the burdens imposed on voters by onerous voter registration and identification laws. *See id.*

232 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1630 (2008) (Souter, J., dissenting).

233 *See* Ellis, *supra* note 6, at 1032–36.

234 *See id.* at 1033; *see also* Jason P.W. Halperin, Note, *A Winner at the Polls: A Proposal for Mandatory Voter Registration*, 3 N.Y.U. J. LEGIS & PUB. POL'Y 69, 94–95 (1999).

235 *See* Caltech/MIT Voting Technology Project, Voting: What Is And What Could Be 27 (2001), http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf.

236 *See* Tokaji, *Voter Registration*, *supra* note 6, at 454–55; *cf. id.* (surveying and analyzing the state of voter registration law).

237 *See* Ellis, *supra* note 6, at 1035; Tokaji, *Voter Registration*, *supra* note 6, at 496–97.

238 U.S. CONST. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of

maintaining separate databases for state and federal elections,[239] use of this power can vastly change the landscape on voting registration.[240] With President Obama and the Democratic Party, which has a majority in both houses of the 111th Congress, staking out strong positions on voting rights,[241] voting rights advocates should seize this unique opportunity to seek the passage of federal legislation that alleviates the cumulative burdens on the right to vote.[242]

The Carter-Baker Commission specifically recommended that state governments take on an affirmative obligation concomitant to the imposition of any voter identification requirement.[243] As such, it recommended certain steps states could take to counterbalance the burdens that would be imposed by stricter voter identification requirements, such as the creation of "ombudsman institutions" to respond to claims of abuse of voter identification requirements,[244] the encouragement of increased state-to-state information sharing about voters who have moved,[245] and other enhanced voter registration list updating methods.[246] It also vaguely encouraged states to use their "best efforts to make voter registration and ID accessible and available to all eligible citizens,"[247] and to increase access to registration services.[248] While these are all fine ideas that should be pursued, the Carter-Baker Commission's recommendations—which at least recognize that strict voter identification laws should not be enacted without complementary provisions addressing the increased burdens these laws impose—are fundamentally flawed in that

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choosing Senators."); *see* Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

239 *See* Tokaji, *Voter Registration*, *supra* note 6, at 467-68.

240 *Cf. id.* (describing effect of NVRA).

241 *See, e.g.*, Whitehouse.gov, "Civil Rights," http://www.whitehouse.gov/issues/CIVIL_RIGHTS/ (last visited Oct. 18, 2009) ("The President is committed to expanding funding for the Justice Department's Civil Rights Division to ensure that voting rights are protected and Americans do not suffer from increased discrimination during a time of economic distress."); Press Release, Democratic National Committee, DNC Announces Unprecedented Election Protection Project, (Aug. 7, 2007), http://democrats.org/a/2007/08/dnc_announces_u.php ("While the Democratic Party continues to work to protect every American's right to vote and have that vote counted, Republicans have aimed to create roadblocks for Americans to exercise their right to vote through restrictive voter ID laws, voter purging, and voter intimidation tactics."); *see also* Deceptive Practices and Voter Intimidation Prevention Act of 2005, S. 1975, 109th Cong. (1st Sess. 2005) (legislation introduced by then-Senator Obama "to prohibit deceptive practices in Federal elections").

242 *Cf.* David Herbert, *The Morning After, Voting Problems Remain*, NAT'L J., Nov. 19, 2008, http://www.nationaljournal.com/njonline/no_20081117_9032.php (discussing continuing calls for election law reform).

243 *See* CARTER-BAKER REPORT, *supra* note 15, at ii.

244 *See id.* at 21.

245 *See id.* at 23.

246 *See id.* at 22–23.

247 *Id.* at 34.

248 *See id.* at 39–40.

they are primarily a set of recommendations for state legislatures, with increased funding from the national government as the only federal overlay.[249] It is highly unlikely the same state legislatures that passed standalone voter identification requirements, despite the demonstrated burdens such laws would impose, would supplement these laws to mitigate these burdens—especially since the *Crawford* Court did not mandate such alleviation.

