RECENT CASES

CONSTITUTIONAL LAW — VOTING RIGHTS — SEVENTH CIRCUIT UPHOLDS VOTER ID STATUTE. — *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *reh'g and suggestion for reh'g en banc denied*, Nos. 06-2218, 06-2317, 2007 WL 1017015 (7th Cir. Apr. 5, 2007).

Having long observed that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements,"[1] courts regularly struggle to balance legitimate state interests in regulating elections against the rights of voters and candidates. In doing so, they often engage in intractable empirical debates over facts that are hard to ascertain. Recently, in *Crawford v. Marion County Election Board*,[2] the Seventh Circuit engaged in such a debate, relying on empirical speculation to uphold a state law requiring voters to present photo identification.[3] However, rather than speculating about voter fraud and exclusion, courts reviewing voter ID laws that do not impose severe burdens on voters should uphold such laws unless they appear to have been passed by legislatures motivated by self-entrenchment. When signs of entrenchment are present, courts should uphold voter ID laws only if the legislature can provide concrete evidence demonstrating the need for such regulations.

Until July 2005, Indiana voters seeking to vote in person were required to sign a polling book for the purposes of signature matching but were not otherwise required to present any form of identification.[4] In 2005, the Indiana General Assembly enacted Senate Enrolled Act No. 483,[5] which requires that voters in either a primary or a general election present a government-issued photo ID.[6] The Act passed on a straight party-line vote.[7] The Indiana Democratic Party brought a

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[1] Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (per curiam) (alteration in original) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) (citing Storer v. Brown, 415 U.S. 724, 730 (1974))) (internal quotation marks omitted).

[2] 472 F.3d 949 (7th Cir. 2007), *reh'g and suggestion for reh'g en banc denied*, Nos. 06-2218, 06-2317, 2007 WL 1017015 (7th Cir. Apr. 5, 2007).

[3] *Id.* at 954.

[4] *Id.* at 950.

[5] 2005 Ind. Legis. Serv. 1241 (West) (codified primarily in scattered sections of IND. CODE ANN. tit. 3).

[6] *See* IND. CODE ANN. §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (West 2006).

[7] *See* Posting of Dan Tokaji to Election Law @ Moritz, http://moritzlaw.osu.edu/blogs/tokaji/2005/04/indiana-photo-id-lawsuit.html (Apr. 29, 2005, 20:28 CST). Republicans voted for the statute and Democrats voted against it. *Id.*

constitutional challenge in federal district court, alleging, among other things, that the law unconstitutionally burdened the right to vote.[8]

The district court granted summary judgment for the defendants.[9] Relying on Supreme Court precedent, the court reasoned that regulations that do not impose "severe burdens" on voters are subject to only minimal judicial scrutiny.[10] The court found that the law did not impose severe burdens[11] and therefore sought to determine whether the burdens were "reasonable" given the interest in preventing voter fraud.[12] The court reasoned that "the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry."[13]

A divided panel of the Seventh Circuit affirmed.[14] Writing for the majority, Judge Posner[15] began by determining that the voter ID law should not be subjected to strict scrutiny. He acknowledged that the law would discourage some people from voting, particularly Democrats.[16] Nevertheless, he focused on the fact that there was "not a single plaintiff" who would be so discouraged.[17] Moreover, Judge Posner emphasized that "it is exceedingly difficult to maneuver in today's America without a photo ID" and that therefore "the vast majority of adults have such identification."[18] He added that people who abstain from voting because of the photo ID requirement may do so because of "very slight costs in time or bother" rather than any significant burden on voters.[19] He further argued that strict scrutiny would be "especially inappropriate" because "the right to vote is on both sides of the ledger"[20]: balanced against the burden on voters is the benefit of preventing fraud that "impairs the right of . . . voters to vote by diluting their votes."[21]

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[8] *See* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782–84 (S.D. Ind. 2006). Two elected officials and several nonprofit organizations joined in the lawsuit. *See id.* at 782–83.

[9] *Id.* at 845.

[10] *See id.* at 821 (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358–59 (1997)) (internal quotation marks omitted).

[11] *Id.* at 822–25.

