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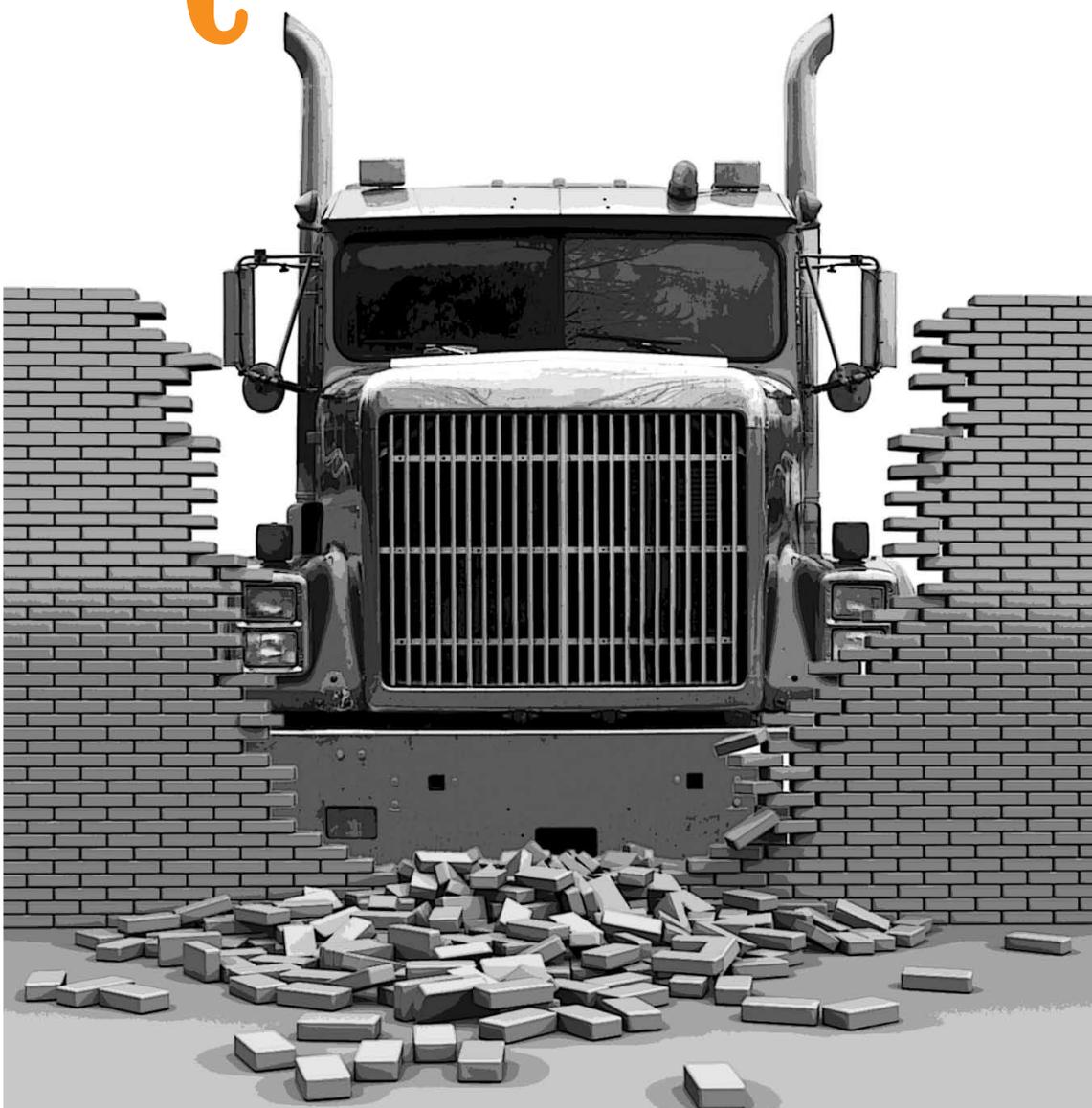