Indeed, this problem severely undercuts the possible effectiveness of many of the proposed policy responses that rely on the states to remedy their own flawed statutory schemes.[250] This includes more federally-oriented policy proposals that make additional federal funding contingent on the states satisfying certain criteria,[251] the fulfillment of which will ultimately be optional for the states. Unless the federal government imposes new rules that must be accepted by the states for federal elections, the states that have chosen to impose strict voter identification requirements will have little incentive to remedy the burdens imposed on voters.

2. Why Voter Registration Law?

Since Congress has broad constitutional authority to regulate federal elections,[252] it could theoretically enact a uniform identification requirement for all federal elections that would effectively preempt more restrictive state voter identification schemes.[253] Indeed, such a response would more directly alleviate the burdens that strict state voter identification laws impose on vulnerable voting populations by effectively rolling back such state restrictions to the federal standard.

However, such a proposal, despite its substantive merits as a more efficient means of alleviating the burdens imposed by strict voter identification schemes, is flawed as a viable public policy proposal because it is susceptible to the same political criticism as the aforementioned state voter identification laws—it primarily benefits only one political party.[254] A federal identification law that reduced only the identification

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249 *See id.* at 33–44.

250 Although proposed before *Crawford* was decided, Professor Overton's possible policy supplements and alternatives are essentially flawed by this same reliance on individual states to remedy the negative burdens their own existing laws impose. *See* Overton, *supra* note 6.

251 *See, e.g.*, Thad Hall & Daniel P. Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, ELECTION LAW AT MORITZ, June 5, 2007, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=153.

252 *See supra* note 238 and accompanying text.

253 *Cf. supra* notes 239–40 and accompanying text (describing the impracticability of maintaining separate elections databases for federal and state elections).

254 *Cf. supra* notes 76–78 and accompanying text (recounting both sides of the voter identification debate accusing the other side of merely acting on the basis of political motivations).

required by individual states would offer nothing to the primarily Republican proponents of stricter voter identification schemes, would be portrayed as a nakedly partisan power grab by the Democratic Party-controlled elected branches of the federal government, and would be assailed and delegitimized by partisan opponents on such grounds.

By comparison, voter registration reform is theoretically more palatable to both major political parties. As proposed in its optimal form below, it addresses policy concerns of both major political parties in a way that a federal voter identification law would not—by working to alleviate the cumulative burdens on the right to vote for vulnerable voting populations (a Democratic Party concern) while also reducing the possibility for voter registration fraud and the concomitant opportunity for exploitation of the voter registration process for in-person voter fraud (a Republican Party concern).

3. The Imperfect Response: Expanded Opportunities for Voter Registration

The federal government has worked to lessen registration burdens through the Voting Rights Act of 1965, the National Voter Registration Act, and HAVA.[255] These expansions of registration opportunities produced a significant increase in voter registrations in lower socioeconomic voting populations[256]—those most burdened by voter identification laws—yet did not produce an increase in in-person voter fraud.[257]

These registration opportunities alone do not help remedy the burdens imposed by strict voter identification laws however, because they do not necessarily reach those who are the most burdened. While the NVRA mandates that state offices that provide public assistance or disability services also offer voter registration opportunities and assistance to those receiving such services in completing the necessary forms,[258] states' compliance with this requirement has been lacking.[259] An immediate response by the Obama administration, which would not require any legislation, would be to direct the Department of Justice to enforce compliance with this provision first, as states that have enforced this provision have shown significant gains through this method of voter regis-

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255 *See* Wendy Weiser, Michael Waldman & Renée Paradis, *Voter Registration Modernization: Policy Summary*, BRENNAN CENTER FOR JUSTICE 1 (2008), http://brennan.3cdn.net/b75f13413388b2fccc_ynm6bn1l2.pdf; Tokaji, *Voter Registration*, *supra* note 6, at 498; *supra* Part I.A.

