COMMENTS

TURNING TO THE STATES: WHY VOTING RIGHTS ADVOCATES SHOULD BRING VOTER ID CHALLENGES TO STATE COURTS AND HOW TO IDENTIFY A FRIENDLY FORUM *LESSONS FROM THE POST-*CRAWFORD *DECISIONS*

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INTRODUCTION: THE VOTER FRAUD MYTH

On January 6, hundreds of protesters stormed the United States Capitol to protest election results they believed to be fraudulent.[1] The insurrection followed months of propaganda, fearmongering, and completely baseless claims by the President and Republican legislators that "voter fraud" had illegally swung the 2020 election.[2] It had not. U.S. election officials publicly stated that the 2020 election was "the most secure in American history," and "independent experts, governors, and state election officials from both parties [said] there was no evidence of widespread fraud."[3] Even Attorney General Barr—a Trump loyalist—concluded that the U.S. Department of Justice "had seen no evidence" of voter fraud that could have impacted the

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1 Luke Mogelson, *Among the Insurrectionists*, NEW YORKER 2 (Jan. 15, 2021).

2 *Id.*; *see also* Hope Yen, Ali Swenson, & Amanda Seitz, *AP FACT CHECK: Trump's Claims of Vote Rigging Are All Wrong*, AP NEWS (Dec. 3, 2020), https://apnews.com/article/election-2020-ap-fact-check-joe-biden-donald-trump-technology-49a24edd6d10888dbad61689c24b05a5 [https://perma.cc/R7YN-7QXJ] (explaining that President Trump baselessly clung "to false notions of voter fraud" for months, even after his allegations "of massive voting fraud ha[d] been refuted by a variety of judges, state election officials and an arm of his own administration's Homeland Security Department").

3 Reuters Staff, *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021), https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1 [https://perma.cc/F9QK-MVV3].

election.[4] And yet, the false narrative that voter fraud—not votes—determined the election has persisted. In April 2021, sixty percent of Republicans still believed that the 2020 election results were fraudulent.[5]

Voter fraud has never been significantly documented in the United States.[6] Instead, the insurrection was the culmination of a lie set in motion more than a century ago in order to disenfranchise poor, elderly, disabled, and minority voters.[7] Efforts to restrict voting access in the name of preventing "voter fraud" trace back to the late nineteenth century, when Northern conservative reformers sought to weaken the power of white ethnic and working class electorates. For these reformers, "the sight of large numbers of poorly educated voters marching to the polls could only mean widespread manipulation and corruption."[8] These reformers—and, later, white supremacists in the Reconstruction South—insisted that strict voting requirements were necessary to prevent voter fraud, and yet "the most striking feature of the contemporary literature on fraud was the *sparsity* of actual cases it cited."[9] Even the reformers "themselves admitted that many of these requirements were wholly ineffective" against fraud.[10] But preventing fraud was not the point. Instead, advocates pushed for stricter voting requirements because the measures "increased the individual voter's burden of participation and edged large numbers of marginal voters out of the process," thus "restoring control by strongly conservative interests."[11]

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4 Yen, Swenson & Seitz, *supra* note 2.

5 Alison Durkee, *More Than Half of Republicans Believe Voter Fraud Claims and Most Still Support Trump, Poll Finds*, FORBES (Apr. 5, 2021), https://www.forbes.com/sites/alisondurkee/2021/04/05/more-than-half-of-republicans-believe-voter-fraud-claims-and-most-still-support-trump-poll-finds/?sh=befe7501b3ff [https://perma.cc/P8NC-E42H].

6 *See* Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1887 (2009) ("Evidence of in-person voter fraud, the only type of fraud that photo ID requirements would squarely address, is notoriously scant.").

7 Aaron Blake, *The Great Capitulation of Trump's Voter Fraud Crusade*, WASH. POST (Apr. 12, 2021), https://www.washingtonpost.com/politics/2021/04/12/great-capitulation-trumps-voter-fraud-crusade/ [https://perma.cc/GA9X-VQUF] ("The 2020 election is a case study in how unproved claims can be weaponized. For decades, former President Donald Trump's party warned of significant voter fraud while successfully pushing policies such as voter ID. . . . By 2020, when Trump lost, it culminated in a huge portion of the electorate believing in a 'stolen election' theory for which there is vanishingly little actual evidence."); *see also* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 382 (1991) (tracing the origin of voter fraud claims to conservative efforts to disenfranchise poor, uneducated, and working class people).