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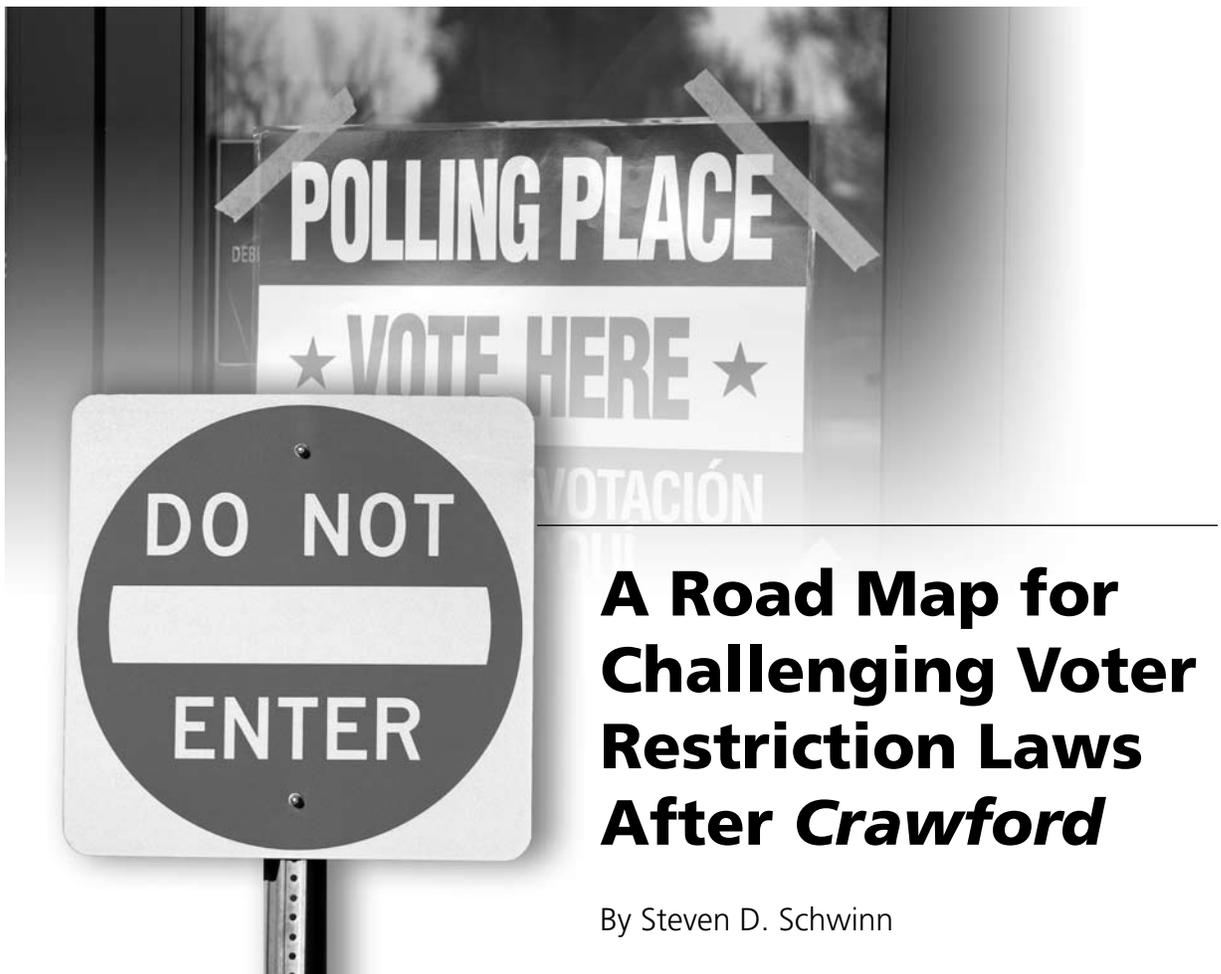


