

## DEBATE

### VOTER ID: WHAT'S AT STAKE?

As Lyle Denniston wrote earlier this fall on SCOTUSblog.com, “[f]ew cases the [Supreme] Court might have agreed to hear w[ill] be likely to have as much real-world political impact as the newly granted case[] of *Crawford v. Marion County Election Board* . . . , involving an Indiana voting requirement law that is said to be among the most demanding in the nation.” (*Analysis: An Election Issue for an Election Year*, Sept. 25, 2007, <http://www.scotusblog.com/wp/uncategorized/analysis-an-election-issue-for-an-election-year/>). Before the Justices themselves have an opportunity to delve into the case, Professors Bradley A. Smith, of Capital University Law School, and Edward B. Foley, of The Ohio State University, debate the major legal, political, and philosophical issues behind the controversial matter of voter ID.

Professor Smith finds no reason for the Court to tinker with Indiana’s voter ID laws, and leads off the debate by invoking the “broken windows” theory of Kelling and Wilson. He intuits that “to most Americans . . . a requirement that a voter demonstrate that he is who he claims to be is considered a most minimal intrusion.” He continues, even if it is true “that a voter ID law prevents very little fraud in a direct sense, . . . like fixing broken windows and cleaning up litter and graffiti, such a basic procedure may prevent fraud from growing. It sends a message that voting is serious . . . .”

Professor Foley agrees that voting is a serious matter—so serious, in fact, that “[e]qual voting rights are a prerequisite to democratic fairness not only for their instrumental value . . . but also . . . for the additional symbolic . . . reason that they signify the equality of citizenship upon which democratic fairness depends.” Professor Foley sees Indiana’s law as unnecessarily draconian and argues that “a fair effort to introduce modernity and rationality to th[e] authentication process would use a form of public-spirited . . . reasoning that attempted to consider the interests of all citizens equally, rather than to select a more onerous than necessary method of authentication because it would promote a partisan advantage.”

## OPENING STATEMENT

*Broken Windows and Voting Rights*Bradley A. Smith<sup>†</sup>

The Supreme Court has agreed to hear a case on voter ID laws this term, *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007). Here, plaintiffs, including the Indiana Democratic Party, challenge the constitutionality of Indiana's law, which, with generous exceptions for seniors living in assisted living facilities, absentee voters, and indigent voters unable to obtain ID without payment of a fee, requires voters to produce a government-issued photo ID in order to vote. It is, at first glance, not at all apparent that there is anything meaningful at stake in this case, despite a lot of hot rhetoric from partisans both left and right. In fact, the stakes are high, but not in the way most people seem to think.

The government claims that voter photo ID laws are needed to prevent fraud at the polling place, but the evidence that such fraud is common is almost entirely anecdotal and not especially compelling. The majority decision at the Court of Appeals, written by the eminent and empirically grounded Judge Richard Posner, notes that voting fraud is already a crime, subject to prison time and fines. Further, the State conceded that, "as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter," and, "there are no reports of such fraud in [Indiana]." *Id.* at 953. The Court of Appeals did suggest reasons why this might be so, other than the possibility that such fraud does not occur frequently, but certainly the growing consensus (in academic circles, anyway) is that voter impersonation is an unusually rare occurrence. I have publicly added my voice to that skepticism.

On the other hand, the plaintiffs' claims that Indiana's law will result in massive "disenfranchisement" of poor and minority voters seem at least equally stretched. Indeed, the trial court was almost scornful of the inability of the plaintiffs to find actual people unable to vote due to their inability to produce or obtain a photo ID. On appeal,

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Judge Posner noted more dryly, “There is not a single plaintiff who intends not to vote because of the new law . . . .” *Id.* at 951-52.

Is this all, then, much ado about nothing? Among political elites the debate has been marked by a powerful partisan divide, with most Republican leaders supporting voter photo ID laws and most Democratic activists opposed to them. This suggests that there may be more to the claims than meets the eye, but just what? Democrats accuse Republicans of wanting to suppress the votes of minorities and the poor, who they argue are less likely to have photo IDs, and who they presume, probably correctly, will vote largely Democratic. Republicans accuse Democrats of intentionally laying the groundwork to engage in electoral fraud. In short, the voter ID debate causes activists in each party to see in their opposites their worst partisan stereotypes come seemingly to life. I have heard activists on both sides justify their position on voter photo ID laws wholly by reference to the opposition. “If Republicans didn’t want to suppress minority votes,” say Democrats, “why would they fight so hard for these laws?” Republicans retort, “If Democrats didn’t intend to enable voters of dubious legitimacy, if not obvious illegitimacy, to vote, why are they making so much fuss over such a minor element of electoral housekeeping?” Meanwhile, neither side makes a very compelling case on the merits. Perhaps this really is a dispute in which symbolism, at least for party activists, is clouding realistic appraisals of the stakes involved.