8 Cunningham, *supra* note 7, at 382.

9 *Id.*

10 *Id*. at 384.

11 *Id*. at 385, 374.

Today, conservative lawmakers continue to push for increasingly restrictive voter ID laws in the name of protecting elections from voter fraud.[12] It does not matter that evidence of in-person voter fraud (the only kind of fraud that such laws could prevent) is "notoriously scant" because deterring voter fraud is not the point.[13] Instead, conservatives continue to push for voter ID laws because "parties with an interest in deterring the types of voters least likely to own a photo ID"—read, Democratic voters—"have an interest in propagating fears of voter fraud."[14] The possibility of voter fraud itself does not threaten our democracy; however, the events of January 6, 2021 demonstrate that the *myth* of voter fraud does, both by disenfranchising large numbers of voters and by weakening the public's faith in our elections. Twenty-one states currently enforce strict voter ID requirements,[15] and conservative state legislatures are in the process of restricting access to the polls even further in response to the Democratic victories in 2020.[16] It is more urgent than ever for voting rights advocates to challenge voter ID laws in court.

I. THE NEED FOR A NEW FORUM

Since the Civil Rights era, voting rights advocates have overwhelmingly preferred to bring their challenges in federal courts.[17] This preference was based, in part, on the perception that federal judges were less partisan and

12 Heller, *supra* note 6, at 1888.

13 *Id*. at 1887.

14 *Id*. at 1889.

15 *See Photo ID Laws by State*, SPREAD THE VOTE, https://www.spreadthevote.org/voter-id-states [https://perma.cc/XU4G-NUZQ] (last visited Apr. 20, 2022) (identifying states that demand photo-ID in order to vote).

16 *See Voting Laws Roundup: March 2021*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 [https://perma.cc/8NQP-BL3Y] (stating that in a backlash to the 2020 election victories, state lawmakers have introduced 361 restrictive voting bills in forty-seven states as of March 24, 2021).

17 *See* Irving Joyner, *Challenging Voting Rights and Political Participation in State Courts*, 21 SCHOLAR 231, 249 (2019) ("[T]he tendency of litigators has been to bring voting rights challenges in federal courts" because "more meaningful relief has been possible when civil rights claims are presented to federal court judges than with state court judges.").

more committed to protecting individual liberties than their state counterparts.[18] Unfortunately, much has changed.[19]

The federal courts have experienced an unprecedented wave of judicial appointments under the Trump Administration. Today, nearly one in four appellate judges and one in seven district judges were appointed by President Trump.[20] This class is more white, more male, and significantly younger than the Obama and Bush appointees.[21] On matters of individual rights protection, these appointees are "more conservative even by Republican standards."[22] They are also significantly more partisan in their rulings than their Republican predecessors, "openly engag[ing] in causes important to Republicans."[23]

This leaning is particularly strong when it comes to curtailing voting rights.[24] A recent study conducted by the group Take Back the Court examined the Trump district and appellate appointees' records on voting rights and found "a partisan pattern in voting rights rulings" that resulted in "anti-democracy decisions in 85 percent of the election-related cases they

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18 *Id.* at 249 ("Traditionally, federal courts have provided a more favorable forum due to . . . less partisan judges."); *see also* Steven Mulroy, *How State Courts—Not Federal Judges—Could Protect Voting*, YAHOO (Oct. 27, 2020), https://www.yahoo.com/now/state-courts-not-federal-judges-170355651.html [https://perma.cc/95CC-8TCT] (explaining that since the Civil Rights movement, federal courts have enjoyed a reputation as "the guardians of voting rights, a refuge from states' discrimination").

19 *See* Joyner, *supra* note 17, at 249 (arguing the perception that federal courts are friendlier forums to voting rights challenges is "not necessarily as true today as it was in the past"); Mulroy, *supra* note 18 ("Now, voting rights cases in federal court face uncertainty.").

