protects while still speaking "effectively as an institution,"[84] the Court forced trial judges to develop a more detailed trial record, and the most straightforward way to develop a record is to conduct a more thorough inquiry. A more thorough inquiry is more likely to protect, perhaps even overprotect,[85] the constitutional interests in play.

Trial judges may respond to the *Snyder* presumption in a way less likely to protect the constitutional interests in *Batson*, however. The presumption does not teach judges to develop richer records in general; it teaches them to credit demeanor-based challenges more clearly. Since *Snyder* did nothing to upset the Court's general rule that a trial judge's rulings based on demeanor deserve special deference, judges may be more apt in the wake of *Snyder* to insure against reversal by crediting demeanor. Where a judge is equally persuaded by multiple justifications for a strike, some fit for appellate review and others (like demeanor) less so, she would best protect her ruling by stating that she is allowing a peremptory challenge because she is persuaded by the prosecutor's characterization of a potential juror's demeanor. If this is the legacy of *Snyder*, then the underlying constitutional norm in *Batson* is subject to less protection than before.

Snyder presented an opportunity for greater clarity in the Court's *Batson* jurisprudence, but it also presented an opportunity for a deep division in the Court. The Court avoided the problem of weighing pretext against demeanor — which could have led to a discussion of unconscious bias, the utility of peremptory challenges generally, and thus the constitutional interests protected by *Batson* — by assuming it away. The *Snyder* presumption helped put Chief Justice Roberts's philosophy to work, creating a narrower opinion joined by a unified, seven-Justice majority. In *Snyder*'s wake, trial judges are likely to develop a clearer record at the peremptory stage. This may lead to a more thorough examination of prosecutors' proffered reasons and thus to more expansive *Batson* protection, or it may lead to judges defaulting to demeanor-based justifications and thus simply to narrower appellate review.

2. Photo Identification Requirement for In-Person Voting. — When the Supreme Court assesses a burden on voting that is not facially discriminatory, it applies a balancing test that considers the state's interest in imposing the regulation, the degree to which the regulation advances that justification, and the burden imposed on vot-

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[84] Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 59 (1997).

[85] *Cf.* Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1709 (2008) (explaining that "the core of the strongest case *for* judicial review" is that "errors that result in the underenforcement of rights are more troubling than errors that result in their overenforcement").

ers. Members of the Court frequently balance these elements differently, seeing certain aspects of voting as central to American democracy and others as disposable. Last Term, in *Crawford v. Marion County Election Board*,[1] the Supreme Court upheld Indiana's Senate Enrollment Act No. 483[2] (SEA 483) against a facial challenge, reasoning that the state's interest in preventing voter fraud justified requiring every in-person voter to produce valid, government-issued photo identification.[3] In reaching this conclusion, the Court's opinion revealed a vision of American democracy that tolerated the exclusion of voters as both inevitable and acceptable. Moreover, by allowing this exclusion, the Court made it more difficult for those who disagreed with its vision of the role of voting in democracy to challenge that vision with their votes. Thus, by upholding Indiana's voter identification law, the Supreme Court embraced a view of democracy that not only excluded certain legal, qualified voters, but also entrenched itself against democratic challenges.

In 2005, the Indiana General Assembly passed SEA 483. The law requires that all registered voters produce an accepted form of photo identification before voting in-person in Indiana.[4] If a voter cannot do so, she may still cast a provisional ballot,[5] which will be counted only if the voter appears before a circuit court by noon on the second Monday after the election and executes an affidavit stating that she is indigent and unable to obtain proper identification or produces a photo ID and executes an affidavit that she cast the provisional ballot.[6] Legislators voted along strict party lines; all Republicans voted in favor, and all Democrats voted against.[7]

Plaintiffs, comprising representatives of the Democratic party, two publicly elected officials, and a variety of public interest groups, facially challenged the constitutionality of the statute on First and Fourteenth Amendment grounds.[8] In *Indiana Democratic Party v. Rokita*,[9] the U.S. District Court for the Southern District of Indiana granted

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

[2] 2005 Ind. Legis. Serv. 1241 (West) (codified primarily in scattered sections of IND. CODE ANN. tit. 3).