For the parties’ rank-and-file voters, the issue seems simpler. Public opinion polls show overwhelming support for voter ID laws, with support cutting across party lines. The private Commission on Federal Election Reform (the “Carter-Baker Commission”) recommended that states require photo ID, even while stating forthrightly, “[t]here is no evidence of extensive . . . multiple voting.” And if the majority seemed casual in its recommendation, to this ear, at least, it was the dissenters on the Commission who sounded shrill and unconvincing in arguing against photo IDs.

My own sense is that public support for voter photo ID laws can be attributed to what might be called the “broken windows” theory of election law, if we may borrow from the theory of crime prevention popularized in the 1990s by then-New York Mayor Rudolph Giuliani. The theory draws its name from a 1982 *Atlantic Monthly* article by George Kelling and James Q. Wilson. Professor Robert C. Ellickson described Kelling and Wilson’s theory thusly:

An onlooker construes the visible presence of drunks, prostitutes, litter, graffiti, and other low-level annoyances on a block as a sign of basic inadequacies of public policing . . . . [U]ncorrected disorders tend to mul-

tiply because a potential miscreant regards the evident absence of social controls at a location as an additional temptation to misbehave there.

*New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 78-79 (1998).

Most Americans, I think, share the general view of Judge Posner, who noted in *Crawford*, “[I]t is exceedingly difficult to maneuver in today’s America without a photo ID (try flying, or even entering a tall building . . . without one . . .) . . .” 472 F.3d at 951. Most Americans have almost certainly devoted little if any thought to voter ID laws, but most probably do not honestly believe that large numbers of people are voting fraudulently under assumed names. Nonetheless, to most Americans, I suggest again merely from personal experience, a requirement that a voter demonstrate that he is who he claims to be is considered a most minimal intrusion. And what regular voter has not, at some point, wondered what would prevent her from claiming another identity at the polls?

It may be true that a voter ID law prevents very little fraud in a direct sense, though a few such cases almost certainly exist; but like fixing broken windows and cleaning up litter and graffiti, such a basic procedure may prevent fraud from growing. It sends a message that voting is serious—at least as serious as cashing a paycheck or buying cigarettes, both of which require photo ID. The mere sense that someone is likely to ask for ID may be perceived by would-be perpetrators as increasing the odds of being caught and identified in some other type of fraud (or, we should add, voter intimidation scheme). It brings a sense of order and modernity to elections, and as such may be perceived as indicative that other forms of fraud, such as absentee ballot fraud, are also being watched and are likely to be caught. Judge Posner’s *Crawford* opinion may inadvertently come closest to applying the “broken windows” analogy when it briefly compared voter fraud to littering, in that both crimes are exceedingly hard to catch in the act.

Thus, voter ID laws will, I think, retain their popularity with the broad public. Voter ID is seen as a basic component of any voting system that places even the most modest priority on prevention of fraud—its absence both invites more serious fraud and leads to lack of confidence in electoral results. Just as people would be unlikely to deposit money in a bank that seemed to have no visible safeguards on withdrawing funds from an account, voters may not participate in elections that seem cavalier about fraud.

Nonetheless, were a typical citizen to read Judge Posner’s *Crawford* opinion, it would likely jar the ear. Never one to shy from controversy, Judge Posner does not stop with what will seem to most as a common

sense approach to voter ID. Rather, Judge Posner goes on to question the value to the individual of voting at all:

A great many people who are eligible to vote don't bother to do so. Many do not register, and many who do register still don't vote, or vote infrequently. The benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value . . .), and even very slight costs in time or bother or out-of-pocket expense deter many people from voting . . . . So some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote . . . .

*Crawford*, 472 F.3d at 951. What Posner says here is not controversial among political scientists, economists, and election experts, at least not since Anthony Downs's seminal 1957 work, *An Economic Theory of Democracy*. But this type of talk runs contrary to America's civic myths about voting, and to how the Supreme Court has treated the power to vote.

In *Yick Wo v. Hopkins*, an 1886 case dealing with the rights of Chinese immigrants to operate laundries in California, the Supreme Court, in dicta justifying a substantive due process holding, noted that voting, "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless . . . is regarded as a fundamental political right, because [it is] preservative of all rights." 118 U.S. 356, 370 (1886). That dicta then lay dormant for nearly eighty years, until resurrected to justify the imposition of the equal population rule into legislative districting in *Reynolds v. Sims* in 1964. Since then the Court has cited *Yick Wo* regularly for this proposition.