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A Road Map for Challenging Voter Restriction Laws After *Crawford*

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A highly fractured U.S. Supreme Court last Term ruled that Indiana's voter-identification law, commonly known as the "Voter ID Law," did not run afoul of the equal protection clause of the Fourteenth Amendment.¹ The Court in *Crawford v. Marion County Election Board* rejected a facial challenge to the law, which requires all Indiana voters to present valid photo-identification at the polls in order to vote.² The law quite clearly places a special burden on those Indianans who cannot (or who can only with great difficulty) obtain valid photo-identification, most notably the poor, elderly, and immobile.³ Indiana's voter-identification requirement looks eerily similar to the infamous poll tax, categorically struck down by the Court in *Harper v. Virginia Board of Elections* as an unconstitutional impingement on the fundamental right to vote.⁴

But the six justices who voted to uphold the law were not convinced. They claimed that the plaintiffs failed to make their case; the plaintiffs failed to present concrete evidence that the law saddled voters without voter identification with burdens such as costs, hassles, or outright denials; such evidence would outweigh the state interest in reducing voter fraud.⁵ In part, they were right. The plaintiffs' facial challenge was quite ambitious, and the record should have been stronger.

¹*Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008). Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, authored the opinion of the judgment of the Court. Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment. Justice Souter, joined by Justice Ginsberg, dissented. Justice Breyer wrote a dissenting opinion. Indiana's voter-identification law is Senate Enrolled Act No. 483, Pub. L. No. 109-2005.

²Senate Enrolled Act No. 483, Pub. L. No. 109-2005.

³*Id.*

⁴*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); U.S. CONST. amend. XXIV.

⁵*Crawford*, 128 S. Ct. at 1622-23.

The six justices also failed to recognize what anyone who works with the poor, elderly, or immobile knows: complying with seemingly simple, common, or even perfunctory requirements, such as getting a photo-identification document, turns out to be quite difficult, even impossible, for those who lack the requisite resources or capabilities. This failure of understanding, more than anything else, led the Court to uphold the Indiana law.

And the six justices gave short shrift to other problems with the law. For example, the Indiana legislature enacted the law in a politically charged environment with highly partisan motives. The state's asserted interests in enacting the law were largely, if not entirely, spurious. The whole affair was reminiscent not only of the poll tax but also of a more recent attempt to estrange categorically an entire class of individuals from the political process. Colorado in 1992 amended its constitution to prohibit antidiscrimination laws that protected gays and lesbians; that attempt led to *Romer v. Evans*.⁶

There is much to criticize in the *Crawford* opinions. We are beginning to see the fallout from *Crawford* in the several cases decided in its wake and in pending cases.⁷ The *Crawford* opinions, despite their faults, set out a clear road map for challenging any “evenhanded restrictions” on the right to vote—those requirements that apply to all voters and purportedly “protect the integrity and reliability of the electoral process itself.”⁸ Here I seek to plot that map.

I start by giving a bit of background on the Indiana law and describing the law's

operation. Next I mine two key opinions in *Crawford* for clues to a successful challenge of voter-identification laws. Then I argue that *Crawford* gives us three imperatives for successful challenges, and I offer some thoughts on each.

Indiana's Voter-Identification Law

Indiana's Voter ID Law requires Indianans to present a valid, government-issued photo-identification document—most commonly a driver's license, a state photo-identification card, or a passport—prior to voting.⁹ Supporters of the law claimed that it would modernize the state's election system, prevent voter fraud, and safeguard voter confidence in elections.¹⁰ That the law was passed by both the Indiana House and Senate along strict party lines suggests, however, that Republicans sought political advantage in the measure: Republicans (and Democrats) knew that the law would especially burden populations that lean Democratic.¹¹

This it did. Poor and elderly Indianans, who as a group are likely to vote Democratic, are particularly burdened by the requirement to obtain an often costly “primary” document, such as a birth certificate, to support their application for photo-identification.¹² Moreover, these less mobile Indianans are particularly burdened by the need to travel to apply for photo-identification.

To address these problems, the Voter ID Law contains several exceptions to the photo-identification requirement and its accompanying burdens. For example, the photo-identification requirement does

⁶*Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

⁷Some of these cases are cited below. For a full list of pending cases, see Moritz College of Law, Ohio State University, ElectionLaw @ Moritz, <http://moritzlaw.osu.edu/electionlaw/>, which tracks election-related litigation.

⁸*Crawford*, 128 S. Ct. at 1616 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (2008)).

⁹IND. CODE ANN. § 3-5-2-40.5 (West 2006).

¹⁰*Crawford*, 128 S. Ct. at 1616–20.

¹¹All fifty-two Republican House members voted for the bill. Forty-five Democrats voted against it, and three Democrats were excused from voting (3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF INDIANA Roll Call No. 259 (March 21, 2005)). All thirty-three Republican Senators voted for the bill; all seventeen Democratic Senators voted against it (3 JOURNAL OF THE SENATE OF INDIANA Roll Call No. 417 (April 12, 2005)).

¹²140 IND. ADMIN. CODE 7-4-3 (2008).

not apply to absentee ballots submitted by mail, and it does not apply to Indians living in and voting at state-licensed facilities such as nursing homes.¹³ Indiana provides free photo-identification to qualified voters who can establish their residence and identity.¹⁴ And any Indian without photo-identification on election day may vote a provisional ballot, which is counted if the voter then presents a valid identification or executes an affidavit at the county clerk's office within ten days after the election.¹⁵

But these exceptions create their own problems. Absentee ballots are far more likely to be discounted in the final tally of votes; “free” photo-identification cards still require a costly “primary” document, travel, and proof of residency (a particular challenge for the homeless); and a provisional ballot requires an extra trip to the county clerk's office soon after the election and is likely to be discounted anyway. Even with the exceptions, the law creates significant hurdles for certain Indians. In response to these problems, the Indiana Democratic Party and the Marion County Democratic Party filed suit, lodging a facial challenge to the law as an infringement upon the fundamental right to vote.