256 *See* Tokaji, *Voter Registration*, *supra* note 6, at 469–70 (citing Robert D. Brown & Justin Wedeking, *People Who Have Their Tickets but Do Not Use Them: "Motor Voter," Registration, and Turnout Revisited*, 34 AM. POL. RES. 479, 491–98 (2006)).

257 *See id.* at 495–96.

258 *See* 42 U.S.C. §§ 1973gg-5(a)(2), 1973gg-5(a)(4) (2006); Tokaji, *Voter Registration*, *supra* note 6, at 468; *supra* note 43 and accompanying text.

259 *See* Tokaji, *Voter Registration*, *supra* note 6, at 484.

tration.[260] Congress should also amend current legislation to expressly allow private lawsuits to compel state compliance with the registration laws currently on the books.[261]

Furthermore, voters who do not drive (i.e., low-income voters, urban voters, older voters) are doubly burdened in that they do not have access to the easiest method of registration (via the local DMV) or of securing voter identification (a driver's license).[262] Expanding voter registration opportunities to those government services where such voters actually interact with the government would help to remedy this imbalance. By expanding the NVRA provisions to cover those forms and government services these voters more frequently interact with—including, but not limited to, the Selective Service System, the Post Office, the Social Security Administration, Medicare and Medicaid, the Internal Revenue Service[263]—through the simple voter registration addendum that already appears on driver's license applications, actual practice would begin to more closely live up to the spirit of the Motor Voter Law by reaching those who truly need its help.

However, such reforms will still place the burden of registering to vote on individual voters.[264] The population groups most affected by strict voter identification laws are those more likely to move often and have to re-register each time, to have living situations that are not conducive for registering (such as temporary or assisted living housing), to lack information on registering and access to it via the Internet, to lack the ability to travel to registration sites, and to lack the discretionary time in which to undertake the research and procedures necessary to vote.[265]

Voter-initiated registration also creates problems when combined with voter identification laws. When voters are required to register to vote they may make mistakes or submit information that is not completely in line with their photographic identification (if they have one), or they may fail to re-register or update their identification when moving

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260 *See id.* at 484–85.

261 *See id.* at 494.

262 *See id.* at 485; *see also* Halperin, *supra* note 234, at 102.

263 *See* Richard L. Hasen, *Registering Doubt: If we can nationalize banks, why not our election process?*, SLATE, Oct. 27, 2008, http://slate.msn.com/id/2203138/ [hereinafter Hasen, *Registering Doubt*]. The proposal advanced here draws from elements of proposals election law scholars refer to as "automatic registration" and "election federalization" schemes. *See* Tokaji, *Voter Registration*, *supra* note 6, at 499, 501–03.

264 *See* Weiser et al., *supra* note 255, at 2; *see also* Tokaji, *Voter Registration*, *supra* note 6, at 502.

265 *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 965 (2005) [hereinafter Hasen, *Beyond the Margin of Litigation*]; Weiser et al., *supra* note 255, at 4–5.

(thus making the photographic identification that does not match the registration useless).[266]

This problem could be partially mitigated by allowing election day (or "same-day") registration for participation in federal elections.[267] However, for this approach to actually be useful for those voters unduly burdened by strict state voter identification schemes, the identification requirements that would almost certainly be attendant to such a system would have to allow for "lesser" identification to suffice for this registration—a difficult proposition to sell politically.

Furthermore, expanded voter registration opportunities alone also do not solve the problem of "bloated" voter rolls and the problems attendant to third-party voter registration drives that fill the void left by voter-initiated registration, which then present the asserted justifications for strict voter identification laws and other possibly discriminatory practices like voter roll purges.[268]

Thus, while expanded voter registration opportunities may superficially appear to be the more feasible policy response, it is imperfect at best; the more optimal response would be federal universal voter registration.