20 Carrie Johnson, *Trump's Impact on Federal Courts: Judicial Nominees by the Numbers*, NAT'L PUB. RADIO (Aug. 5, 2019, 5:01 AM), https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers [https://perma.cc/2YWA-ULPB] ("[Trump's] administration has appointed nearly 1 in 4 of the nation's federal appeals court judges and 1 in 7 of its district court judges.").

21 *Id.* (estimating that around seventy percent of Trump appointees are white men and are relatively young and could remain on the bench for 30 or 40 years); Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/7XUN-WXCB] (noting that among Trump appointees, "[t]wo-thirds are white men, and as a group, they are much younger than the Obama and Bush appointees.").

22 Mulroy, *supra* note 18.

23 Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/3B96-6K68].

24 *See* Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/10/17/us/politics/federal-appeals-courts-trump-voting.html [https://perma.cc/C8VS-XUXH] (noting that circuit courts are more conservative since Trump took office, so the panels, on average, are going to be more conservative in the way they adjudicate voting cases).

heard."[25] The study concluded that "there is a systematic pattern of Republican-appointed judges and justices tipping the scales in favor of the GOP by making voting harder."[26]

The Supreme Court has also undergone a significant conservative shift with the appointments of Justice Brett Kavanaugh, Justice Neil Gorsuch, and Justice Amy Coney Barrett.[27] As federal courts at every level "are increasingly populated by Trump judges who will not expand individual rights through interpretations of the Federal Constitution," it stands to reason that federal courts will likely remain an unfavorable forum for voting rights challenges for decades to come.[28]

Furthermore, the Supreme Court has clearly demonstrated over the last two decades that it cannot be counted upon to protect voting rights.[29] Three particularly damaging decisions stand out. First, the Court's 2006 decision in *Purcell v. Gonzalez* established a doctrine that effectively prevents lower federal courts from striking down unconstitutional voting measures "on the eve of an election."[30] The Court reasoned that intervention by lower federal courts, "especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls" that grows as the election draws nearer.[31] In practice, the *Purcell* doctrine has the ironic effect of allowing appellate federal courts—by reversing or vacating lower courts' decisions—to cause further changes to state voting laws *even closer* to the

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25 *Id.*

26 *See* Charlie Savage, *G.O.P.-Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html [https://perma.cc/3Y3P-6KVD] (quoting Aaron Belkin, the director of Take Back the Court, which commissioned the study of federal appellate judges' rulings in voting disputes).

27 Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129, 1130 (2019) ("[W]ith at least two Trump appointees—Neil Gorsuch and Brett Kavanaugh—already on the U.S. Supreme Court, there is every reason to think that the Court will restrict rights protections.").

28 *Id*.

29 *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 557 (2013) (finding Section 4 of the Voting Rights Act unconstitutional and thus eliminating the protections afforded by that section); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (holding that Indiana's photo voter ID law was not excessively burdensome on the right to vote and was justified by the state's interest in preventing voter fraud); *and* Purcell v. Gonzalez, 549 U.S. 1, 3–5 (2006) (finding that the U.S. Court of Appeals for the Ninth Circuit erred in granting an injunction against Proposition 200, a law that required photo ID for voter registration in Arizona, because the district court had not issued any findings of fact, to which the Court of Appeals owed deference).

30 *See* Republican Nat'l Comm'n v. Democratic Nat'l Comm'n, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.") (citing Purcell v. Gonzalez, 549 U.S. 1 (2006))).

31 *Purcell*, 549 U.S. at 4–5.

election.[32] For example, in *Republican National Commission v. Democratic National Commission*, a Wisconsin district court enjoined a state law requiring absentee ballots to be postmarked by election day, in light of the COVID-19 pandemic.[33] Invoking the *Purcell* doctrine, the Supreme Court stayed the district court's injunction—thereby reinstating the voting law—*one day* before the deadline to turn in the ballots.[34] In dissent, Justice Ruth Bader Ginsburg argued, "If proximity to the election counseled hesitation when the District Court acted . . . this Court's intervention today—even closer to the election—is all the more inappropriate."[35] The Court's fears of creating voter confusion, she wrote, "pale in comparison to the risk that tens of thousands of voters will be disenfranchised" by the late decision.[36] For this reason, the *Purcell* doctrine has come to represent the Court's propensity for striking down district court orders that attempt to protect voting rights.[37]

The Supreme Court's *Crawford v. Marion County* decision also betrayed its hostility to the cause of voting rights. In that case, the Court held that Indiana's voter ID law (which imposed significant burdens on low-income, minority, and elderly voters) was "not excessively burdensome"[38] and justified by the state's interest in preventing voter fraud—a threat that had *never* been documented in the state.[39] This decision effectively gave states permission to enact restrictive voter ID laws based upon the completely hypothetical and undocumented threat of voter fraud.