[3] *Crawford*, 128 S. Ct. at 1624.

[4] IND. CODE ANN. § 3-11-8-25.1(a) (LexisNexis 2008). Acceptable identification must include a photograph of the individual to whom the identification was issued, an expiration date, and the individual's name, which must "conform[] to the name in the individual's voter registration record." *Id.* § 3-5-2-40.5. The identification must be current and must be issued by either the United States or the state of Indiana. *Id.*

[5] *Id.* § 3-11-8-25.1(d).

[6] *Id.* §§ 3-11-7.5-2.5, 3-11.7-51.

[7] *Crawford*, 128 S. Ct. at 1623 & n.21.

[8] Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782–83 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007).

[9] 458 F. Supp. 2d 775.

summary judgment to the defendants. Applying rational basis scrutiny,[10] Judge Barker held that concerns about voter fraud provided reasonable justification for the law and the burdens it imposed.[11]

The Seventh Circuit affirmed.[12] Writing for the panel, Judge Posner[13] reasoned that few voters would be disenfranchised because most would have the necessary identification, it was easy to obtain the identification, and voters could cast a provisional ballot if they could not obtain the identification.[14] Although he acknowledged that some poor voters would be deterred and that Democratic candidates would likely suffer,[15] Judge Posner reasoned that the law's burden was "slight,"[16] and therefore the state's interest in preventing voter fraud justified the law.[17] In dissent, Judge Evans asserted that the panel should have assessed the law using strict scrutiny due to its partisan origins.[18]

The Supreme Court affirmed. Justice Stevens,[19] who announced the judgment of the Court, laid out the applicable balancing test: a court must evaluate state justifications for the law and then weigh those interests against the burden imposed.[20] Rational restrictions "unrelated to voter qualifications," however, are "invidious."[21] Applying the balancing test, Justice Stevens found that the three justifications advanced by the state justified the law. The state had an interest in "election modernization" because two federal statutes, the National Voter Registration Act of 1993[22] (NVRA) and the Help America Vote Act of 2002[23] (HAVA), "made it necessary for States to reexamine their

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[10] *Id.* at 821–25.

[11] *Id.* at 825–26. Judge Barker dismissed the plaintiffs' arguments on the grounds of the law's incidental impact on voters who forget their photo identifications, *id.* at 828, the possibility of reasonable alternatives to photo identification, *id.* at 828–29, the existence of legislative alternatives to combat voter fraud, *id.* at 829, and the "cumulative burdens" imposed by the combination of all of Indiana's voting laws, *id.* at 829–30.

[12] *Crawford*, 472 F.3d 949.

[13] Judge Posner was joined by Judge Sykes.

[14] *Crawford*, 472 F.3d. at 950.

[15] *Id.* at 951.

[16] *Id.* at 952.

[17] *Id.* at 953–54.

[18] *Id.* at 954 (Evans, J., dissenting).

[19] Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy.

[20] *Crawford*, 128 S. Ct. at 1616 (opinion of Stevens, J.) (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

[21] *Id.*

[22] 42 U.S.C. §§ 1973gg to 1973gg-10 (2000). NVRA requires state motor vehicle driver's license applications to double as voter registration applications, § 1973gg-3, and makes it more difficult for states to remove names from the list of registered voters, § 1973gg-6(a)(3).

[23] 42 U.S.C. §§ 15301–15545 (2000 & Supp. V. 2005). HAVA requires states to create statewide lists of registered voters, § 15483(a), verify information on a voter's registration application using either the voter's driver's license number or the last four digits of her social security number, § 15483(a)(5)(A)(i), and, if she lacks both forms of identification, assign her a voter identification number, § 15483(a)(5)(A)(ii).

election procedures."[24] The state's interest in preventing voter fraud similarly supported the law because that interest was both legitimate and important.[25] Although the record did not contain evidence of in-person fraud in Indiana, and the state had criminal fraud laws, other examples of fraud gave Indiana good reason to be concerned.[26] Moreover, the state's voter rolls were vastly inflated with the names of voters "who had either moved, died, or were . . . convicted of felonies."[27] Finally, the state had an interest in safeguarding "public confidence in the integrity of the electoral process."[28]