[12] *Id.* at 825.

[13] *Id.* (quoting Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004)) (internal quotation mark omitted).

[14] *Crawford*, 472 F.3d at 954.

[15] Judge Sykes joined Judge Posner's opinion.

[16] *See Crawford*, 472 F.3d at 951 (noting that "most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates").

[17] *Id.* at 951–52.

[18] *Id.* at 951.

[19] *Id.*

[20] *Id.* at 952.

[21] *Id.*

Turning to the interest in preventing voter fraud, Judge Posner found that there was a sufficient need for the voter ID law. He discounted the complete absence of prosecutions for voter fraud in Indiana, arguing that it was explained by "endemic underenforcement of minor criminal laws . . . and by the extreme difficulty of apprehending a voter impersonator."[22] In light of some evidence of voter fraud in other states, as well as evidence in Indiana of a discrepancy between the number of registered voters in the state and the substantially smaller number of people actually eligible to vote, Judge Posner reasoned that voter impersonation was indeed a problem and that Indiana's interest in preventing voter fraud therefore justified the law.[23]

Writing in dissent, Judge Evans interpreted Supreme Court precedent as permitting "a flexible standard" of review and argued that "strict scrutiny may still be appropriate in cases where the burden, as it is here, is great and the state's justification for it, again as it is here, is hollow."[24] Judge Evans suggested that Indiana's law would make it "significantly more difficult" for about four percent of eligible voters to vote.[25] Rejecting the stated justification for Indiana's law, he observed that "no one — in the history of Indiana — had ever been charged with" voter fraud and that "[n]ationwide, . . . the U.S. Election Assistance Commission has found little evidence of the type of polling-place fraud that photo ID laws seek to stop."[26]

Both the majority and the dissent relied upon empirical claims that appear tenuous given the difficulty of marshalling evidence of either voter fraud or the effects of a photo ID requirement. Instead of basing decisions on such speculation, courts hearing challenges to voter ID laws[27] should draw on the insights of scholars and judges writing about campaign finance law, an area of election law plagued by similar problems. In the absence of a clearly severe burden on voters, courts reviewing voter ID laws should generally defer to legislatures but should demand concrete evidence to justify laws that appear to have

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[22] *Id.* at 953.

[23] *See id.* at 953–54.

[24] *Id.* at 956 (Evans, J., dissenting) (citing Burdick v. Takushi, 504 U.S. 428, 433–34 (1992)).

[25] *Id.* at 955. He further observed that "this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof." *Id.*

[26] *Id.*

[27] Future challenges seem likely, given the increasing number of voter ID laws. The Commission on Federal Election Reform, a bipartisan, private commission, recently recommended that states require voters to produce a photo ID. *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–21 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf. Bills that tighten photo ID requirements have been introduced by Congress and the majority of state legislatures. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633–34, 639–44 (2007). This trend is not likely to abate. *See Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1145 (2006).

been passed to entrench political majorities rather than to regulate.[28] This approach will ensure that voter ID laws are based on more accurate empirical judgments and preserve a fair electoral process.

As the Supreme Court recently observed, "the facts" in challenges to voter ID laws are "hotly contested."[29] In *Crawford*, the majority and dissent each relied on empirical speculation, an unreliable and easily manipulable process that is common in litigation about voter ID laws.[30] In determining the burden on voters, Judge Posner relied heavily upon analogies to other activities that require photo IDs,[31] a form of reasoning that has been heavily criticized.[32] He also made the argument that "the right to vote is on both sides of the ledger."[33] However, even if fraudulent votes are cast, those votes, diluted by an entire electorate, may have little or no effect; moreover, given Judge Posner's concession that Indiana's law will disproportionately affect certain demographic segments of voters,[34] symmetrical dilution of all votes would not cancel out the effect of excluding certain groups of voters. Finally, in determining the need for such a law, Judge Posner drew inferences from evidence of voter fraud in other states, which may have different safeguards than Indiana has, and from the size of Indiana voter rolls, which, even if it proves voter fraud, may prove forms of voter fraud not prevented by voter ID laws.[35] Judge Evans

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[28] This proposal rejects the effects-based approach that Professor Richard Hasen advocates in his recent critique of institutional, process-based analysis. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843. Although Professor Hasen ultimately concludes that evidence of "bad intent" should motivate courts to take a "hard look" at laws, *see id.* at 846, 888–90, he would give such evidence a far more limited role. *See id.* at 889 (arguing that "in most cases" evidence of bad intent will play "no role" and that "the main job of the court will be to balance the stated and proven interests").