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32 *See* Republican Nat'l Comm'n, 140 S. Ct. at 1207 (explaining that the lower court's action in allowing absentee ballots mailed or postmarked after the election date to be counted is the type of action the *Purcell* doctrine seeks to prevent).

33 *Id*.

34 *Id.* at 1206.

35 *Id.* at 1210–11.

36 *Id*. at 1211.

37 *See* Jim Rutenberg & Rebecca R. Ruiz, *Federal Appeals Courts Emerge as Crucial for Trump in Voting Cases*, N.Y. TIMES (Nov. 7, 2020) (noting that there have been many election disputes this year in which federal district judges sided with civil rights groups to deliver a voting rights victory, only to be stayed by appellate courts who apply the notion that "federal courts should not render decisions affecting state voting provisions too close to elections"). This article observes that this trend is explained in part by a recent, unprecedented wave of ultra-conservative appellate judicial appointees who are "sympathetic to . . . a campaign by Republicans to limit voting." *Id.*

38 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008) (plurality opinion) (quoting Storer v. Brown, 415 U.S. 724, 738 (1974)).

39 *Id.* at 194 (finding that Indiana has a valid state interest in preventing voter fraud, notwithstanding the fact that "[t]he record contains no evidence of any such [in-person voting] fraud actually occurring in Indiana at any time in its history").

Finally, in *Shelby County v. Holder*, the Supreme Court struck down the Section 4(b) coverage formula[40] of the Voting Rights Act and, as a consequence, rendered the Section 5 preclearance provision[41] "effectively inoperable."[42] In the lead opinion, Justice John Roberts argued that the Section 4(b) formula could no longer be justified—and was therefore an unconstitutional transgression of states' "equal sovereignty"—because it was based on forty-year-old data and "things have changed in the South."[43] Things had not changed in the South. Within hours of the decision, states moved to enact voting measures that would significantly prevent minority, elderly, and low-income voters from accessing the franchise.[44]

Taken together, these three decisions pose serious obstacles to voting rights litigators. As a result of *Shelby*, voting rights litigators have witnessed a proliferation of discriminatory laws that could not have been implemented under Section 5 preclearance.[45] The *Crawford* decision gave permission to states to enact voter ID laws that impose substantial burdens on voters, all to

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40 *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/XG75-ZHA5] ("The coverage formula determined which jurisdictions had to 'preclear' changes to their election rules with the federal government before implementing them, based on their history of race-based voter discrimination.").

41 *See* Ryan P. Haygood, *Hurricane SCOTUS: The Hubris of Striking Our Democracy's Discrimination Checkpoint in* Shelby County *& the Resulting Thunderstorm Assault on Voting Rights*, 10 HARV. L. & POL'Y REV. S11, S17–18 (2015) (explaining that the Section 5 preclearance provision required all jurisdictions under the coverage formula "to obtain preclearance from the Department of Justice or a three-judge panel of the District Court for the District of Columbia before enacting voting changes" and that "[p]reclearance would be granted after it was demonstrated that voting changes . . . were not discriminatory").

42 *The Effects of* Shelby County v. Holder, *supra* note 40 (explaining that the *Shelby* decision "rendered the Section 5 preclearance system effectively inoperable").

43 *See* Shelby Cnty. v. Holder, 570 U.S. 529, 540, 544, 554 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203–04 (2009)).

44 *See The Effects of* Shelby County v. Holder, *supra* note 40 ("The effects [of the *Shelby* decision] were immediate. Within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law. Two other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred . . . ."); *see also* Haygood, *supra* note 41, at S35–47 (describing the efforts of legislatures in North Carolina, Mississippi, South Carolina, Virginia, Arkansas, and Alabama to enact voter ID laws immediately following the *Shelby* decision).