The Court's Ruling and Opinions in *Crawford*

The Supreme Court upheld the Voter ID Law in a 3-3-2-1 split decision. Six justices agreed to uphold the Voter ID Law, but for different reasons; five justices agreed upon the reasons but disagreed upon the application; and three justices agreed that the Voter ID Law was unconstitutional but disagreed slightly as to why. The lead opinion was written by Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy. Justice

Scalia, joined by Justices Thomas and Alito, wrote a concurring opinion. Justice Souter, joined by Justice Ginsberg, wrote a dissent as did Justice Breyer.

No opinion is controlling, but certain principles emerge from this morass:

- The right to vote is still fundamental under *Harper v. Virginia Board of Elections*, and any restriction upon the right to vote that “invidiously discriminates—that is, a restriction irrelevant to the voter's qualifications—is subject to “a stricter standard” of review.¹⁶
- By contrast, “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are subject to a balancing test between the state's justifications for the restrictions and the burden of the restrictions on voters.¹⁷
- This balancing test is flexible: a “sliding-scale balancing analysis,” not a “pre-set level[] of scrutiny.”¹⁸ In other words, evenhanded impingements on the right to vote do not automatically trigger a “deferential, ‘important regulatory interests’ standard.”¹⁹

Because no single opinion controls, I examine the two opinions that set out the analytical framework for challenges to impingements on the right to vote: Justice Stevens's lead opinion and Justice Souter's dissent. Together these two opinions represent a five-justice majority, even as they disagree on the application of that framework to the Indiana Voter ID Law. These opinions teach us how to challenge voter restrictions most effectively.

More to the point, if advocates can overcome the deficiencies identified in Justice Stevens's lead opinion, they will gain a comfortable six-justice majority (in-

¹³IND. CODE ANN. § 3-11-8-25.1(e) (West 2006).

¹⁴*Id.* § 9-24-16-10(b) (West Supp. 2007).

¹⁵*Id.* §§ 3-11.7-5-1, 3-11.7-5-2.5(c), 3-11.7-5-2.5(b) (West 2006).

¹⁶*Crawford*, 128 S. Ct. at 1610, 1615–16.

¹⁷*Id.* at 1615–16; *id.* at 1627–28 (Souter, J., dissenting).

¹⁸*Id.* at 1627–28 (Souter, J., dissenting).

¹⁹*Id.* at 1624–25 (Scalia, J., concurring); *id.* at 1616, n.8 (Stevens, J., lead opinion).

cluding Justice Breyer) for overturning any state law impinging on voting rights.

Justice Stevens began, significantly, his analysis with a reaffirmation of *Harper*'s holding that a restriction on the right to vote, that "invidiously discriminate[s]," that is, one that is irrelevant to the voter's qualifications, is subject to "a stricter standard" of review.²⁰ In *Harper* the Court overturned Virginia's \$1.50 poll tax. The state's justification for the tax—that it promoted civic responsibility by "weeding out those voters who did not care enough about public affairs to pay a small sum" for voting—was rational but "invidious because it was irrelevant to the voter's qualifications."²¹ The tax therefore did not withstand the stricter standard of review. The Court stated 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."²²

Justice Stevens also reaffirmed the holding in *Anderson v. Celebrezze* that "evenhanded restrictions that protect the integrity and the reliability of the electoral process itself" are not invidious and satisfy the standard set forth in *Harper*.²³ But this did not end the inquiry. In examining "evenhanded restrictions" the *Anderson* Court had evaluated the state's interests in its restriction against the burden that the restriction imposed on voters and then made the "hard judgment" as to their constitutionality.²⁴ Justice Stevens wrote that the Court followed this flexible balancing test in *Norman v. Reed* and honed

it in *Burdick v. Takushi*, the case that best states the current test: "[A] court evaluating a constitutional challenge to an election regulation [must] 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.'"²⁵

Because the test derives from *Anderson*, *Norman*, and *Burdick*—cases involving First and Fourteenth Amendment challenges to candidate filing deadlines, rules for new political parties, and restrictions on write-in voting, respectively—the balancing test apparently applies to all election laws imposing "evenhanded restrictions."²⁶