4. The Optimal Response: Universal Registration

The most promising proposal for a federal policy response is a comprehensive set of policy changes that advocates refer to as "universal voter registration"—a structure whereby every eligible citizen is able to vote because the government has the affirmative obligation to ensure they are on the voter rolls permanently.[269] While the burdens that such a system would remove from voters are not the same as those that strict state voter identification laws impose, universal registration would help alleviate the cumulative burdens on the right to vote, and even eliminate the main rationale for strict voter identification laws in the first place—the need to prevent in-person voter fraud that takes advantage of bloated voter rolls and lax voter registration rules.[270]

Government-run universal registration is standard practice in almost every industrialized Western democracy except the United States.[271]

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266 *See id.* at 5–6.

267 *Cf.* Halperin, *supra* note 234, at 105–08.

268 *See* Hasen, *Registering Doubt*, *supra* note 263.

269 *See* Weiser et al., *supra* note 255, at 1.

270 *See id.* at 4–5; *cf.* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1620 (2008) ("[I]nflated voters rolls [provide] a neutral and nondiscriminatory reason supporting the State's decision to require photo identification.").

271 *See* Christopher Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL'Y 255, 302 (2002); G. Bingham Powell, Jr.,

Under a universal registration structure, the federal government would assume the obligation to register all eligible voters for federal elections.[272] This approach would go beyond the model of the voter-initiated Motor Voter Law, even if supplemented as suggested above,[273] and would require affirmative governmental action to ensure that all eligible voters are on the proper rolls to be able to vote.

Proposals for such a system often begin with the baseline of state voter rolls,[274] which were required by HAVA to be computerized and state-wide,[275] and expand to include proposals for census-style door-to-door registration, automatic registration when citizens turn 18, and automatic updating of registration information when a change of address form is filed with the post office.[276] Such proposals should be supplemented by requiring the government to automatically update the information gained through these methods to include the information gleaned from those interactions covered under the expanded Motor Voter Law proposal above,[277] i.e., whenever the voter has interacted with the government.

Such a system would address the concerns of Democrats interested in increasing voter access to the polls and would also further Republican interests in ensuring the sanctity of each individual ballot by reducing some of the claimed causes and opportunities for potential in-person voter and voter registration fraud.[278] Indeed, depending on the specific configuration of the statutory scheme promulgating universal registration, this system may also address other frequently cited complaints about contemporary elections systems in the United States.[279]

American Voter Turnout in Comparative Perspective, 80 AM. POL. SCI. REV. 17, 21 (1986); Halperin, *supra* note 234, at 97 (citing Richard M. Scammon & Jeanne Richman, *Election Reform in the United States*, *in* ISSUES IN ELECTORAL REFORM 153, 158 (Richard J. Carlson ed., 1974)).

272 Weiser et al., *supra* note 255, at 1.

273 *See supra* note 263 and accompanying text.

274 *See, e.g.*, Carmichael, *supra* note 271, at 302; R. Michael Alvarez, Thad E. Hall & Morgan Llewelly, *How Hard Can It Be: Do Citizens Think It Is Difficult To Register To Vote?*, 18 STAN. L. & POL'Y REV. 382, 407–08 (2007); Hasen, *Beyond the Margin of Litigation*, *supra* note 265, at 970.

275 *See supra* note 52 and accompanying text. *But cf.* Tokaji, *Voter Registration*, *supra* note 6, at 471–72 (detailing difficulties many states have had in complying with this requirement).

276 *See, e.g.*, Hasen, *Registering Doubt*, *supra* note 263.

277 *See supra* note 263 and accompanying text.

278 *See* Hasen, *Registering Doubt*, *supra* note 263.

279 *See* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 166–67 (W.W. Norton Press 2006) (advocating universal voter registration as a way to eliminate fraud by the organizations currently conducting voter registration drives); Hasen, *Beyond the Margin of Litigation*, *supra* note 265, at 970 (addressing how universal registration would solve problems like voter registration fraud).