[29] Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (per curiam). Indeed, "[a]t least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Id.* (Stevens, J., concurring).

[30] *See* Overton, *supra* note 27, at 665–66 (observing that "judges inclined to favor a photo-identification requirement . . . can invoke a plausible anecdote of fraud" and "speculate that photo identification is not unreasonably burdensome," whereas judges inclined to oppose such requirements "can underemphasize the existence of voter fraud and overemphasize anecdotes about individuals who had difficulties securing a photo-identification card"). Supporters of photo ID requirements often rely on flawed assertions about voter fraud or inapt analogies to other areas in which photo IDs are required. *See id.* at 644–53. Opponents of photo ID requirements "regularly recite talking points about threats to voter participation by the poor and minorities but often fail to quantify this assertion." *Id.* at 636.

[31] *See Crawford*, 472 F.3d at 951.

[32] *See* Overton, *supra* note 27, at 650–52.

[33] *Crawford*, 472 F.3d at 952.

[34] *See id.* at 951.

[35] For example, although the number of registered voters might exceed the number of people eligible to vote, the voter rolls might include ineligible voters who nonetheless do not misrepresent their identities at polling places.

engaged in the same kind of empirical speculation, but he did so to support the opposite conclusion. He suggested that Indiana's law would exclude four percent of voters, but the most he could say in support of that figure was that it had "been bandied about."[36] Moreover, he relied upon the fact that voter fraud had never been prosecuted to conclude that it is not a problem. But, as Judge Posner noted, this statistic does not capture the actual amount of voter fraud.[37]

Neither judge can be blamed for this empirical speculation. There is simply not enough evidence to resolve the factual questions in *Crawford* or similar cases.[38] Without such evidence, courts are faced with two bad options: they must either speculate about the relevant facts, an unreliable process likely to invite judges to make value judgments about the relative importance of poll access and election integrity, or simply defer to legislatures, an especially worrisome choice given the concern that election regulations may be passed to entrench the very legislators creating them.[39]

Campaign finance litigation has long been plagued by a similar problem. It is very hard to marshal evidence of corruption, or the appearance of corruption, and even harder to measure the effect of contribution limits on curbing such harms.[40] Moreover, like voter ID laws, campaign finance laws may be self-entrenching.[41] Several judges

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[36] *Crawford*, 472 F.3d at 955 (Evans, J., dissenting).

[37] Because voters were not previously required to show photo IDs, voter misrepresentation could have been prosecuted only if a poll worker detected a signature discrepancy and convinced the suspect voter to remain at the polling place until the police arrived.

[38] "No systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date . . . ." Overton, *supra* note 27, at 635; *see also* U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 1, 16–19 (2006), *available at* http://www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf. It is not easy to predict voter behavior, nor is it easy to detect voter fraud, which by definition occurs surreptitiously. Some have suggested that further empirical research could close the "gap in knowledge." *See, e.g.*, Overton, *supra* note 27, at 634, 653–58. However, for reasons including those discussed by Judge Posner, it is unclear how successful such research would be.

[39] *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, LAW OF DEMOCRACY 64 (rev. 2d ed. Supp. 2005) (noting "the always present risk that election regulations enacted by self-interested legislatures can be a vehicle for incumbent or partisan protection"); *see also* Clingman v. Beaver, 125 S. Ct. 2029, 2044 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the state "is not a wholly independent or neutral arbiter" because it is "controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit").