45 *See The Effects of* Shelby County v. Holder, *supra* note 40 ("The decision in *Shelby County* opened the floodgates to laws restricting voting throughout the United States."); Deuel Ross, Opinion, *Voting Rights Success? Not So Fast*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/18/opinion/voting-rights-success-not-so-fast.html [https://perma.cc/2L7P-KECA] (explaining that the NAACP Legal Defense and Educational Fund "has seen more voter discrimination—not less—in the three years since [*Shelby*]" and that the eliminated provisions of the Voting Rights Act "would have blocked [these] discriminatory state and local voting changes").

address a problem (systemic voter fraud) that has never been documented.[46] Finally, even if district judges strike down an unconstitutional state voting law, increasingly conservative appellate courts are likely to overturn those decisions pursuant to the *Purcell* doctrine.[47]

The Supreme Court's increasingly hostile voting rights jurisprudence combined with the recent wave of conservative judicial appointees indicate that federal courts may no longer offer the most favorable forum for voting rights challenges. The time has come for voting rights advocates to consider a new venue.

II. JUDICIAL FEDERALISM: WHY STATE COURTS OFFER A VALUABLE ALTERNATIVE FORUM

In response to a similar conservative shift in the 1970's, Justice William J. Brennan, Jr. authored an extremely influential article advancing the theory of "judicial federalism."[48] Justice Brennan chastised the Court for retreating from the protection of individual rights, instead issuing "door-closing decisions" that undermined civil rights in the name of "comity and federalism."[49] Justice Brennan urged state courts to "step into the breach" left by the federal judiciary. He wrote:

> The very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them . . . with federal scrutiny diminished, state courts must respond by increasing their own.[50]

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46 *See* Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J. 1, 15 (2016) [hereinafter Douglas, *State Judges*] ("After *Crawford*, states, likely emboldened by the U.S. Supreme Court's decision, began enacting stricter voter ID laws, especially in states with conservative-led legislatures."); *see also* Democratic Party of Ga. v. Perdue, 707 S.E.2d 67 (Ga. 2011) (applying *Crawford* analysis to hold that the state voter ID law does not impose a substantial burden on voting rights and is justified by the state's interest in preventing voter fraud); Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014) (same); League of Women Voters of Ind. v. Rokita, 929 N.E.2d 758 (Ind. 2010) (same); Gentges v. State Election Bd., 419 P.3d 224 (Okla. 2018) (same); *see also Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth [https://perma.cc/H3HJ-7X5T] (surveying numerous nationwide studies, governmental investigations, and federal and state court decisions all concluding that systemic voter fraud has never been documented).

47 *See* Rutenberg & Ruiz, *supra* note 24 (noting "at least eight major election disputes" in which federal appellate courts stayed district court decisions that "sided with civil rights groups and Democrats").

48 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

49 *Id.* at 502.

50 *Id.* at 503.

Justice Brennan observed that state constitutions offer an independent "font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[51] He urged states to use their state constitutions to build upon this federal floor and provide more robust civil rights protections, insisting that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution." Without the "independent protective force" of state constitutional rights, "the full realization of our liberties cannot be guaranteed."[52]

Justice Brennan's arguments apply with equal force today. Just as the Supreme Court withdrew from the protection of individual liberties in the 1970s, the federal judiciary can no longer be counted upon to protect voting rights. State courts are called, once again, to "step into the breach."[53]

The case for judicial federalism is particularly strong in the context of voting rights because the federal constitution clearly contemplates that the states will fill in gaps left by the federal laws. For example, Article I, Section 2 of the federal constitution leaves to the states the task of determining election rules and voter eligibility requirements.[54] The provision suggests that the Framers intended state governments to build upon the voting rules (and protections) provided for by the federal constitution and federal jurisprudence.[55]

There is also a particularly strong need for state courts to protect voting rights because the federal constitution *never explicitly grants* a fundamental right to vote.[56] Although the U.S. Constitution mentions individual voting rights seven times (in Article I, Section 2 and in the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments) *none* of those provisions actually guarantees a right to vote.[57] Instead, the

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51 *Id*. at 491.

52 *Id*.

53 *See* Devins, *supra* note 27, at 1130 ("Today, perhaps more than ever before, state supreme courts will have ample opportunity to be rights innovators.").