Justice Stevens then examined the burdens that SEA 483 imposed on voters. He reasoned that since Indiana driver's licenses, an acceptable form of identification, were free, the mere "inconvenience" of gathering the required documents, going to the Bureau of Motor Vehicles, and obtaining a license could not "qualify as a substantial burden."[29] Although acknowledging that some voters might face "a special burden" under the law, Justice Stevens rejected the petitioners' argument that the Court should weigh the particular burdens imposed on those voters; the record lacked evidence about the number of registered voters without identification and the burdens imposed on them.[30] Justice Stevens concluded that the burdens did not outweigh the state's interest in the law.[31]

Finally, Justice Stevens rejected the petitioners' argument that SEA 483 was unconstitutional as a partisan measure. He acknowledged that "partisan considerations" played a role, but reasoned that an otherwise valid law was not unconstitutional because "partisan interests" may have motivated certain legislators.[32]

Justice Scalia concurred in the judgment,[33] urging the application of a "two-track approach" to analyzing burdens on voting.[34] First, he asserted, the Court should determine if the burden was severe.[35] If so, strict scrutiny should apply; otherwise the Court should apply a deferential standard.[36] Justice Scalia reasoned that when analyzing "generally applicable, nondiscriminatory" voting restrictions, the Court must

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[24] *Crawford*, 128 S. Ct. at 1617 (opinion of Stevens, J.).
[25] *Id.* at 1619.
[26] *Id.*
[27] *Id.* at 1619–20. An identification requirement would prevent fraudulent use of such names.
[28] *Id.* at 1620.
[29] *Id.* at 1621.
[30] *Id.* at 1622.
[31] *Id.* at 1623.
[32] *Id.* at 1624.
[33] Justices Thomas and Alito joined Justice Scalia.
[34] *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment).
[35] *Id.*
[36] *Id.* (citing Burdick v. Takushi, 504 U.S. 428, 433–34 (1992)).

ignore burdens, like those imposed by SEA 483, that fall only on a minority of voters.[37] He concluded that SEA 483's burden on voters was not severe, and therefore the Court should defer to the legislature.[38]

Justice Souter dissented.[39] He applied the same balancing test as Justice Stevens, but concluded that SEA 483 substantially burdened the First and Fourteenth Amendment rights of voters — particularly the elderly, indigent, and disabled — due to travel costs and fees to obtain the documents necessary to acquire photo identification.[40] Justice Souter reasoned that the relief provided by the provisional ballots was minimal because voters still needed to travel to the county seat.[41] Moreover, he concluded that the law restricted the voting rights of a significant number of voters; Justice Souter found that approximately 43,000 Indiana residents lacked the necessary identification and would be discouraged or prevented from voting.[42] Justice Souter also concluded that the state's reasons for the law did not justify the burden: The state's interest in preventing voter fraud was insufficient because the law prevented only one (undocumented) form of voter fraud.[43] Even if the state's interests supported some kind of voter identification requirement, the state had nevertheless failed to justify the burdens placed on indigent voters.[44]

Justice Breyer also dissented. Justice Breyer concluded that the statute was unconstitutional because it "impose[d] a disproportionate burden" on voters without the proper identification[45] by not making the documents necessary to obtain the required identification free or phasing in the new law.[46]

These opinions demonstrated that the Justices held fundamentally different views about what constitutes the role of voting in American democracy. Whereas Justices Stevens and Scalia assumed that voting laws could constitutionally exclude some eligible voters, Justice Souter saw near universal participation as democracy's defining element. In upholding the Indiana law, the Court chose a theory that validated the exclusion of eligible voters in a distinctively harmful way and thus

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[37] *Id.* at 1625.
[38] *Id.* at 1627.
[39] Justice Ginsburg joined Justice Souter's dissent.
[40] *Id.* at 1628–31 (Souter, J., dissenting).
[41] *Id.* at 1631–32.
[42] *Id.* at 1633–34.
[43] *Id.* at 1636–37.
[44] *Id.* at 1639–40.
[45] *Id.* at 1643 (Breyer, J., dissenting).
[46] *Id.* at 1644.

uniquely entrenched its chosen vision of democracy against legislative debate and change.[47]

