SYMPOSIUM

Litigating the Indiana Photo-ID Law: Lessons in Judicial Dissonance and Abdication

William R. Groth, *Fillenwarth Dennerline Groth & Towe, LLP*

Following the 2004 elections Republicans assumed ascendancy in Indiana, capturing the governorship for the first time in 16 years, retaining control of the Senate and regaining control of the Indiana House of Representatives after eight years in political exile. This political development set the stage for the passage in April 2005 of the Indiana photo-ID law, also known as Senate Enrolled Act 483 (SEA), on a straight party-line vote. Two days after SEA 483 was signed into law by governor Mitch Daniels the Indiana Democratic Party (IDP) filed suit in federal district court in Indianapolis (*IDP v. Rokita* 2006). The case was assigned in a blind draw to U.S. district judge Sarah Evans Barker, an appointee of President Reagan and a former U.S. attorney. The same day the Indiana chapter of the ACLU filed an action in Marion Superior Court, *Crawford v. Marion County Election Board*. The Indiana attorney general intervened in both cases to defend the law's constitutionality and removed *Crawford* to federal court, where it was immediately consolidated with *Rokita*.

Both suits were pre-enforcement facial challenges under the First and Fourteenth Amendments, meaning that the IDP was challenging the law on its face as imposing unconstitutional burdens on voters who would disproportionately prefer its candidates. A facial (as opposed to an as-applied) challenge to the constitutionality of a legislative enactment is a challenge to a law in the abstract rather than as applied to a particular individual. It is the most difficult type of challenge to mount successfully because, at least outside the First Amendment and (up until the Court's decision in *Crawford*) the election-law context, the federal courts have deemed a law to be facially invalid only if no set of circumstances exist under which it could be validly applied. A successful facial challenge voids the entire enactment, while an as-applied challenge only enjoins its enforcement against the individual plaintiff. Despite its disdain for facial challenges generally, the Supreme Court had until very recently accorded wide latitude for their use in cases implicating the First Amendment. Facial challenges had, at least until the Court's 2007 decision in *Gonzales v. Carhart*, also been the primary method of challenging overly restrictive abortion laws (*U.S. v. Sabri* 2004). They had also been a favored and routine method of challenging state election laws alleged to violate the constitution. (See, e.g., *Burdick v. Takushi* [1991]; *Lerman v. Board of Elections* [2000].) Democrats widely viewed the law with suspicion, seeing it as yet another effort by Republicans to suppress turnout among groups who tended to favor their candidates, in particular African Americans, who had long been the targets of Republican-inspired laws designed to dilute their political power.

The Republican Party's preoccupation with voter fraud has spawned a long history of voter suppression tactics masked as "ballot security" programs targeting heavily black precincts. Republican belief that minority voters were engaging in pervasive election fraud had animated GOP opposition even to such moderate reforms as the "motor voter bill" passed by the Democratic Congress in 1992 and designed to facilitate registration by lower-income citizens by requiring that registration forms be made available at public assistance agencies and driver's license bureaus, a bill later vetoed by President George H. W. Bush but the next year re-passed and signed into law by President Clinton.

As has been chronicled by Chandler Davidson et al. in their treatise "Republican Ballot Security Programs" (2004), while efforts to discourage minority voting were originally identified with segregationist elements of the Southern wing of the Democratic Party, after the presidential campaigns of Barry Goldwater in 1964 and Richard Nixon in 1968 those tactics came to be a Republican trademark. The voter-ID laws of the early twenty-first century had many precursors in the Jim Crow era, including facially neutral yet discriminatory-in-practice devices such as literacy tests and poll taxes. Poll taxes were eventually struck down by the Supreme Court in *Harper v. Virginia Bd. of Elections* (1966) and *Harman v. Forssenius* (1965), and were permanently banned by the Twenty-Fourth Amendment and the Voting Rights Act of 1965. But, as Davidson observes, the Warren Court's demonstrated vigilance in protecting the right to vote merely gave rise to new, more sophisticated devices. For instance, in 1996 in heavily Democratic Passaic County, New Jersey, new rules were enacted requiring persons who had moved to a different election district without notifying election officials to verify their new address at the municipal clerk's office on Election Day. This meant going to the polling site, where the voter would be told of this new requirement, then going to city hall, executing a "transfer affidavit," and once the new address was verified, returning to the polling site and voting. Thus, the "two-trip" feature of the new Indiana law had many historical antecedents, which until the Indiana law was passed in 2005 courts had consistently struck down. Indeed, over a century earlier the Indiana

doi:10.1017/S1049096509090258

https://doi.org/10.1017/S1049096509090258 Published online by Cambridge University Press

Supreme Court had declared unconstitutional an Indiana voter-registration law in part because it required certain voters to make two trips for their votes to count, "when only one ought to be required" (*Morris v. Powell* 1890).