54 *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 96 (2014) [hereinafter Douglas, *The Right to Vote*] ("The U.S. Constitution does not provide the qualifications for voters itself but instead delegates that responsibility to the states.").

55 *See id.* at 95 (explaining that the U.S. Constitution merely provides "the "floor" of individual rights"—including voting rights—while state constitutions "grant more robust rights"); *and id.* at 102 (explaining that states set out rules that govern voter registration, the availability of absentee ballots and early voting, and measures to protect the integrity of elections).

56 *Id.* at 95 ("[T]he U.S. Constitution confers only 'negative' rights, or prohibitions on governmental action, as opposed to specifically stated grants of individual liberties.").

57 *Id.* at 95–96.

U.S. Constitution "merely implies the right to vote through negative language" and requires only that "once a state grants the right to vote, it simply must do so on equal terms."[58] In stark contrast, "virtually every state explicitly confers the right to vote to all state citizens in its state constitutions."[59] In fact, forty-nine out of fifty state constitutions contain an explicit guarantee of the right to vote, many of which are phrased in positive, affirmative language.[60] In this sense, "state protection for the right to vote is . . . more robust than what is provided under federal law."[61]

There are also strong policy arguments for looking to state courts to provide stronger voting rights protections. First, state courts "have the primary responsibility to interpret their state's constitution"[62]—including the parameters on the right to vote—and "have no more duty to follow a U.S. Supreme Court decision than they do to follow a decision of a sister state supreme court."[63] This is true even where the state "is construing similar, even identical, language in their own constitutions"[64] as that which appears in the federal constitution. Therefore, a state supreme court is not obligated to follow federal precedent on matters of voting protections and "is immune from review by the U.S. Supreme Court."[65] Second, state supreme courts already decide significantly more voting rights issues than do the federal courts.[66] Finally, advocacy in state courts is invaluable because a successful voting rights challenge in one court may influence other state courts—and eventually, federal courts—to follow suit.[67] All in all, state courts'

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58 Douglas, *State Judges*, *supra* note 46, at 13.

59 *Id.*

60 Douglas, *The Right to Vote*, *supra* note 54, at 104–05 ("[S]tate constitutions go well beyond the U.S. Constitution in discussing the right to vote. In fact, most state constitutions have a separate article specifically dealing with elections and the franchise. Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all citizens . . . .").

61 Douglas, *State Judges*, *supra* note 46, at 13.

62 Joyner, *supra* note 17, at 250.

63 Jeffrey S. Sutton, *Forward: The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 794 (2018).

64 *Id.*

65 Joyner, *supra* note 17, at 250.

66 Douglas, *State Judges*, *supra* note 46, at 1–2 (describing state courts as "paramount in defining the constitutional right to vote" whereas "federal courts have issued far fewer opinions on voter ID laws than state courts have in the past decade").

67 *See* Sutton, *supra* note 63 at 796 *("*"Allow a State or two to experiment in addressing a new problem, to be the first responder in this area . . . after which other state courts (or state legislatures) can decide whether to follow that path or mark a new one. After the evidence is in, the [federal] judge can decide whether to nationalize the issue, to allow more time, or to leave the issue to the States."); Douglas, *State Judges*, *supra* note 46, at 4 ("Many state court opinions rely on decisions from other

considerable experience in construing voting rights issues and their license to construe state constitutional provisions independently from federal precedent suggest that state courts are well-equipped to "step into the breach."

III. APPLYING JUDICIAL FEDERALISM TO VOTER ID LAW CHALLENGES

In *Crawford v. Marion County*, the Supreme Court determined that Indiana's photo voter ID requirement did not unconstitutionally burden the right to vote under the Equal Protection Clause of the federal constitution.[68] For voting rights advocates, this decision yielded two major consequences. First, the *Crawford* decision "emboldened" many states to enact stricter voter ID laws.[69] Second, the *Crawford* decision effectively "closed the door to a federal constitutional challenge to voter ID laws . . . ."[70] For these reasons, voting rights advocates turned their attention to state courts, "challenging these voter ID laws around the country under state constitutions."[71] The results, thus far, have been "decidedly mixed," with "some states upholding their state's voter ID law and others striking it down."[72]

In the following analysis, I will compare the Supreme Court's analysis in *Crawford* to the analysis of four "pathbreaking" courts that struck down voter ID laws pursuant to their state constitutions. In doing so, I will pay particular attention to whether these courts generally "lockstep" with federal jurisprudence or give independent meaning to their state constitutions. I will also compare these "pathbreaking" courts (which struck down voter ID laws post-*Crawford*) with "lockstepping" courts that upheld voter ID laws to determine how factors such as partisanship leanings; party control over state government; judicial retention methods; and risk of subsequent constitutional amendment may predict a "friendly" state forum for future voter ID challenges.