Judge Posner's logic challenges this conception. *Crawford* suggests that whether or not a particular individual votes, or has a ballot counted, does little to protect that individual's rights. And from the standpoint of a single individual, the right to speak, to bear arms, or even to assemble with others is probably a far more effective tool for preserving other rights than is voting. An individual's single vote will usually be far less effective in changing government policy than his ability to speak and publish, allowing him to convince many of his fellow citizens that government policy is wrong; or than his ability to own property, allowing him to protest government policy without fear of material deprivation by the government. For any given individual, voting is also ineffective as a means of political expression, due to the secret ballot.

If, as the ultimate logic of Judge Posner's *Crawford* opinion suggests, voting has little value as an individual "right," then what is it? It is a power granted to participate in governance of the state—a collective, instrumentalist tool that exists to assure good government, part of which includes, as *Yick Wo* might have stated, protecting individual liberties, such as freedom of religion or the right to property. But such rights and liberties may also be protected—indeed, better protected—in other ways, such as through the structure of government (including bicameralism, separation of powers, and federalism) or limitations on government power (including the Bill of Rights and the doctrine of enumerated powers), though in fact many of these protections have been seriously eroded over the last seventy-five years.

Furthermore, though voting is one means among many to protect rights and liberties, if unchecked it is also the power to destroy rights and liberties. Individuals who violate our rights, through robbery, criminal assault, torts and the like, are subject to punishment. But who is punished when the government violates substantive rights through acts of the legislature, serving as the duly elected representatives of the people? Private citizens may not lawfully turn the right to bear arms into a means to seize the property of some and give it to others (through armed robbery, theft and the like), but they may use their votes to empower their legislatures to do so, as the Supreme Court's *Kelo v. City of New London* decision starkly reminds us. Thus, while voting is not terribly important as an individual right, there may be powerful reasons to check its use as the power to destroy liberty.

The logic of Judge Posner's *Crawford* opinion, therefore, suggests that the Court's longstanding treatment of voting as something akin to an individual "super right"—a treatment that has underscored nearly every judicial opinion in the area of voting rights from *Reynolds* through *Bush v. Gore*—is fundamentally in error. While it is highly unlikely that affirmation would result in a sudden sea change in the Court's jurisprudence, *Crawford* could be the thin edge of the wedge that calls for long-term adjustment in the Court's voting jurisprudence. Such an adjustment would place greater emphasis on the role of voting in creating good government, granting governments, in some ways for better and in others, potentially, for worse, more leeway in crafting redistricting and voting procedures.

## REBUTTAL

*Details, Equal Citizenship, and Reasonable Fairness*Edward B. Foley<sup>†</sup>

I agree with Professor Smith that there is an air of unreality surrounding the voter ID debate, suggesting that the issue may have more symbolic than practical importance. But I also think that much of that unreality stems from debating voter ID in the abstract, as a monolithic proposition, with an underlying assumption that all voter ID laws are equivalently evil or equivalently virtuous. In fact, voter ID regimes come in a wide variety of flavors—some mild, others piquant—and one thing to look for in *Crawford* is whether the Justices have a sufficiently sensitive palate.

Consider the law in *Crawford* itself. It permits voters who lack the required ID to cast a provisional ballot that will count if they submit an affidavit that gives either of two acceptable reasons: (1) they are indigent and unable to obtain an ID without paying a fee or (2) they have a religious objection to being photographed. Would it be so problematic for the state to add a third acceptable ground for submitting an affidavit in lieu of the ID: unforeseeable delay in securing underlying documents, like a birth certificate, that are a prerequisite for obtaining one of the restrictive pieces of voter ID that qualify under state law? The state may be correct in claiming that extremely few individuals who wish to vote experience this kind of unexpected difficulty. But if that is true, then what is the harm to the state in giving these few individuals a method to validate their provisional ballots comparable to what the state already provides for indigents and religious objectors?

The state's interest in denying this third "hardship" ground for an affidavit alternative is even more dubious when one considers that the state could create, as part of the affidavit process, an additional obligation to provide some other form of corroborating evidence as to the voter's identity (for example, a separate affidavit from a family member or neighbor, to authenticate the voter's identity and explanation for lacking the qualifying piece of ID). With this corroboration procedure in place, there would be no risk that this provisional voter was

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fraudulently attempting to impersonate a different registered voter—which, after all, is the state’s professed concern. Moreover, the fact that other states, like Michigan, extend the affidavit alternative to this additional hardship situation belies any claim on the part of Indiana that it would be infeasible to do so.