Justice Stevens's application of the balancing test could not be much further from the strict scrutiny employed in *Harper*. For example, where the Court in *Harper* seemed to assume voter harm based on the practical inference that a poll tax would necessarily exclude poor voters, Justice Stevens demanded concrete evidence of voter harm. He found none.²⁷ Justice Stevens recognized that "a somewhat heavier burden may be placed" on the elderly and the poor, but he wrote that the record contained no evidence of any such burden.²⁸ The sparse record was particularly problematic because the plaintiffs lodged a facial challenge, which required them to show that the law was invalid in every conceivable application and to seek relief that would categorically invalidate it.²⁹

²⁰*Id.* at 1610–1615 (Stevens, J., lead opinion).

²¹*Id.* at 1615 (quoting *Harper v. Virginia Board of Elections*, 383 U.S. 663, 685 (1966)).

²²*Id.* (quoting *Harper v. Virginia Board of Elections*, 383 U.S. at 666).

²³*Id.* at 1616 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9 (1983)).

²⁴*Id.*

²⁵*Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. at 789); *Norman v. Reed*, 502 U.S. 279 (1992); *Burdick v. Takushi*, 504 U.S. 428 (1992). Justice Stevens rejected Justice Scalia's "two-pronged" approach, in which evenhanded restrictions are subject only to a "deferential 'important regulatory interests' standard" (*Crawford*, 128 S. Ct. at 1616 n.8 (quoting Scalia, J., concurring, *id.* at 1624–25)).

²⁶*American Association of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1215 (D.N.M. 2008) ("The Supreme Court seems to be using a similar lens to examine the constitutionality of all election laws, whether the challenge is made under the First Amendment or under some other constitutional provision.").

²⁷*Crawford*, 128 S. Ct. at 1622.

²⁸*Id.*

²⁹*Id.* at 1623 (citing *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008)).

And, unlike the Court in *Harper*, Justice Stevens granted extraordinary deference—akin to the lowest form of rational basis review—to the state’s articulated interests in support of the law. According to Justice Stevens, the state’s interest in modernizing its electoral system was justified merely because the Voter ID Law was consistent with, even though not mandated by, the National Voter Registration Act of 1993, the Help America Vote Act, and the Commission on Federal Election Reform report.³⁰ The state’s interest in preventing voter fraud was justified by “flagrant examples of such fraud in other parts of the country ... throughout this Nation’s history,” even though the state could not point to a single case of in-person voter fraud in Indiana’s history.³¹ And the state’s interest in safeguarding voter confidence was justified merely on the intuition that “public confidence in the integrity of the electoral process ... encourages citizen participation in the democratic process.”³²

Thus the Court’s balancing test in *Crawford* is a far cry from the Court’s strict scrutiny analysis in *Harper*. The Court in *Harper* categorically overturned the poll tax; the Court cited no concrete harms to any specific plaintiffs and entirely glossed over the state’s asserted interest in “weeding out those voters who did not care enough about public affairs to pay a small sum.”³³ The Court certainly did not credit the state’s interest by balancing it against the plaintiffs’ harm; the harm alone was enough to invalidate it.³⁴

Strict scrutiny could have applied to the Voter ID Law just as it applied in *Harper*.³⁵ Certainly there is nothing on the face of

either the poll tax or the Voter ID Law that compels different treatment. Both laws are thinly veiled efforts to discriminate against and to exclude a certain class of voters, and they both were enacted for spurious reasons related to the integrity of the voting process. Indeed, the Voter ID Law operates as a poll tax merely one step removed from the actual polls. But while the *Harper* Court, in presuming the voter harm and discounting the legislative purpose, ruled the poll tax invidious and subjected it to strict scrutiny, the *Crawford* Court turned this approach on its head. It first assumed (without analysis) that the Voter ID Law was a noninvidious “evenhanded restriction”; then it discounted the voter harm and assumed a legitimate legislative purpose. The *Crawford* Court in analyzing the Voter ID Law’s constitutionality gave threshold deference to the legislature whereas the *Harper* Court met any law that impeded the right to vote with threshold skepticism. Indeed, under the *Crawford* approach, a clever legislature today may easily enact nearly any restriction simply by labeling it “evenhanded” and claiming that it is loosely related to the integrity of the election process. In this sense the lead opinion is a significant step back from the *Harper* standard.