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states, especially when considering similar issues. When a state court faces . . . a voter ID requirement, it is going to consider the views of its sister states. Federal courts also look to state jurisprudence.").

68 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008) (plurality opinion); *id.* at 204 (Scalia, J., concurring in judgment) (agreeing petitioners failed to show the Indiana photo voter ID unconstitutionally burdened their right to vote).

69 Douglas, *State Judges*, *supra* note 46, at 15.

70 *Id.*

71 *Id.*

72 *Id.* at 15–16.

A. The "Door-Closing" Crawford *Decision*

In *Crawford*, the Supreme Court also upheld the constitutionality of Indiana's voter ID law, SEA 483.[73] The law required all citizens voting in person to present government-issued photo identification.[74] The law contained exceptions for voters who (1) live in a state-licensed facility, such as a nursing home; (2) are indigent; or (3) have a religious objection to being photographed.[75] The law allowed voters without photo identification to file a provisional ballot that would be counted as long as they brought a photo identification to the circuit court clerk's office within ten days.[76] The state also offered free photo identification cards to qualified voters.[77] Immediately following the law's enactment in 2005, the Indiana Democratic Party and the Marion County Democratic Central Committee filed complaints alleging, among other claims, that the new law substantially burdened the right to vote in violation of the Fourteenth Amendment.[78]

The Supreme Court's *Crawford* analysis was damaging to voter ID law challenges for four major reasons. First, the Court held that the *Anderson-Burdick* standard applies—"a lower level balancing test, which is more deferential to a state's role in regulating elections"[79]—in lieu of strict scrutiny review, the standard more typically applied to laws that implicate fundamental rights.[80] Applying the *Anderson-Burdick* test, the Supreme Court looked first to the state interests that purportedly justified SEA 483—namely, preventing voter fraud.[81]

The second damaging piece of the *Crawford* analysis is the Court's recognition that voter fraud is a valid state interest for enacting restrictive voter ID requirements—*notwithstanding a complete lack of evidence that such fraud exists*. Even as Justice John Paul Stevens acknowledged that "the only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places" and "[t]he record contains no evidence of any such fraud

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73 *See Crawford*, 553 U.S. at 202–04 (plurality opinion).

74 *Id.* at 185

75 *Id.* at 186.

76 *Id.*

77 *Id.*

78 *Id.* at 186–87.

79 *See* Douglas, *State Judges*, *supra* note 46, at 15 (explaining that "the Court did not apply strict scrutiny review but instead employed a lower level balancing test, which is more deferential to a state's role in regulating elections")

80 *Id.*

81 *See Crawford*, 553 U.S. at 191. The Court also acknowledged the state's interests in promoting voter confidence and updating the state's voter rolls.

actually occurring in Indiana at any time in its history," he nonetheless held that "the interest in orderly administration and accurate recordkeeping provides a sufficient justification" for the law.[82] In essence, the Court found that preventing voter fraud—even where the state cannot demonstrate any evidence that voter fraud has ever occurred—is a valid state interest weighty enough to justify infringing the right to vote.