Justice Stevens applied the balancing test in *Crawford* in a way that demonstrated a view of democracy that sees the voting polity as exclusive, a special group to which a potential voter must earn entry. This theory of democracy related to and possibly drew upon "elite-centered" theories of democracy.[48] Professor Heather Gerken has identified these "elite-centered" theories of democracy, which deemphasize or dismiss the importance of individual voter participation and favor elite control of the process;[49] these theories focus on how the electoral process functions at the level of the candidate or elected official, rather than at the level of the individual voter. For example, some conceive of democracy as simply "rule by officials who are . . . chosen by the people"; this approach defines democracy by the structure used to select officials, rather than by the participation of voters in that structure.[50] Professors Samuel Issacharoff and Richard Pildes have argued that politics are best viewed as markets for the competition of political parties;[51] they have criticized the Court for conceiving of voting as an

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[47] This comment assumes that several tens of thousands of eligible voters will be prevented from voting by SEA 483. The district court found that approximately 43,000 eligible voters lacked a current driver's license, the most common form of acceptable photo identification. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 807 (S.D. Ind. 2006). Indeed, nationwide, approximately 6–10% of eligible voters, or eleven to twenty million Americans, lack the kind of photo identification required by the statute. *See* John Mark Hansen, *Verification of Identity*, *in* TASK FORCE ON THE FED. ELECTION SYSTEM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 6.1, 6.4 (John Mark Hansen coordinator, 2001), *available at* http://www.tcf.org/Publications/ElectionReform/full_tf_report.pdf.

The evidence as to whether this number overestimates or underestimates the number of voters who will be disenfranchised is contradictory. On the one hand, voters might use other forms of photo identification, and there are exceptions to the photo identification requirement. *See Rokita*, 458 F. Supp. 2d at 807 n.43. These exceptions, however, are themselves burdensome: they require the voter to first cast a provisional ballot, IND. CODE ANN. § 3-11-8-25.1(e) (LexisNexis 2008), and then to appear before a circuit court by noon on the second Monday after the election to execute the relevant affidavit, §§ 3-11.7-5-1, 3-11.7-5-2.5, 3-11.7-5-1.

Moreover, there is significant evidence that the estimate of 43,000 disenfranchised voters actually underestimates the number of voters who will be disenfranchised. *See Rokita*, 458 F. Supp. 2d at 807 n.43. Some voters may have recently moved to Indiana and not yet obtained identification. *See id.* Moreover, the State of Indiana is trying to revoke over 30,000 licenses because the names on the licenses do not match those in a Social Security database. Joseph Dits, *Court Date Set for Bid To Stop BMV Revoking Licenses*, S. BEND TRIB., Feb. 21, 2008, at B1; *see also* Joseph Dits, *Judge Refuses To Stop License Revocations*, S. BEND TRIB., Apr. 25, 2008, at B1. Most of those mismatches, however, have innocent explanations such as typographical errors and legal name changes. *Crawford*, 128 S. Ct. at 1633 n.23 (Souter, J., dissenting).

[48] Heather K. Gerken, Essay, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 748 (2006).

[49] *Id.* at 748–49.

[50] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 144 (2003).

[51] *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 615 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the*

individual right rather than assessing whether voting structures, such as voting districts, maximize electoral competition.[52] Thus, under these theories, the participation of individual voters matters only to the extent that it will affect who is elected; voter participation is not a goal in and of itself.

Justice Stevens's reasoning resembled that of these "elite-centered" theorists. Like these theorists, he considered the outcome of elections to be an essential element of democracy in need of protection; since voter fraud might affect the results of an election, these results must be protected in the absence of evidence of in-person voter fraud or even attempts at in-person fraud in Indiana.[53] Although he considered the outcome of elections essential, Justice Stevens saw the participation of individual voters as almost incidental, much as elite-centered democratic theories do. For example, in Justice Stevens's vision of democracy, even the voters themselves are an exclusive group, albeit one to which the majority of adult citizens has access: voters are expected to overcome burdens on the right to vote.[54] Although Justice Stevens acknowledged that obtaining valid photo identification in order to vote would burden some number of voters, this "inconvenience" was one of any number of acceptable, potentially exclusionary burdens.[55] Justice Stevens's default assumption was that there will be burdens associated with voting, and a voter should be expected to deal with those burdens in order to exercise her right to vote. Thus, Justice Stevens's opinion reflected his particular, elite-centered view of the role of voting in democracy.