The Indiana photo-ID law was among the first of a new wave of strict voter-identification laws that emerged with peculiar spontaneity in certain "swing" states with Republican-dominated state legislatures. After a federal district court in Georgia struck down that state's new voter-ID law as an unlawful poll tax (*Common Cause Georgia v. Billings* 2005), and the Missouri Supreme Court invalidated that state's similar law under Art. I, §25 of that state's constitution (prohibiting the legislature from "interfer[ing] to prevent the free exercise of the right of suffrage" [*Weinschenk v. State* 2005]), Indiana's law suddenly became the most onerous in the nation—the only voter-ID law that did not provide an affidavit bypass or other alternative, less burdensome means for a voter to self-identify.

The decision to challenge the law facially on federal constitutional grounds before any election had been held under it was thus an easy one. Given the complete lack of evidence before the Indiana legislature of in-person impersonation fraud; the gratuitous burdens the law imposed on the poor, elderly, and disabled; and the plethora of Warren Court precedents that accorded the right to vote the highest degree of constitutional protections and strictly scrutinized laws most laws regulating its exercise, not to mention the lack of deference the Court's conservative wing had recently accorded to many other election regulations such as those regulating campaign finance (*McConnell v. FEC* 2003), the law looked to be low-hanging fruit to many constitutional litigators. Further, since the law by its very nature would be enforced by poll workers appointed by party bosses, and because it contained many ambiguities (it failed to define key terms such as *indigency* and *conform*), there appeared to be a substantial probability under Warren Court-era precedents, as well the Court's broad pronouncements in *Bush v. Gore* (2000) ("The right to vote is protected in more than the initial allocation of the franchise . . . Having once granted the right to vote on equal terms, the State may not, by later arbitrary or disparate treatment, value one person's vote over that of another"), that the law would be found unconstitutional. Further, by exempting mail-in absentee voters, the law also lacked the usually requisite uniformity. The law's new burdens would also fall most harshly on Indiana voters without driver's licenses who intuitively occupied the lowest rung on the economic ladder, thereby implicating cases such as *Bullock v. Carter* (1972), which had struck down election laws targeting citizens based on their economic status. These and other venerable election law decisions, including *Dunn v. Blumstein* (1972) (striking down Tennessee's lengthy residence requirement for voting), seemed to predestine the law for strict scrutiny and hence likely constitutionally mandated oblivion.

What could not have been fully anticipated at the time were subsequent developments, both in the legal and political arenas, which dramatically altered the landscape in ways that foreshadowed the Supreme Court's ultimate decision. The first was Justice O'Connor's unexpected announcement on July 1, 2005, of her retirement from the Court. Justice O'Connor's concurring opinion in *Clingman v. Beaver* (2005) ("the State is itself 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") had signaled that her vote could be the key to striking down the law in light of its partisan origins. Next was the release of the Carter-Baker Commission report in September 2005 recommending that beginning in 2010 Congress enact a national voter-ID law, a concept unexpectedly endorsed by prominent Democrats such as former president Jimmy Carter, former Indiana congressman Lee Hamilton, and Atlanta civil rights leader Andrew Young. Supreme Court decisions handed in *after* the Indiana cases were filed also played a major role in its April 2008 decision. The first was the surprise *per curiam* opinion issued by the Supreme Court in October 2006 in *Purcell v. Gonzalez*, a decision that sent back to the lower courts a constitutional challenge to Arizona's restrictive voter-ID law, a development that caught nearly everyone off guard because the decision issued without the benefit of full briefing. In *Purcell* the Court for the first time appeared to elevate to a level of constitutional equivalence with vote dilution caused by malapportionment the apprehension allegedly felt by some voters that voter fraud would lead to a "dilution" of their votes, a proposition based not on any evidence but apparently on the collective intuition of the justices. Justice Stevens in his concurrence, perhaps foreshadowing his views in *Crawford*, expressed concern with the fact that the sparse factual record in the courts below left unresolved "the scope of the disenfranchisement" that the challenged identification requirements would produce, as well as the "prevalence and character of the fraudulent practices that allegedly justify those requirements." The other unforeseeable legal development, but one foreshadowed a year earlier in the Court's late-term abortion case *Gonzales v. Carhart*, was the Court's decision in *Washington State Grange v. Washington State Republican Party* (2008), issued a few weeks before *Crawford*, in which it signaled it would begin to apply its significantly more restrictive approach regarding facial challenges also to election laws, even those challenged under the First Amendment.