There also is a common sense explanation why the plaintiffs in *Crawford* could not produce any individuals who fell into this third hardship category. Who knows in advance that he or she will have unforeseeable difficulties in getting a birth certificate? Thus, the fact that no one can predict which particular individual voters will need this third basis for invoking the affidavit alternative does not mean that the need will not exist. Judge Posner’s contrary logic would limit health insurance for rare diseases to only those persons who know for certain in advance that they will contract the disease—a logic that obviously defies the whole point of health insurance. Provisional voting is a form of election insurance, yet Judge Posner would render it useless in the situation where it is most necessary: the unpredictable obstacle to completing the qualifying paperwork.

Now I readily acknowledge that the idea that each individual voter ought to have insurance to protect against unforeseeable snafus in getting the necessary documentation is built on a premise that Professor Smith wishes to question: the paramount importance of protecting each citizen’s right to vote. Voting is overvalued in constitutional law, Professor Smith suggests, especially in relation to other constitutional rights (like property, free speech, or the right to bear arms). At one level, I have no argument with this suggestion. In any contest between democracy (process) and justice (substance), most people will choose justice hands down.

At another level, however, just the opposite is true. The problem is that reasonable people don’t always agree about what justice (substance) requires. So they need democracy (process) to resolve their differences of opinion about justice (substance) in order to live together. In the institutional arrangements that determine the rules by which people accept the authority of government over their lives—in other words, constitutional law—developing a fair set of democratic procedures necessarily must take precedence over insisting that one’s own substantive vision of justice must prevail over the competing substantive visions of justice advanced by one’s fellow citizens.

Professor Smith is correct insofar as he suggests that a fair set of democratic procedures requires more than voting rights. Some form of free speech is undoubtedly essential to a fair democratic process.



Some form of private property is also likely essential, although it is more controversial to contend that a fair democracy depends upon the right of individual citizens to bear arms (and, if so, what kinds). But whatever the full panoply of individual rights that is necessary for any democratic process to be fair, equal voting rights for all adult citizens surely would be included. Equal voting rights are a prerequisite to democratic fairness not only for their instrumental value, which is most readily apparent when likeminded citizens pool their equal voting rights to prevail under majority rule; but also, equal voting rights are an essential ingredient to democratic fairness for the additional symbolic—but no less important—reason that they signify the equality of citizenship upon which democratic fairness depends. Thus, whatever adjustments and refinements we might wish to make to constitutional law, we cannot negate the status of one-person-one-vote as a “superright,” to use Professor Smith’s term.

I am also prepared to agree with Professor Smith that the set of rules for administering a fair democracy should include some form of a voter ID requirement. I am not sure, however, that I would attribute this point to a “broken windows” theory of election law. Instead, I would suggest that it inheres in the “superright” status of one-person-one-vote and its symbolic importance as the legal manifestation of equal citizenship. Precisely because the right to cast a ballot that counts equally as much as every other citizen’s ballot is so fundamental, each citizen needs to confirm that he or she is a proper possessor of this precious right—and is entitled to know that every other voter also can confirm this equal entitlement. In this respect, both Professor Smith and I believe that it honors the importance (he would say “seriousness”) of voting rights to require each voter to demonstrate one’s authenticity as an eligible citizen (or, in Smith’s words, “[to] demonstrate that he is who he claims to be”).

I stress again, however, that the particular methods of this authentication make a difference. I share the view that traditional methods of authentication, primarily reliance on poll workers to recognize their neighbors, are outdated. As Professor Smith says, modernity and rationality require some form of documentation, which as we have seen may include an affidavit alternative for the few individuals who unexpectedly cannot obtain the primary method of documentation in time. But a fair effort to introduce modernity and rationality to this authentication process would use a form of public-spirited (or civic-minded) reasoning that attempted to consider the interests of all citizens equally, rather than to select a more onerous than necessary

method of authentication because it would promote a partisan advantage.

The best way to illustrate the difference between public-spirited reasoning versus the effort to promote partisan advantage is to invoke the idea of a “veil of ignorance” made famous by the political philosopher John Rawls. Try to imagine as best as you can that you did not know whether you were a Republican or Democrat, rich or poor, lucky or unlucky, and so forth. What form of voter identification procedures—methods to authenticate each other’s equality of citizenship—would you adopt? In considering potential alternatives, you would insist on one that was fair to everyone regardless of personal circumstances. This “veil of ignorance” thought experiment might not be able to settle upon the single fairest voter identification system, but rather would point to a range of options all of which are appropriately fair and reasonable to choose among. But this thought experiment undoubtedly would rule out some voter ID alternatives as unduly partisan.

I do not say that the Supreme Court’s interpretation of the Fourteenth Amendment, in *Crawford* or any other case, necessarily should embrace all details of John Rawls’s political philosophy. But I do think, as a majority of the current Justices (including Justices Stevens and Kennedy) have articulated, that the Fourteenth Amendment embodies a commitment to governmental impartiality toward all equal citizens, a commitment that requires public-spirit reasoning (rather than the promotion of partisan advantage) on matters as fundamental as the implementation of one-person-one-vote in the design of the democratic process. Thus, I do think that the Supreme Court needs to rule out particular forms of voter ID requirements that are evidently partisan, rather than within the range of reasonably fair alternatives.