Although reaching the same conclusion as Justice Stevens, Justice Scalia's opinion reflected a largely unrelated view of democracy based on majority rule and pragmatic concerns. Justice Scalia's analysis

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Democratic Process, 50 STAN. L. REV. 643, 646 (1998); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 40 (2004). Although Professor Pildes distinguishes his work from that of minimalist theorists, *see* Pildes, *supra*, at 43, Professor Gerken groups Professors Issacharoff and Pildes along with "minimalists" such as Judge Richard Posner and Joseph Schumpeter, *see* Gerken, *supra* note 48, at 749.

[52] *See* Issacharoff, *supra* note 51, at 607–08; Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 687–88 (2004) (book review); Pildes, *supra* note 51, at 40.

[53] *Crawford*, 128 S. Ct. at 1619 (opinion of Stevens, J.). Justice Stevens admitted that the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* As evidence of the threat of voter fraud, he pointed to examples from other states, *id.* at 1619 n.12, to instances from New York City in the nineteenth century, *id.* at 1619 n.11, and examples of absentee ballot fraud, *id.* at 1619 n.13. Interestingly, Justice Stevens did not note that excluding tens of thousands of voters could also affect the outcome of an election.

[54] *See id.* at 1621 (reasoning that the burden at issue in *Crawford* was acceptable because it did not "represent a significant increase over the usual burdens of voting," thus demonstrating an expectation that the right to vote would always be burdened).

[55] *Id.*

drew on a strand of reasoning that views the Supreme Court as incapable of making the kind of decision requested by the *Crawford* plaintiffs. In the past, Justices writing in dissent have argued that the Court did not have the capacity to assess the constitutionality of state decisions about the administration of elections. For example, in *Baker v. Carr*,[56] a redistricting case, Justice Frankfurter reasoned that the case was not justiciable because "[w]hat [was] actually asked of the Court in this case [was] to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy — in order to establish an appropriate frame of government for the State . . . and thereby for all the States of the Union."[57] In his view, it was simply not the Court's job to make that kind of choice.

Similarly, Justice Scalia argued that it was neither within the Court's capacity nor its constitutional province to step into the "political thicket"[58] by assessing state voter qualifications.[59] Indeed, the Constitution's delegation of the administration of elections to state legislatures was an essential part of his theory of the role of voting in democracy.[60] For example, Justice Scalia seemed to reject lawsuits based on burdens placed on individual voters because allowing legal challenges in those cases would open the door to disruptive levels of litigation.[61] Simply put, a "voter-by-voter examination of the burdens of voting regulations would prove especially disruptive" to the administration of elections in practice; therefore, the Court should stay out and let the legislature do its job weighing the policy arguments.[62] The Court should consider the effects of generally applicable voting regulations only on "voters generally."[63] As in Justice Stevens's view, the participation of individual voters was irrelevant. Justice Scalia's conclusion thus turned on institutional capacity rather than on the value of individual participation.

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[56] 369 U.S. 186 (1962).

[57] *Id.* at 300 (Frankfurter, J., dissenting).

[58] Colegrove v. Green, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.).

[59] *Crawford*, 128 S. Ct. at 1626–27 (Scalia, J., concurring in the judgment).

[60] *Id.*

[61] *See id.* at 1626. Justice Scalia reasoned that the Court's precedent dictated that the Justices ignore the burdens on "individual voters or candidates," *id.* at 1625, including on "vulnerable voters," *id.* at 1626, but instead consider burdens "categorically," *id.* at 1625, as they would apply to a theoretical "reasonably diligent" voter or candidate, *id.* at 1626. Under this framework, if a law severely burdened and effectively disenfranchised a significant minority of voters, for example, who share an unusual vulnerability, the Court should still uphold it as long as it would not severely burden Justice Scalia's "reasonably diligent voter" — assuming the law lacked discriminatory intent. Thus, unless the vulnerability becomes so widespread that the "reasonably diligent" voter would be severely burdened by it — presumably when it affects at least a majority of voters — Justice Scalia would uphold it.