When *Crawford* was filed, there was no reason to suspect that the federal courts would not require the state to at *least* prove the type of fraud (impersonation fraud) the law was designed to address. In fact, Judge Barker's reported decisions gave reason to predict that she would impose a significant proof burden on the state in light of the First Amendment protections afforded the right to vote. For instance, 15 years earlier in *Paul v. Indiana Election Board* (1990), she had struck down Indiana's ban on write-in voting, finding that the right to vote enjoyed broad first amendment protection ("the right to vote for the candidate of one's choice, far from being a penumbral right, lies at the heart of the first amendment's protection").

The *Rokita* and *Crawford* plaintiffs filed their respective summary judgment motions and supporting briefs in October 2005. Supporting those motions were numerous affidavits from heads of various social services agencies and from ordinary citizens detailing the extremely burdensome process involved in obtaining a "free" photo ID. Included in those

https://doi.org/10.1017/S1049096509090258 Published online by Cambridge University Press

evidentiary materials were affidavits from elderly, mostly African American, voters who had been unable to obtain their original birth certificates because they had not been born in a hospital. An extraordinary affidavit was submitted by 78-year-old Theresa Clemente, a non-driving Bostonian who had recently moved to Fort Wayne and had made four trips to the bureau of motor vehicles (BMV) without obtaining a photo ID.

The evidentiary record in the district court also included two affidavits from expert witnesses. The first expert report was submitted by Marjorie Hershey, a political scientist from Indiana University. In her report "Raising the Cost of Voting: What Will Be the Effects of Indiana's New Photo ID Law on Voter Turnout?" (2005), Hershey argued that a review of voting literature suggested that the law would discourage a significant number of registered voters from voting because of its cumbersome requirements, and that the impact would be a disparate one in that most of those persons would come from the lower-economic strata, including many minority, elderly, homeless, and disabled voters. One of the enduring puzzles of this case is why her work, which was largely unchallenged by the state, was mentioned by the district court only in passing, but uncritically, and ignored by both the Seventh Circuit and the Supreme Court. The other expert affidavit was submitted by Kimball W. Brace, the president of Election Data Services, Inc. Brace was no neophyte when it came to analyzing demographic data. His assigned task was to perform a statistical analysis of BMV and voter databases in order to make an informed estimate as to the number of voters without the newly required photo ID in Marion County. Judge Barker's strict scrutiny of Brace's findings in her April 2006 summary judgment ruling in favor of the state stands in stark contrast to the unquestioning deference she gave to the state's asserted interests for enacting the law even in the face of the state's acknowledgement that it had no evidence of impersonation voter fraud ever occurring in the state's history.

Using language more befitting an advocate's than that of a dispassionate federal judge, the district court judge in *IDP v. Rokita* (2006) belittled plaintiffs' argument that the law should be judged against the mosaic of Indiana election laws, a position the U.S. Supreme Court over the years, and Justice O'Connor only a few months earlier in her *Clingman* concurrence (observing that election laws must be evaluated in the context of the overall scheme of regulations), had repeatedly endorsed. The district judge's repudiation of Brace's conclusions and methodology would later receive prominent mention in Justice Stevens' lead opinion in *Crawford*. The district court judge's near total rejection of Brace's report (*IDP v. Rokita* 2006, at 803-09) must be contrasted with the Court's unwillingness to accord any legal or evidentiary significance to the state's own failure to offer even a scintilla of evidence that the law was either necessary to insure the integrity of elections or that it would deter a greater number of fraudulent votes than the number of legitimate voters it would discourage from voting.

The Seventh Circuit panel's 2–1 decision to affirm the district court (472 F.3d 949), was handed down in January 2007. After filing for *en banc* (full court) review and attracting a powerful dissenting opinion from Judge Diane Wood joined by three of her colleagues (484 F.3d 436, 437) plaintiffs faced a decision whether to file for a writ of *certiorari*. After consulting prominent election-law scholars and seasoned litigators from around the nation, the decision was made to seek Supreme Court review. Defying the expectations of some veteran Supreme Court watchers (for example, the case didn't make SCOTUSblog's "petitions to watch" list), the Court announced on September 29, 2007, that it would hear the case.