[40] *See* ISSACHAROFF ET AL., *supra* note 39, at 65 ("[W]hile one can show a correlation between contributions and votes, it is quite difficult to prove that those contributions *caused* those votes — which is what proof of corruption would require."); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 135–36 (2004)

[41] *See* Pildes, *supra* note 40, at 137 (emphasizing that "presumptions of legitimacy associated with ordinary laws are not appropriate, given Congress's obvious self-interest in this context").

and scholars have suggested a second-order institutional analysis of campaign finance cases. Justice White argued that courts should liberally defer to legislatures, which are relatively better at resolving factual matters and have expertise about the mechanics of elections.[42] In contrast, others have argued for aggressive review by courts, noting the significant risk of self-entrenchment.[43] Assuming a more nuanced position, Professor Richard Pildes has suggested that courts should evaluate institutional competence on a case-by-case basis. According to this approach, courts should more freely defer to legislatures when there are signs of "meaningful democratic processes"[44] but demand more concrete evidence when regulations appear to be motivated by entrenchment.[45]

Courts should use a similar nuanced approach to evaluate voter ID laws. First, they should evaluate the process by which such laws were enacted, reasoning that voter ID laws passed with bipartisan support and serious policy consideration are less likely to reflect self-entrenchment by political majorities and more likely to reflect a reasoned effort at legislation.[46] Second, courts should take a "peek"[47] at the effects of such laws to detect self-entrenchment. If the process and effects suggest that a law was passed to entrench rather than regulate, courts should demand concrete evidence of the need for the law.

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[42] *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 311 (1981) (White, J., dissenting) (arguing that although a legislature cannot "'prove'" any improper influence of money in politics, the Court should not disregard the "widespread conviction in legislative halls, as well as among citizens, that the danger is real"); Buckley v. Valeo, 424 U.S. 1, 261 (1976) (White, J., concurring in part and dissenting in part) (criticizing the majority for "claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress . . . who have been deeply involved in elective processes and who have viewed them at close range over many years").

[43] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 263–64 (2003) (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part) (observing that the "first instinct of power is the retention of power" and that therefore courts should "resist the incumbents' writing of the rules of political debate").

[44] Pildes, *supra* note 40, at 138.

[45] *See id.* at 130 (arguing that "courts should distinguish between democracy-regulating laws that are vehicles for incumbent or partisan self-entrenchment and those that reflect permissible choices (wise or not) about how to structure democracy"). Justice Breyer seemed to adopt a similar position in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), when he argued that courts defer to legislatures, which have "institutional expertise," but only so long as there is no concern of "such constitutional evils" as "permitting incumbents to insulate themselves from effective electoral challenge." *Id.* at 402 (Breyer, J., concurring).

[46] *Cf.* Pildes, *supra* note 40, at 137–39. For example, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.), upheld in *McConnell v. FEC*, 540 U.S. 93 (2003), was enacted after years of advocacy and with bipartisan support, which suggests that it was not meant to entrench but was truly intended as a reform. *See* Pildes, *supra* note 40, at 137–38 & n.471.

[47] Professor Frederick Schauer uses this term to describe an informal look at factors that a decisionmaker should not or cannot normally evaluate. *See* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 677, 679 (1991).

This case-by-case analysis attempts to determine whether a legislature's judgments are "permissible expression[s] of democratic disaffection through ongoing experimentation with the design of democratic institutions."[48] It serves to allocate difficult empirical determinations to legislatures when they were likely making a good faith effort at regulation and to courts when legislative majorities were likely entrenching their political power. Moreover, the special concern about entrenchment captures a larger point: Democracy, however defined, requires accountability.[49] Regulations intended to preserve the power of the current political majority create a democratic harm by undermining this goal of democracy, which courts should safeguard.[50]

Indeed, second-order analysis is arguably more likely to track the validity of underlying empirical judgments and democratic harms in cases of voter ID laws than in cases involving other kinds of election regulations. Although certain entrenching regulations may be constitutionally permissible,[51] it is hard to imagine a well-formed argument that majorities should be able to entrench themselves by excluding voters. And, although some election regulations passed with bipartisan support might reflect bipartisan, incumbent self-entrenchment,[52] a voter ID law is unlikely to do so.[53]

Applying the proposed method to *Crawford* would be relatively straightforward. Indiana's statute was adopted following a party-line

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[48] Pildes, *supra* note 40, at 141.