But in another sense the lead opinion simply reflects the flaws of the plaintiffs’ facial challenge. According to Justice Stevens, the record did not state the number of registered voters who lacked photo-identification, it did not supply any concrete evidence of the burden on voters without identification, and it said “virtually nothing about the difficulties

³⁰*Id.* at 1617–18; National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.* (Supp. V 2006); Help America Vote Act, 43 U.S.C. §§ 15301–15545 (Supp. V 2006); BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM § 2.5 (2005), http://www1.american.edu/ia/cfer/report/full_report.pdf.

³¹*Crawford*, 128 S. Ct. at 1618–20.

³²*Id.* at 1620.

³³*Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966); see also *Dunn v. Blumstein*, 405 U.S. 330 (1972) (reaffirming the fundamental right to vote and—using strict scrutiny—overturning a durational residency requirement for voters).

³⁴*Harper*, 383 U.S. at 666.

³⁵See Brief for Professor Erwin Chemerinsky as Amicus Curiae Supporting Neither Party [Applicable Legal Standard], *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008) (No. 07-21) (arguing that the applicable legal standard in *Crawford* should be strict scrutiny, not the sliding-scale balancing test of *Burdick*).

faced by either indigent voters or voters with religious objections to being photographed.”³⁶ Justice Stevens’s opinion, through its reaffirmation of *Harper* and *Burdick*, signals that Chief Justice Roberts and Justices Stevens and Kennedy would have considered employing a higher level of scrutiny if the plaintiffs had presented better evidence of harm. Moreover, the lead opinion turned in large measure on the plaintiffs having brought a facial challenge during the same Term that the Court set a new high bar for facial challenges.³⁷ In this sense the lead opinion may force plaintiffs to tailor their case more carefully but also holds open the possibility of higher scrutiny.

Justice Souter, joined by Justice Ginsberg, also used the *Burdick* standard but disagreed with the application.³⁸ Justice Souter scrutinized the state’s interests at a higher level because he found that plaintiffs had suffered greater harms than those identified in the lead opinion. Justice Souter considered the obvious practical harms to the plaintiffs—even those harms not plainly in the record. He carefully scoured publicly available material outside the record and concluded that travel costs, document costs, and even opportunity costs of compliance with the photo-identification requirement were significant for the poor and elderly.³⁹ He also focused on the inadequacies of provisional voting—the law’s primary escape—and concluded that it, too, resulted in significant harms to the poor.⁴⁰ Justice Souter’s opinion was marked by a practical consideration of the harms from the perspective of the poor and elderly—a perspective that is obvious to anyone fa-

miliar with these populations but eluded the lead justices.

Based on these harms, Justice Souter applied greater scrutiny, or what he called a “more rigorous assessment,” to the state’s interests under the *Burdick* balancing test.⁴¹ He regarded the state’s asserted interest of “election modernization” as a mere “slogan.”⁴² As to voter fraud, he focused on the lack of evidence of in-person voter fraud in Indiana, the other protections against fraud on Indiana’s books, and the Voter ID Law’s inability to address more serious fraud.⁴³ Justice Souter argued that the state’s assertions that the law would clean up the voting rolls and safeguard voter confidence “actually weaken[ed] the State’s case”; the state itself created the bloated voting rolls that it only later used as justification for the Voter ID Law, and there was simply no evidence that voters lacked confidence in Indiana’s electoral system.⁴⁴

The *Crawford* Imperatives

Between Justice Stevens’s lead opinion and Justice Souter’s dissenting opinion, five justices agree that the strict scrutiny test in *Harper* applies to invidious restrictions on the right to vote. The same five justices agree that the sliding-scale, flexible balancing test in *Anderson* and *Burdick* applies to evenhanded restrictions designed to protect the integrity of the electoral process. After adding Justice Breyer, who would have overturned the law under a more rigid balancing test, a plaintiff who can cure the deficiencies laid out in the lead opinion

³⁶*Crawford*, 128 S. Ct. at 1621–22.

³⁷*Washington State Grange*, 128 S. Ct. 1184.

³⁸*Crawford*, 128 S. Ct. at 1627–30 (Souter, J., dissenting) (“The lead opinion does not disavow these basic principles.... But I think it does not insist enough on the hard facts that our standard of review demands.”).

³⁹*Id.* at 1629–35.

⁴⁰*Id.* at 1632 (In the 2007 municipal elections in Marion County, “thirty-four provisional ballots were cast, but only two provisional voters made it to the County Clerk’s Office within the 10 days.”).

⁴¹*Id.* at 1629–35.