[62] *Id.* at 1626.

[63] *Id.* at 1625 (emphasis omitted).

Theorists such as Professor Lani Guinier have advanced views of democracy that hinge on individual participation.[64] The way in which Justice Souter assessed the justifications for the burden on voting, for example, demonstrated the essential role of voter participation.[65] While Justice Stevens required the petitioners to produce evidence establishing that voters would be burdened,[66] Justice Souter would have required the state to produce evidence both that its concerns about voter fraud were valid and that the voter identification law would successfully combat fraud.[67] Professor Guinier, however, points out the political necessity of voting as well: even if participation is not always sufficient to ensure that a group of voters elects a candidate or institutes a policy of its choice, it is, at the very least, necessary.[68] Unlike Justices Stevens and Scalia, Justice Souter based his analysis on a theory of voting in democracy that valued individual voter participation both as a means to realizing political objectives and as a value in itself.

Thus, both the opinion of the Court and the concurrence did not merely uphold a particular set of voter ID laws, they vindicated visions of democracy that accept the exclusion of some significant number of qualified voters as inevitable. The Court's decision in *Crawford* is problematic, however, because it entrenched its vision of democracy

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[64] *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1594 (1993). Professor Guinier's argument, however, ultimately goes several steps beyond what Justice Souter advocated in *Crawford*: she argues for proportional voting rather than representation based on districts, *id.*, such that "[e]ach voter [is] able to choose, by the way she casts her votes, who represents her," *id.* at 1594 n.19.

[65] In contrast to Justices Stevens and Scalia, Justice Souter analyzed SEA 483 using a concept of democracy based on close to universal participation. Justice Souter's vision of democracy resembles the substantive democratic vision behind John Hart Ely's "participation-oriented, representation-reinforcing" theory of judicial review. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980). Ely argues that the Court's central role is to broaden access to representative government and guarantee equal democratic participation through judicial review. *Id.* at 103. Thus, judicial review is justified to strike down statutes that, for example, deny legal voters the right to vote. *Cf. id.* (arguing for judicial intervention in democratic "malfunctioning"). Like Justice Souter, Ely assumes that maximum, near universal participation in the democratic process is a necessary element of democracy. Indeed, Ely takes this idea a step farther by premising the Court's own ability to act through judicial review on its potential to enhance such participation. *Id.*

[66] *See Crawford*, 128 S. Ct. at 1621 (opinion of Stevens, J.).

[67] *See id.* at 1637–39 (Souter, J., dissenting). Unlike Justice Stevens, Justice Souter required that the state produce tangible evidence of voter fraud or its threat. According to Justice Souter, "[n]othing . . . the State [had] to say [did] much to bolster its case," *id.* at 1638: Indiana could not justify its concerns about voter fraud because it "[had] not come across a single instance of in-person voter impersonation fraud in all of Indiana's history," *id.* at 1637, and because "the State [had] not even tried to justify its decision" not to incorporate a phase-in period for the law, *id.* at 1640.

[68] Lani Guinier, *Voting Rights and Democratic Theory — Where Do We Go From Here?*, *in* CONTROVERSIES IN MINORITY VOTING 283, 288 (Bernard Grofman & Chandler Davidson eds., 1992).

by disrupting the processes by which that vision might be challenged and altered. Legal scholars have identified the related problems of entrenchment both of legislators and of laws, which often involves passing laws designed to insulate lawmakers and their substantive policies from competition. Legislators are able to ensure their own power, for example, by passing laws that are facially neutral, but which in practice favor their ability to retain their offices, "freeze out serious challengers," and entrench their own political parties.[69] Professors Issacharoff and Pildes have identified partisan gerrymanders and ballot-access restrictions as two forms of self-entrenching legislation.[70] Similarly, Professor Michael Klarman has discussed the problem of "cross-temporal majorities,"[71] in which "a temporary political majority . . . may seek to extend its hold on power into the future, when its members may no longer enjoy majority status."[72] In particular, Professor Klarman points to malapportionment in the legislature, which allows "a past majority to continue exercising power beyond the term of its majority status, [as] inconsistent with majoritarian principles."[73]