I recognize that some Justices, most notably Justices Scalia and Thomas, are suspicious of an approach to the Fourteenth Amendment that calls for judicial reliance on public-spirited reasoning, instead of judicial reliance on longstanding traditional practices. But in this regard there is perhaps a potential irony in the making. A tradition-based approach to the Fourteenth Amendment would be highly dubious about the constitutionality of any new law that required voters to document their identity, since these new laws form no part of the tradition of democracy in America. Instead, as Professor Smith says and I have concurred, they are an effort to bring modernity and rationality to our democratic process. Thus, it will be interesting to see whether

Justices Scalia and Thomas employ their tradition-based approach in evaluating the constitutionality of the voter ID law in *Crawford*.

## CLOSING STATEMENT

Bradley A. Smith

The Supreme Court cannot decide *Crawford*, or other current voting controversies, by a simplistic appeal to “fairness” or “equality” of process.

Professor Foley argues that whatever other rights are necessary to a fair process, “fair, equal voting rights for all adult citizens surely would be included.” Perhaps, but what is “fair” and “equal”? As Professor Foley notes elsewhere, “people don’t always agree about what justice . . . requires,” and they don’t all agree about what is a fair and equal process, either. If “fair, equal voting rights” means, to give just one example, that convicted felons serving their sentences could vote equally with all others, I suspect that such a proposition would lose, even if put to an initial vote that included such felons among “all adult citizens.” In fact, all democracies in history have placed restrictions on the power to vote. In modern times, the United States and other democracies have gone much further than ever before, and almost entirely for the good, in expanding the franchise. But restrictions on voting remain. Even the concept of “adult” is up for grabs—how old must one be? Sixteen? Eighteen? Twenty-one? And why only citizens, a somewhat arbitrary concept that can itself be influenced— and limited—by law?

Professor Foley’s conclusion that, because “people don’t always agree about what justice . . . requires,” democracy is the only process that can “resolve their differences of opinion about justice . . . in order to live together,” does not follow. Societies may, for example, rely on monarchy, dictatorship, the reign of judges, or some other form of social arrangement to assure social peace. Democracy is not the only option. We have adopted it because we have concluded in light of theory and experience, and rightly in my view, that it is the best option. But if democracy is adopted because it is seen as the best way to sustain political peace and valued substantive rights, it does not follow that there can be no restriction on voting. Indeed, there are many already. Moreover, we are not writing on a blank slate. Rather, the Court is being asked to interpret a written Constitution long in place.

“Democracy” is a term often used loosely. Who has not run across the crusty old conservative who insists, “We do not live in a democracy; we live in a republic”? In the classical sense of the word, he is right.

We do not live in a pure democracy. Just as we cannot all agree on what constitutes social justice, there is no reason to think there would be agreement that we must therefore submerge our concepts of substantive justice to a vote, or that we would agree on who is entitled to vote when voting is appropriate. Nor does our Constitution require this. Quite the opposite, I suggest—perhaps the closest we have ever come to a consensus in this country is that substantive justice is best achieved by assuring that most substantive decisions are not subject to democratic determination. We certainly have chosen to remove much, if not most, of our lives from the maw of democracy, from the trivial and private (thank goodness we did not vote on what I ordered for dinner tonight), to the vital (our Constitution does not allow us to vote to lock up all lawyers, no matter how much public opinion demands it) and public (we retain the right to speak and publish). Even on issues of process, democracy is sporadic. We don't vote for every office, and we don't vote every morning, every week, or every month, or even every year for who will exercise the power of elected office. Citizens of Ohio do not vote for the California congressional representatives, though Democratic Leader (and California Congresswoman) Nancy Pelosi's efforts in the House certainly can affect us here in the heartland. Still, few think this is not "fair" and "equal."

Our system is loaded with counter-majoritarian checks and balances, and devices intended to keep government—democracy—out of our lives. Our government is structured around the recognition that democracy is a tool to assure that substantive values such as privacy and property are protected—and the further recognition that, when abused, it is also a tool for destroying those same substantive values. For those reasons, voting has long been regulated. Our representational system of government was not adopted because we could not agree on substance. Rather, it was adopted because there was broad agreement on a few substantive principles, and on limited democracy as the best way to preserve both that agreement and those principles.