*Post-*Crawford*, the inevitable conclusion is that the right of suffrage now enjoys significantly less constitutional protection than the right to keep loaded and deadly weapons in one's home.*

The Court announced its sharply divided and splintered (3–3–2–1) opinion on April 28, 2008. Justice Stevens authored the primary plurality opinion, joined in only by Justice Kennedy and the chief justice. Stopping well short of completely validating the law's constitutionality, Stevens held that the lower courts had "correctly concluded that the evidence in the record in not sufficient to support a facial attack on the validity of the entire statute" (128 S.Ct. at 1615). Stevens disposed of the argument that the law imposed an impermissible burden by redefining *Harper* as a case that had involved "invidious" discrimination, but one that had approved "evenhanded restrictions that protect the reliability of the electoral process itself," even those restrictions that prevented a "significant number" of voters from participating in elections in a meaningful manner (128 S.Ct at 1616). Although recognizing that any state interests justifying such restrictions must be "sufficiently weighty," Stevens concluded that the requirements imposed on certain first-time voters who had registered to vote by mail by the Help America Vote Act (HAVA), a 2002 federal law that set national ID standards, demonstrated that Congress apparently believed photo ID to be an "effective method of establishing a voter's qualifications to vote," a conclusion he observed was concurred in by the Carter-Baker Commission (128 S.Ct at 1618). After acknowledging that one of the primary documents needed to obtain a photo ID in Indiana, a birth certificate, costs up to $12, Justice Stevens opined that "making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote" (128 S.Ct at 1618). Despite acknowledging the reality that "partisan considerations may have played a significant role in the decision to enact" the law, and that the burdens imposed may be

https://doi.org/10.1017/S1049096509090258 Published online by Cambridge University Press

unjustified as to some voters, he held that even these facts were not sufficient reasons to strike down the law given the newly announced heavy burden of persuasion in a pre-election facial challenge, invoking the Court's recent opinion in *Washington State Grange* case as well its 2006 decision in *Ayotte v. Planned Parenthood of Northern New Eng.* (128 S.Ct at 1621-22). Also casting a shadow on the Court's decision, though unmentioned in the Stevens' opinion itself, was the Court's new reluctance, first expressed in *Purcell v. Gonzalez*, to involve itself in pre-election challenges to voting rules. The Stevens plurality did not reject a sliding scale balancing test first set out by the Court in 1991 in *Burdick*, but finessed it by concluding that the burdens imposed on voters were largely irrelevant since Indiana had come up with "neutral" policy or election administration reasons to justify it, even though partisan motives may also have animated those Republican legislators who had engineered its passage. (Justice Scalia, joined by Justices Thomas and Alito, issued a concurring opinion, stating that they found the law to be constitutional in any and all circumstances.)

In dissent Justice David Souter, joined by Justice Ginsburg (Justice Breyer authored a brief separate dissenting opinion), was highly critical of the majority's "cursory examination" of the state's asserted interests in support of the law (128 S.Ct at 1634). Souter viewed the burdens imposed by the law, which he regarded as non-trivial, to require a much more rigorous assessment of the state's interests particularly in light of his observation that the law "targets the poor and weak" (128 S.Ct at 1643). Souter concluded that Indiana could not so burden its citizens' right "merely by invoking abstract interests" even if compelling, but instead must make a "particular factual showing that threats to its interests outweigh the particular impediments it has imposed" (128 S.Ct at 1627).

Two months after *Crawford* was issued, the Court handed down *District of Columbia v. Heller* (2008). In *Heller* the Court, invalidating under the Second Amendment the collective judgment of the citizens of the district that keeping loaded and potentially dangerous handguns at home posed a substantial threat to the public's health and safety, in stark contrast to *Crawford*, displayed little deference to legislative prerogatives.

The juxtaposition of *Crawford* and *Heller* reveals a startling truth—that the "fundamental" right to vote is no longer regarded by the Court as quite so fundamental after all, and that the Court is willing to tolerate burdens and restrictions imposed by state and local legislators on a First Amendment-protected activity, voting, but it would no longer permit on the right of citizens, at least those in the District of Columbia, to possess guns. In other words, in striking the balance between state regulation and constitutionally protected interests, the Court is now significantly more likely to defer to legislative judgments in the case of voting, an activity that is essential to the preservation of our form of government, than it is in the case of laws regulating the sale and use of inherently dangerous devices. Burdens on the right to vote such as the two-trip requirement imposed on poor persons glossed over in *Crawford* were viewed in a far different and much more critical light than were the relatively slight burdens on gun ownership disapproved in *Heller*.