[49] *See id.* at 43.

[50] *See id.* at 46. The Supreme Court has long focused on balancing individual rights. *See id.* at 40–41; *see also* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1457 & n.185 (2002) (listing malapportionment cases in which the Court adopted an individual rights approach). However, the Court may be shifting toward a greater willingness to look at "democratic harms." *See, e.g.*, Randall v. Sorrell, 126 S. Ct. 2479, 2492 (2006) (plurality opinion) (reasoning that a Vermont campaign finance law "implicate[d] the integrity of our electoral process" (quoting *McConnell*, 540 U.S. at 136) (internal quotation mark omitted)); Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/moveabletype/archives/2006/06/todays_opinion_11.html (June 26, 2006, 11:44 EST) (reporting Professor Pildes's observation that "the Court in [*Randall*] ma[de] as clear as it has in any constitutional decision involving democratic institutions" that it views its role as protecting the "structural integrity of the democratic process").

[51] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364–68 (1997) (holding that a state may ban candidates from running under the banner of multiple parties, because although the ban excludes minor parties, that exclusion prevents voter confusion and maintains a stable political system); *see also* Hasen, *supra* note 28, at 875 ("Courts have recognized that in certain circumstances some anticompetitive legislative action should be permissible.").

[52] *See, e.g.*, *McConnell*, 540 U.S. at 260–61 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part) (observing the risk of bipartisan incumbent protection in campaign finance laws); Pildes, *supra* note 40, at 60–61 (discussing bipartisan or "sweetheart" gerrymanders).

[53] It is difficult to imagine a class of voters excluded by an ID requirement whose exclusion would equally benefit both major parties, particularly because those voters helped the legislators in question get elected the first time around.

vote with strictly Republican support, and even Judge Posner conceded that it "injures the Democratic Party."[54] Accordingly, the court should have recognized that entrenchment was at least a serious worry and therefore demanded more evidence of voter misrepresentation. Without such evidence, the court should have struck down the law.

Criticisms of this approach must be evaluated in light of the need to balance the institutional incapacities of courts and legislatures. For example, one might worry that the proposed test incorrectly assumes the preexisting state of election regulations as a neutral baseline.[55] However, if a legislature believed that a law would be entrenching, then although courts cannot determine a normatively correct baseline, it is highly likely that the newly adopted regulation is not one that will improve the system. Similarly, one might worry that a varying demand for evidence would be administratively difficult in cases of laws passed out of mixed motives[56] or would incidentally capture laws that were not passed to entrench but rather because political parties divided for legitimate ideological[57] or even pluralist reasons.[58] One might also worry that courts are unable to evaluate evidence of bad intent. However, the question is *not* whether courts can execute this approach perfectly. Rather, the question is how *best* to approach judicial review of voter ID laws given the different institutional limitations of courts and legislatures. Although courts cannot perfectly gauge the process by which a law was created, the risks associated with this limitation are less than the risks of courts' speculating, without concrete evidence, about voter ID laws.

It is true that no bright lines separate permissible election regulations from unconstitutional infringements on voters' rights. Nonetheless, courts should not draw such lines casually. Instead, they should entrust that judgment to the institution best able to draw those lines in each individual case and should do so while protecting the underlying purpose of voting — democracy.

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[54] *Crawford*, 472 F.3d at 951.

[55] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 542–43 (1997) (noting the absence "of an uncontroversial baseline against which to measure entrenchment effects"). Imagine, for example, that Democrats gain control of the Indiana legislature and eliminate the voter ID requirement in a vote along party lines. Using the proposed method of review, a court would paradoxically demand a great deal of evidence to uphold that new law.

[56] *See id.* at 529.

[57] For example, legislators of a certain party might simply value election integrity more than poll access. Notably, however, by "peeking" at the effects of a law, courts can minimize the risks associated with this scenario.

[58] For example, legislators of both parties might believe a voter ID law is necessary to prevent rampant corruption, but one party might act out of self-interest to ensure as many of its supporters as possible can conveniently vote. Or legislators who believe a voter ID law is necessary might cave to political pressure from communities that would be partially excluded.