This brings us back to *Crawford*, and Judge Posner's provocative opinion for the Seventh Circuit. The issue in the case is not that individuals are being denied the right to vote; rather, their ability to vote is conditioned on the requirement that they produce photo IDs in accordance with the law. This may keep a small number from voting, but it is not quite the same as denying them the vote. Every restriction on voting will burden the franchise, and at each step some small number of voters may decide voting is not worth the effort. As Judge Posner notes, in practice at least half the registered electorate already decides not to cast a ballot in any election, and this is due to a calcula-

tion, at some level, that the costs of voting outweigh the benefits. Many others, of course, do not even register to vote. No one, I think, believes that government must remove all costs to voting for all individuals, or even reduce them to an absolute minimum, to maintain a constitutional system.

The number of people who cannot vote because of Indiana's law must be quite small. Professor Foley's suggestion that the reason *Crawford* plaintiffs were unable to identify any individuals who actually wanted to vote, but were legally barred, was because individuals cannot predict that they will have problems getting ID seems strained. And in any case, if there were really many such individuals they would presumably be easily identified after the election and would have standing to sue under the doctrine of capable of repetition but avoiding review.

Professor Foley suggests that it would be simple for the state to improve on the law by adding another exception to its photo ID rule. Perhaps. But that merely puts back to the Court the question of how far it ought to go in protecting the right to cast a ballot at all costs. Is the fact that the law might have been made marginally less burdensome enough to strike it down? Maybe, under a "least restrictive means" analysis, but that is not so easy to determine either. For example, decreasing by one the number of voting machines, or closing the polls at 7:00 p.m. rather than 7:30 p.m., could lead to some eligible voter deciding the added burden made voting not worthwhile. At this point, we should see that a decision that relies on sweeping platitudes about the "right to vote" being "preservative of all others" won't necessarily get us where we want to go.

The point here is that the Court cannot seriously adopt a standard declaring that anything inhibiting any otherwise eligible person from voting is unconstitutional. Such a holding would effectively annul all voter registration requirements and demand massive judicial supervision of the voting process, including polling hours and places, since those, too, can and will discourage some from voting. So the Court will have to make a decision—what requirements can be placed on the right to vote? At what point does a burden become too great?

In considering this issue, conspicuously missing from the evidence presented to the Court are good numbers on either (a) the number of eligible voters who would like to vote, but cannot because of Indiana's photo ID law, or (b) the number of ineligible voters who would be prevented from voting fraudulently by Indiana's photo ID law. This is

all the more reason for caution about basing the decision on broad declarations of principles.

In this situation, if the Court substitutes vacuous statements about the precious nature of the right to vote for serious analysis of the precious nature of the right to vote, it will gain praise in editorial pages but do little to truly resolve the difficult issues at stake. A sweeping opinion striking down the Indiana photo ID law will likely open the court to a raft of litigation challenging election procedures, many of which will be filed in the heat of election day, demanding that no barrier stand between the would-be voter and the ballot box.

How, then, to develop the “sensitive palate” that both Professor Foley and I would like to see?

What Judge Posner grasps is that, given the extreme improbability that any one vote will decide an election, it is not particularly important to any one individual to actually vote or have his ballot counted, so long as such exclusions are not the result of discrimination on invidious grounds against groups or individuals. In *Crawford*, the Seventh Circuit did not see this type of invidious discrimination. The Court accepted plaintiffs’ claim that the law will fall most heavily on lower-income voters, but poverty is not generally considered a “suspect class,” and almost any voter registration requirement, or even the requirement to travel to specified polling locations, can be said to fall more heavily on the poor than on other income classes. Perhaps the Supreme Court should consider this more seriously, but it will be charting new ground to do so. The Court of Appeals also conceded that these low-income voters were more likely to be Democratic voters than Republican voters. But the Supreme Court has also refused, with rare exception, to find invidious discrimination in election laws merely because they adversely impact particular political parties, especially major parties.

Like the plaintiffs, Professor Foley suggests that the problem is that the Indiana voter ID law is unduly partisan in its effects. Voters in a Rawlsian original position, he argues, would reject a scheme with partisan effects. I think that is wrong.

Leaving aside that there is little evidence of any major partisan effect (precisely because there is little evidence that large numbers of people will be prevented from voting, properly or fraudulently), we might consider that under a true “veil of ignorance,” voters would not know who benefits from a law. Professor Foley suggests that the “veil of ignorance” cuts against the Indiana law, but gets there only by, in fact, removing the veil to look at the partisan effects. Absent such knowledge, why would voters in a Rawlsian “original position” insist on

a law making it marginally easier for a very small percentage of the population to vote, knowing that the odds were about 99:1 that they would not be in that position, and knowing that, by perhaps preventing some small amount of fraud, a photo ID requirement would help guarantee in some small way such value as their own votes might have? And in fact, as I noted in my Opening Statement, most voters see photo ID laws as “common sense,” with substantial support across party lines. Whether or not they directly prohibit much fraud may be beside the point—implicitly adopting the “broken windows” theory of election law, voters perceive that fixing the small problems and tidying up the neighborhood can prevent larger problems from developing.