⁴²*Id.* at 1636–37.

⁴³*Id.* at 1627–31.

⁴⁴*Id.* at 1626–28.

will find a solid six-justice majority in favor of overturning voter-identification requirements and other evenhanded restrictions on elections. But plaintiffs must tailor their challenges in a particular way to meet certain burdens suggested by the lead opinion. Taking together Justice Stevens's lead opinion and Justice Souter's dissent, successful plaintiffs need to prepare their cases with attention to the following three imperatives.

Plaintiffs must show a concrete harm. The *Crawford* lead opinion requires that plaintiffs allege and show concrete, specific, and identifiable harm to individual voters in order to get heightened scrutiny of evenhanded voter restriction laws. As discussed above, the paucity of such evidence in *Crawford* contributed directly to the lead justices' very deferential level of review. If plaintiffs had produced evidence of a concrete harm, Chief Justice Roberts and Justices Stevens and Kennedy would have scrutinized the state interests more closely. This is evident from Justice Kennedy's dissent (joined by Justice Stevens) in *Burdick*. In *Burdick* Justice Kennedy argued that the petitioner's inability under Hawaiian law to write in his preferred candidate, along with other concrete record evidence of voter dissatisfaction with candidates on the ballot, was sufficient to trigger a more exacting review of Hawaii's ban on write-in voting. Justice Kennedy's analysis of the state's interests in *Burdick* reads remarkably like Justice Souter's analysis in *Crawford*. The only difference: the plaintiff in *Burdick* proffered concrete evidence of the harm.

In challenging evenhanded restrictions, plaintiffs now need to allege and establish concrete harm. In challenging Indiana's Voter ID Law, for example, the

ideal plaintiffs would allege that they were completely denied their right to vote—even with the escape provisions—because their poverty, homelessness, or immobility absolutely prevented them from obtaining the requisite identification and from voting.

A recent case from the Southern District of Indiana—dealing with the same Voter ID Law at issue in *Crawford*—illustrates just what evidence a plaintiff must show in order to overturn a voter restriction law. In *Stewart v. Marion County* plaintiff Robbin Stewart was denied an opportunity to vote at the polls because he did not have an identification card. He filed a provisional ballot, but, he alleged, the ballot was not counted.⁴⁵ Citing *Crawford*, the court rejected his challenge to the Voter ID Law because, despite travel and cost impediments, he ultimately obtained a valid Indiana driver's license.⁴⁶ The case suggests that when a plaintiff ultimately succeeds in voting, no level of cost or burden may be enough to prove harm. Other cases decided in the wake of *Crawford* support this.⁴⁷ Instead plaintiffs need to show that evenhanded restrictions effect an absolute deprivation of the right to vote.

Plaintiffs must show a widespread harm. Showing an absolute deprivation may be quite difficult, especially if a law contains escape provisions, such as those in Indiana's law, and courts are unwilling to credit the practical and very real impediments that voting requirements place on the poor and the elderly. Short of establishing an absolute deprivation, plaintiffs need to allege and establish a widespread harm by showing a concrete and significant burden to a great number of individuals.

⁴⁵*Stewart v. Marion County*, No. 1:2008cv586, 2008 WL 4690984 (S.D. Ind. May 5, 2008).

⁴⁶*Id.* at *3.

⁴⁷*ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (upholding Albuquerque's voter-identification requirement under *Crawford*, where "[p]laintiffs cannot identify a single individual who would not vote, let alone not vote in-person because of the measure"); *Florida State Conference of the NAACP v. Browning*, 569 F. Supp. 2d 1237, 1253 (N.D. Fla. 2008) (upholding Florida's identification requirement for voter registration under *Crawford* where "[p]laintiffs advance no evidence that applicants who are required to validate their [identification] numbers cannot comply with the law"); *American Association of People with Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1230–31 (D.N.M. 2008) (upholding New Mexico's third-party voter registration restrictions under *Crawford* where the plaintiffs failed to establish a severe restriction on the plaintiffs' speech); *Ray v. Texas*, 2008 WL 3457021, at *5–6 (E.D. Tex. 2008) (upholding under *Crawford* a Texas law making it a crime to sign as a witness for more than one early voting ballot application where "[t]he record as a whole is similar to *Crawford* because it does not include concrete evidence that the statute has 'had a chilling effect' on voting by elderly or disabled voters").