One possible objection to this proposal is the opportunity this system might present for manipulation by partisan officials charged with overseeing such registration efforts and databases. Indeed, the state election officials currently responsible for registration lists are frequently accused of manipulation by the opposition party.[280] To mitigate concerns about political manipulation, the officials tasked with this responsibility should be located in a federal agency, where more oversight and media scrutiny is theoretically possible than at the state level; should be nominated and confirmed by the Senate,[281] to ensure vetting; and should be protected against removal from office for reasons other than neglect of duty or malfeasance (i.e., for political reasons).[282] Moreover, the federal entity empowered to undertake this effort should be politically balanced.[283] Admittedly, this proposal places considerable faith in the confirmation and oversight process, and does not necessarily prevent the possibility of a stalemate by the agency authorized to oversee universal registration due to either a lack of quorum or a deadlock over proposed action.[284]

While a proposal for universal registration may seem radical now, it should be noted that many of the proposed methods for expanding voter registration in the 1970s that were decried as radical at the time by their opponents—including allowing voters to register by mail—are now standard, and lauded, provisions of the NVRA.[285] Furthermore, if such legislation is passed, in light of *Crawford* and *Washington State Grange* and the trend of federal courts to withdraw from adjudging the minutiae of

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280 *See, e.g.*, Brunner v. Ohio Republican Party, 128 S. Ct. 5 (2008) (per curiam); Mary Pat Flaherty, *Ohio Litigating Its Way Through Election Cycle*, WASH. POST, Oct. 18, 2008, at A2.

281 *Cf.* Federal Trade Commission Act, 15 U.S.C. § 41 (2006) ("Commissioners . . . shall be appointed by the President, by and with the advice and consent of the Senate.").

282 *Cf. id.* ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (reading this provision to restrict the President's ability to remove appointees and upholding such a restriction).

283 *Cf.* 15 U.S.C. § 41 ("Not more than three of the Commissioners shall be members of the same political party.").

284 *Cf.* Matthew Mosk, *FEC Reduced to Offering Advice*, WASH. POST, Jan. 9, 2008, at A13 (describing stalemate at the Federal Election Commission caused by an insufficient number of members for quorum). *But cf.* 15 U.S.C. § 41 ("[U]pon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."). For further treatment of these and other issues of institutional capacity for broad election reform, see Daniel P. Tokaji, *The Future of Election Reform*, 28 YALE L. & POL'Y REV. 125 (2009) (identifying decentralization and partisanship in election administration as the primary structural hurdles to broad election law reform); Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL'Y REV. 1, 12–16 (Online) (Jan. 22, 2009), http://www.hlpronline.com/Tokaji_HLPR_012209.pdf.

285 *See* Halperin, *supra* note 234, at 90–91.

much election law, the courts will be less likely to curtail such provisions.[286]

Universal registration is not a panacea for all the burdens that voter identification laws may impose,[287] but it is a progressive policy response that advocates discouraged by the Supreme Court's decision in *Crawford* should pursue as a complementary response to litigation.

CONCLUSION

Since the Supreme Court's decision in *Crawford v. Marion County Election Bd.*, the status of strict voter identification laws has been strengthened, but not placed beyond the reach of constitutional challenges. Indeed, although the Court's decision was a setback for advocates bringing facial challenges to strict voter identification statutes, the splintered plurality opinion left open the possibility that as-applied challenges to such laws may be successful if challengers can prove that the laws improperly burden specific voters' right to vote. While such legal challenges are still continuing, the remedies they are likely to win in light of *Crawford* are limited.

Instead of relying solely on litigation to remedy the situation, voting rights advocates should focus on ensuring passage of complementary legislation at the federal level that may help alleviate the burdens placed on low-income, elderly, disabled, and minority voters by strict voter identification laws. The most promising possible federal response is known as universal registration, and is a comprehensive scheme whereby the government, not the individual voter, has the affirmative obligation to ensure that every eligible voter is registered and able to vote. Such a system would not directly alleviate all of the burdens imposed by strict voter identification laws, but it would help reduce the cumulative burdens that exist on the right to vote for far too many in this country.

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286 *See* Douglas, *As-Applied Challenges in Election Law*, *supra* note 189, at 682.
287 *See* Tokaji, *Voter Registration*, *supra* note 6, at 506.