In this context, is it unduly partisan if Republicans support a common sense law that has adverse impact on Democrats, or does the undue partisanship occur when Democrats oppose a common sense law merely because it has a marginally positive impact for Republicans? Or, in the context of another current controversy, there may be constitutional arguments for granting felons the power to vote, but simply because granting the vote to convicted felons might benefit Democrats vis à vis Republicans is probably not one of them.

The Supreme Court has struck down literacy tests and poll taxes as a requirement for voting, but those decisions came in light of substantial evidence that the tests were being applied in a racially discriminatory fashion and for racially discriminatory purposes. Plaintiffs in *Crawford* make different claims—that the requirement of ID is itself discriminatory, regardless of how it is administered, and that it was enacted for partisan rather than racial purposes. This is a difficult road to travel, in that the burden on individual voters seems small, even if the benefits seem tenuous as well. It is tempting, in such a case, to err on the side of protecting the power to vote. But erring on the side of protecting the power to vote is to *ipso facto* err on the side of diluting the votes of legitimate voters with those of fraudulent voters. Put that way—that we should err on the side of vote dilution—the argument doesn’t seem so compelling, at least not in the absence of good evidence about the extent of either voting fraud or the true burden on voters.

As I noted in my Opening, I strongly suspect that the immediate stakes in *Crawford* are much lower than the parties to the case seem to believe. How the Court reasons may therefore be far more important, over time, than how it rules. Hopefully, the Court will make a serious effort to come to grips with the Posner challenge, and craft an opinion that gives the power to vote the serious analysis that a precious



right deserves, rather than relying on vague platitudes about “preserving all other rights.”

## CLOSING STATEMENT

Edward B. Foley

Professor Smith and I started our discussion with a specific Supreme Court case, *Crawford v. Marion County Election Board*, which concerns the constitutionality of Indiana's particular version of a voter ID law. We very quickly moved to deep and difficult questions of political philosophy concerning the nature of democracy and its relationship to individual rights. We then came back to the details of *Crawford*.

Ronald Dworkin would be pleased with this traversal. After all, he is the one who insists that important cases of constitutional law—like *Crawford*—cannot be thought through on their merits without delving into those deep philosophical questions. One need not subscribe to Dworkin's answers to those philosophical questions, or indeed to his views on particular constitutional cases, to think that perhaps he has a point on this jurisprudential connection between specific facts and general theory in the adjudication of cases.

In any event, precisely because questions of political philosophy are so difficult, it is impossible to do them justice (pun intended) in the space we have for this discussion. Professor Smith is correct that we could have a Hobbesian social contract merely to keep the peace, but that would not be a fair social contract, or so most people would agree. Professor Smith is also right that most people believe that a fair social contract must protect certain substantive rights from abridgement by the government, no matter how democratic that government may be. The social contract tradition from Locke through Rawls, including of course our own constitutional Bill of Rights, subscribes to that view.

But as Rawls himself recognized, while his own *Theory of Justice* was put through the philosophical wringer, it is not so easy to get agreement on the substantive rights that the social contract should protect—except perhaps at a level of abstraction (“life, liberty, and the pursuit of happiness,” or is it “of property”?) that, as Professor Smith acknowledges, is but platitudinous. Our own constitutional history bears this out. Rights deemed obviously part of a fair social contract in the *Lochner* era were repudiated after the New Deal. *Roe v. Wade*, which seemed relatively straightforward in 1973, was anything but a decade later. As for the suggestion that our own Constitution is robustly counter-majoritarian, the recent confirmation battles over Supreme

Court nominees—which is our nation’s new method of amending the Constitution, since Article V is too difficult—demonstrate that the judicial interpretation of the social contract over time will be decidedly majoritarian in character.

All of this is not to say that we shouldn’t wrestle with issues of constitutional architecture, including how best to keep important liberties relatively immune from populist impulses. But it won’t be easy. And when I assert that we need a fair process for debating the issues on which we disagree, Professor Smith—like philosopher Jeremy Waldron—argues that we won’t be able to agree on what process to use. Maybe, but we have to start somewhere. Otherwise, the game is over before we even begin. If we want a fair social contract, as both Professor Smith and I do, then we need to go back and try to develop as best we can a fair, mutually agreeable method for identifying the terms of this contract.