Justice Stevens’s opinion in *Crawford* suggests as much in devaluing the plaintiffs’ harm in part because “the evidence in the record does not provide us with the number of registered voters without photo identification....”⁴⁸ The *Stewart* court similarly devalued the plaintiff’s harm for failure to produce any concrete evidence that anyone other than the plaintiff was burdened by the law.⁴⁹ The *Stewart* court suggested that plaintiffs might better meet this evidentiary burden by representing a class of similarly situated individuals rather than pursuing the claim on their own.⁵⁰

Since *Crawford*, some empirical work has started to produce the kind of data necessary to challenge the Indiana law successfully. For example, Prof. Michael Pitts tirelessly surveyed officials in ninety-two Indiana counties to learn what happened to provisional ballots cast in the 2008 primaries. Among his conclusions: nearly 400 voters cast provisional ballots because they lacked photo-identification, and about 80 percent of them were not counted.⁵¹ This kind of study alone may not be sufficient to heighten the scrutiny under the *Burdick* balancing test, but it will certainly help.

Plaintiffs should challenge evenhanded restrictions as applied, not on their face. The lead opinion is quite clear that facial challenges are difficult: “Given the fact that petitioners have advanced a broad attack on the constitutionality of [the Voter ID Law], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.”⁵² Thus, in addition to a devalued harm (and the Court’s resulting deference to the state’s interests), the *Crawford* plaintiffs faced a nearly insur-

mountable obstacle because they challenged the Voter ID Law on its face.

Plaintiffs should not, and need not, go so far as to challenge a law “in all its applications.” For any class of plaintiffs, a successful as-applied challenge will result in the relief that they seek—exemption from the requirements for their clients—even if not the broader policy that they support (although a broad-based as-applied challenge could well result in significant reform). An as-applied strategy may be merely incremental, but it is far more likely to be successful.

Because these imperatives satisfy the *Crawford* plaintiffs’ deficiencies (as identified by the lead opinion), adopting them will likely result in a higher level of scrutiny of state interests. And where state interests are like those at issue in *Crawford*—as they are in so many cases challenging voter-identification laws and other evenhanded restrictions—courts should overturn the restrictions in an analysis much like Justice Souter’s.

Appellants in at least one pending case challenging a state voter-identification law, *Young v. Billups*, now before the Eleventh Circuit, integrated these imperatives into their argument. (The Georgia law at issue and the state interests are similar to those in *Crawford*.) The *Young* appellants presented a more concrete record than that in *Crawford* in their as-applied challenge of the Georgia requirement by showing that, including the named plaintiffs, “hundreds of thousands of voters who are already registered do not have a Georgia driver’s license” and that these individuals would need to make a special trip to the county registrar’s office in order to reregister to vote.⁵³ And, much like

⁴⁸*Crawford*, 128 S. Ct. at 1622.

⁴⁹*Stewart*, 2008 WL 4690984, at *3 (“Plaintiff represents himself only, and not the rights of other voters.”).

⁵⁰*Id.* at *2 (“As an initial matter, the Court notes that Plaintiff does not represent a class of similarly situated Indiana voters such that he can rely on others’ voting experiences in support of his Motion.”).

⁵¹Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Ballots*, JOURNAL OF LAW AND POLITICS (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287735.

⁵²*Crawford*, 128 S. Ct. at 1621–22.

⁵³Brief of Appellants at 35, 41, *Young v. Billups*, No. 07-14664 (11th Cir. May 28, 2008).

Justice Souter in *Crawford*, appellants in *Young* argued that the court should use a higher level of scrutiny when analyzing the state's interests than that used by Justice Stevens.⁵⁴ If the appellants are successful in showing a concrete injury in their as-applied challenge, the Eleventh Circuit, too, should adopt this approach and overturn the law.



The *Crawford* ruling is quite disappointing. It overturned a law that obviously and significantly impinged on the right to vote of the poor, the elderly, the immobile, and anyone else who has great difficulties in obtaining photo-identification.

For these populations, the Indiana voter-identification law may be every bit a bar to voting that the poll tax was in an earlier day, yet a majority of justices failed to see this. Moreover, a majority credited quite dubious state interests and utterly ignored (for constitutional purposes) the sharp partisan purpose behind the law.

But, for all its faults, the *Crawford* opinions offer hope. The lead opinion discusses *Harper* approvingly and reaffirms the fundamental right to vote. And the lead opinion and Justice Souter's dissent give us a clear road map for how to win these cases.

COMMENTS?

We invite you to fill out the comment form at <http://tinyurl.com/MayJuneSurvey>. Thank you.

—The Editors

⁵⁴*Id.* at 52–59.

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