The Court's decision is potentially antimajoritarian because it will help entrench the Court's vision of democracy.[74] In upholding this particular law, the Court excluded the subset of qualified voters that, by definition, was most likely to disagree with both the law and the Court's vision of democracy. In so doing, the Court rendered these voters less able to overturn SEA 483 and enact other forms of legislation that reflect a more inclusive theory of voting. On a more theoretical level, the Court also "constitutionalized" its view of democracy, confirming that all the Constitution requires is the protection of voter outcomes even if a significant number of voters are excluded. There-

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[69] Issacharoff & Pildes, *supra* note 51, at 644.

[70] *Id.* at 709. Professors Issacharoff and Pildes have similarly pointed to the "bipartisan" or "sweetheart" gerrymander, in which both parties in a given state agree to a redistricting plan in which both parties' incumbents are placed in "safe" districts. *See id.* at 683 n.149; Pildes, *supra* note 51, at 60.

[71] Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (internal quotation marks omitted).

[72] *Id.*

[73] *Id.* at 506–07.

[74] Both commentators and the plaintiffs argued that SEA 483 was passed specifically to entrench the current Republican majority in the Indiana legislature. *See, e.g.*, David A. Love, *ID Ruling a Blow to Democracy*, MOBILE REG., May 9, 2008, at A13; *see also* David G. Savage, *Voter ID Law Upheld; The High Court's Ruling that a Photo Can Be Required Is a Victory for Republicans*, L.A. TIMES, Apr. 29, 2008, at A1. By disenfranchising voters who the Seventh Circuit agreed were likely to vote for Democrats, *see* Crawford v. Marion County Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), the Republican party at least appeared to engage in just the kind of legislature entrenchment Professors Issacharoff and Pildes criticize. Indeed, the Court admitted that entrenchment may well have been the motivation for the law's passage. *See Crawford*, 128 S. Ct. at 1624 (opinion of Stevens, J.).

fore, even if the Indiana legislature eventually overturns SEA 483 or enacts legislation that rejects the Court's theory, *Crawford* will remain good law, and the Court's theory of democracy will remain in place.

More importantly for the issue of entrenchment, however, *Crawford* embedded the Court's theory of voting in democracy in a distinctive way. Unlike most election laws that the Supreme Court has assessed, SEA 483 was not aimed at election mechanisms such as procedural voter registration requirements, redistricting,[75] or restrictions on who could appear on the ballot.[76] Instead, it was about the identities of the voters themselves and was aimed squarely at the question of who could cast a ballot on Election Day. In *Crawford*, the Court broke a tradition dating back to the 1960s of overturning laws that imposed requirements on individual voters that could prevent them from voting. It thus entrenched its vision of democracy in a unique — and uniquely harmful — way.

D. Freedom of Association

State Primary Regulation. — Supreme Court cases assessing challenges to state requirements for primary ballot access balance the associational rights of political parties to choose their own candidates against the state's interest in ensuring the fairness and representativeness of primary elections. Last Term, in *New York State Board of Elections v. López Torres*,[1] the Supreme Court held unanimously that New York's primary system for nominating Supreme Court Justice candidates did not violate the First Amendment rights of unsuccessful candidates and their supporters, despite facts showing that, under that system, party leaders effectively controlled the choice of nominee. Instead of treating the issue as purely involving a private organization's associational rights, the Court should have recognized that political parties are encompassed by both the private and public spheres and that the state has a strong interest in regulating the public sphere in order to avoid partisan entrenchment. Using this analysis, the Court should have found New York's primary system unconstitutional.

Party nominees are chosen for New York's Supreme Court via an elaborate convention system, codified in state election law, that is unique in the United States.[2] Supreme Court Justices are elected from

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[75] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004).

[76] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992); Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[1] 128 S. Ct. 791 (2008).

[2] *See id.* at 796; *see also* N.Y. ELEC. LAW § 6-124 (McKinney 2007). The election for the office of Supreme Court Justice is the only judicial election in New York that uses a party convention as a primary; all other judicial elections involve a direct primary election. López Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 215–16 (E.D.N.Y. 2006).