But how does all this philosophy relate to the actual practice of constitutional interpretation by the Supreme Court, either in general or in *Crawford* specifically? As a nation, we are at a difficult stage of our constitutional development. We have become unmoored from originalism, and we can’t get back (notwithstanding Justice Thomas’s desire to do so—not even Justice Scalia is willing to roll the clock all the way back). The Court, regrettably, has also become untethered from *stare decisis*. All the Justices feel free to overrule whatever precedents they find objectionable. They just differ on which ones they object to. But for this reason, an appeal to “fundamental principles of constitutional interpretation” is no basis for a shared understanding of how to decide cases: the Justices differ on those fundamental principles (i.e., beliefs of political philosophy), which is why they disagree so vehemently about which cases to overrule. The amendment process is no practical means for keeping errant Justices in check—which, again, is why it all comes down to who sits on the Court at any moment in time. And with a nine-member body that has one individual who is in the middle, what that means is control by a single philosopher-king. Constitutional interpretation as intellectual autobiography: maybe it really is a Hobbesian social contract, after all.

Given this state of affairs, I cannot—and do not—profess to have an answer to *Crawford* that everyone else must accept as objectively correct. Instead, as I will argue at length in a preview essay on *Crawford* to be published in the *Election Law Journal*, the goal for the Court in the case should be to avoid another 5-4 decision, so constitutional law does not continue to be a dictate of Justice Kennedy’s personal beliefs. A unanimous decision from the Court in *Crawford* would be most

salutary—whether upholding or invalidating the statute, and there are plausible grounds for either result—but a 7-2 result would do.

To achieve that kind of consensus, however, would require narrowing the ground for the decision. Justices Souter and Alito are not likely to agree to any big statements about equal protection, levels of scrutiny, or voting rights—much less Justices Ginsburg and Thomas. In searching for a possible ground on which seven if not nine Justices could agree, it seems most promising to focus on the “tailoring” prong of Fourteenth Amendment analysis: whether the law is perhaps excessively rigid even in relationship to its admittedly valid goals. There presumably needs to be some tailoring inquiry, whatever doctrinal “level of scrutiny” applies, and maybe the Justices can agree on whether the law passes or flunks this tailoring inquiry without settling on exactly what level of scrutiny they are applying or what theory of voting rights leads them to that level.

As I suggest in the much longer *Election Law Journal* essay, perhaps there is a way for seven or nine Justices to agree that Indiana’s law is adequately tailored. But that result seems possible only if the limited range of permissible IDs under Indiana’s law actually serves the interests of voting rights, either because it shortens the time in line at polling places or reduces the number of mistakes that poll workers make. (Otherwise, I see even the moderately liberal Justices, Breyer and Souter, balking at this compromise.) But even then, the search for common ground seems a long shot, unless it is really too much to ask Indiana to add the additional hardship exemption I described in my opening contribution to this dialogue. (“Okay,” I can hear these two Justices saying to themselves, “you can have your narrow list, but you still need an escape hatch for those who unexpectedly can’t get the right kind of document.”)

Professor Smith is right that voting regulations often might be a little more voter-friendly (polls staying open an extra half-hour, to use his example). But the tailoring prong generally requires sensitive judgments about matters of degree—what’s reasonable or unreasonable in particular factual circumstances. One could imagine the Justices thinking, “States can choose between twelve and fourteen hours of voting, but a state that adopts the most limited list of permissible forms of identification needs to offer a wider safety valve for those lacking these particular forms than just the destitute or the religious objector.” Can we imagine even the two newest Justices, Roberts and Alito, embracing this thought? There is not enough of a track record

with these two yet, but since I'm wishing for at least a 7-2 decision, I'm letting a lack of information be a basis for hope.

Perhaps more realistic, however, is a remand for further exploration of the factual issues relevant to the tailoring prong. Justice Souter might not be willing to embrace the idea that Indiana's law is an appropriate method for verifying identification, and Justice Alito might be reluctant to say that the law is an impermissible method without an extra hardship exemption. But maybe they would be willing to agree that the lower courts in *Crawford* didn't really consider the tailoring issue at all and should do so.

To be sure, a narrow remand of that kind wouldn't be a momentous decision—except that any decision avoiding a 5-4 split in *Crawford* would be remarkable for that reason alone. If *Crawford* lacks practical significance, then an unmomentous remand is precisely what the case deserves. It certainly is an ideologically charged case, as Professor Smith observes right at the outset. A 7-2, or 9-0, remand would diffuse this ideological charge. Surely, eliminating ideological controversy, especially when it is unnecessary, is a worthwhile goal of Supreme Court decisions.

In the end, maybe Cass Sunstein's call for minimalism is the best we can hope for. Ronald Dworkin surely would not agree with that. But maybe Dworkin would take some comfort in knowing that it was our exploration into the depths of philosophy, and discovering all the quagmires of fundamental disagreement, that led us back to the quest for a minimalist but consensus decision on the Indiana case.

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