Post-*Crawford*, the inevitable conclusion is that the right of suffrage now enjoys significantly less constitutional protection than the right to keep loaded and deadly weapons in one's home. As a result of the Supreme Court's unwillingness to scrutinize Indiana's voter-ID law under the First Amendment as carefully as it has campaign-finance laws and gun laws, the federal courts can no longer safely be counted upon to protect and preserve voting rights. It may be up to Congress to correct this judicial dissonance by crafting legislation that restores the right to vote to its proper place in the hierarchy of constitutionally protected freedoms. One possible approach for Congress to accomplish this goal with a minimum of controversy would be to amend HAVA with a strong preemption clause that explicitly prohibits states from enacting voter-ID laws more restrictive than those set forth in HAVA, the identification of which currently apply only to certain first-time voters who register to vote by mail. The HAVA-imposed identification requirements allow a far broader range of more readily available forms of identification, such as a current utility bill, bank statement, government or private-sector paycheck, or other government document showing the voter's name and address .

By keeping the door open to future "as applied" challenges, the Court's deeply divided opinion in *Crawford* was very likely not the judiciary's final word. The law is currently under challenge again, this time by the Indiana League of Women Voters in Marion County Superior Court (Cause No. 49D13-0806-PL-027627), in which the league contends that the law imposes a new "qualification" for voting that is not expressly authorized by Art. II, Sec. 2 of the Indiana constitution and that it also violates Art. I, Sec.23 by granting certain voters—those who cast an absentee ballot by mail—special privileges (exemption from the photo-ID requirements imposed upon voters who vote in-person) not granted to other voters, notwithstanding that *all* of the documented voter fraud in Indiana has occurred in connection with mail-in absentee voting. Future as-applied challenges under the federal constitution are also likely following the November 2008 elections as otherwise legitimate and constitutionally qualified voters are denied an opportunity to participate in the electoral process as a result of the law's harsh and exclusionary effects.

The 36-year period between Warren Court voting cases such as *Dunn v. Blumstein* and *Crawford* has witnessed major political changes in this country that have tilted the political center of gravity far to the right, and in turn dramatically altered the makeup of the Supreme Court and transformed it from one that could be consistently counted on to protect voting rights from encroachments by transient political majorities to a Court eager to place its imprimatur on exclusionary and unnecessary electoral laws rationalized as fraud-prevention measures. The right to vote now enjoys less constitutional protection than the right to an abortion and the right to bear arms. With the Court having drifted so far away from its previous role the ultimate protector of the right to vote, it will now be up to state supreme courts, and Congress, to find new and creative ways to preserve this right so vital to a vibrant and well-functioning democracy. ■

https://doi.org/10.1017/S1049096509090258 Published online by Cambridge University Press

REFERENCES

Ayotte v. Planned Parenthood of Northern New Eng. 2006. 546 U.S. 320.

Bullock v. Carter. 1972. 405 U.S. 134.

Burdick v. Takushi. 1991. 504 U.S. 428.

Bush v. Gore. 2000. 531 U.S. 98.

Clingman v. Beaver. 2005. 544 U.S. 481.

Common Cause Georgia v. Billings. 2005. 406 F.Supp.2d 1326 (N.D. Ga.).

Crawford v. Marion County Election Bd. 2007. 472 F.3d 949. 7th Cir.

Davidson, Chandler, Tanya Dunlap, Gale Kenny, and Benjamin Wise. 2004. "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression—Or Both?" A Report to the Center for Voting Rights and Protection, September.

District of Columbia v. Heller. 2008. 128 S. Ct. 2783.

Dunn v. Blumstein. 1972. 405 U.S. 330.

Gonzales v. Carhart. 2007. 550 U.S. 124.

Harman v. Forssenius. 1965. 380 U.S. 528.

Harper v. Virginia Bd. of Elections. 1966. 383 U.S. 663.

Hershey, Marjorie. 2005. "Raising the Costs of Voting: What Will Be the Effects of Indiana's New Voter ID Law?" Unpublished manuscript.

IDP v. Rokita. 2006. 458 F.Supp.2d 775 (S.D. Ind.).

Indiana League of Women Voters v. Rokita. Marion County Superior Court. Cause No: 49D13-0806-PL-027627. Case pending.

Lerman v. Board of Elections. 2000. 232 F.3d 135 (2nd Cir.).

McConnell v. FEC. 2003. 540 U.S. 93.

Morris v. Powell. 1890. 125 Ind. 281, 25 N.E. 221.

Paul v. Indiana Election Board. 1990. 743 F.Supp. 616 (S.D. Ind.).

Purcell v. Gonzalez. 2006. 549 U.S. 1.

U.S. v. Sabri. 2004. 541 U.S. 600.

Washington State Grange v. Washington State Republican Party. 2008. 128 S. Ct. 1184.

Weinschenk v. State. 2005. 203 S.W.3d 201 (Mo.).

https://doi.org/10.1017/S1049096509090258 Published online by Cambridge University Press