Next, Justice Stevens balanced the state's interest in preventing voter fraud against the alleged burden of the voter ID law on low-income, elderly, and other voters who lack the required form of identification.[83] Justice Stevens held that requiring these voters to obtain the necessary ID was not a substantial or severe burden on the right to vote because (1) the State offered photo identification cards for free and (2) "the inconvenience of 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."[84]

This conclusion—that gathering the required supporting documents (many of which are not free), traveling to the necessary clerk's office, and obtaining an ID is not a substantial burden on the right to vote—is the third damaging piece of the *Crawford* decision. As Justice David Souter argued in his dissent, the burden imposed by the voter ID law was substantial. He noted that "the burden of traveling to a more distant BMV office . . . is probably serious for many of the individuals who lack photo identification, [who] almost certainly will not own cars . . . and public transportation in Indiana is fairly limited . . . ."[85] He also observed that in order to obtain a "free" Indiana photo ID, voters must present either "a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport" and that "the two most common of these documents come at a price: Indiana counties charge anywhere from $3 to $12 for a birth certificate . . . and the total fees for a passport, moreover, are up to $100."[86] Voter IDs in Indiana were not free—"most voters must pay at least one fee to get the ID necessary to cast a regular ballot."[87] The costs that SEA 483 imposes on voters are significant and, according to Justice

82 *Id.* at 194, 196.
83 *Id.* at 198, 199.
84 *Id.* at 198–200.
85 *Id.* at 213–14 (Souter, J., dissenting).
86 *Id.* at 215.
87 *Id.* at 215–16.

Souter, "disproportionately heavy for, and thus disproportionately likely to deter, the poor, the old, and the immobile."[88]

Despite these facts, Justice Stevens held that there was not sufficient evidence to show the magnitude of the burden that SEA 483 imposed on the right to vote.[89] For this reason, the Court held that "the precise interests advanced by the State are therefore sufficient to defeat petitioners' facial challenges to SEA 483."[90] Herein lies the fourth, final absurdity of the Court's *Crawford* decision—the Court accepted the state's *completely unsubstantiated* arguments that the law is necessary to combat voter fraud, while at the same time holding that the petitioner's considerable evidence documenting the costs that approximately 43,000 voters without an ID would have to shoulder in order to vote was *insufficiently precise* to demonstrate an injury.[91] In doing so, the Court essentially gave states a "free pass" to enact strict voting measures based on the totally undocumented threat of voter fraud—while at the same imposing a significant evidentiary burden on voting rights advocates to demonstrate a sufficient burden.[92]

IV. "PATHBREAKING" ARGUMENTS: RATIONALES ADOPTED TO STRIKE DOWN VOTER ID LAWS

Notwithstanding the "door-closing" *Crawford* decision in 2008, four state courts have since struck down voter ID laws as unconstitutional under their state constitutions.[93] No two decisions were the same—some state courts interpreted their state constitutions to provide more broad voting rights

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88 *Id.* at 215–16.

89 *See id.* at 200–01 (plurality opinion):

> [T]he evidence in the record does not provide us with the number of registered voters without photo identification . . . . Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification . . . . [W]e do not know the magnitude of the impact SEA 483 will have on indigent voters in Indiana.

90 *Id*. at 203 (internal quotations omitted).

91 See *i*d. at 202–04; *see also id.* at 220–211 (Souter, J., dissenting) (noting that "a fair reading of the data supports the . . . finding that around 43,000 Indiana residents lack the needed identification, and will bear the burdens the law imposes," and that "empirical precision . . . has never been demanded for raising a voting-rights claim.").

92 *See* Douglas, *State Judges*, *supra* note 46, at 15 ("In essence, the Court closed the door to a federal constitutional challenge to voter ID laws unless the voter-plaintiffs have very strong evidence of how the law, as applied, severely impedes particular people from voting.").

93 *See* Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (en banc); Applewhite v. Commonwealth, No. 333 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); Martin v. Kohls, 2014 Ark. 427, 444 S.W.3d 844 (2014); Holmes v. Moore, 840 S.E.2d 244 (N.C. Ct. App. 2020).

protections;[94] one relied heavily on federal precedent;[95] and one even "lockstepped" with *Crawford* to hold that voter ID laws do *not* violate equal protection.[96] These cases provide important lessons on the diverse means by which voting rights advocates can seek to overturn voter ID laws in state forums.

Missouri

In 2006—two years before the *Crawford* decision—the Missouri Supreme Court became the first state high court to strike down a voter ID law in *Weinschenk v. State*.[97] That case concerned a state constitutional challenge to SB 1014, a law that required particular forms of photo identification to vote in-person.[98] The new law prohibited registered voters "from voting if they present only out-of-state picture identification, social security cards, utility bills, school or work IDs, or other documents that [had] served as proper identification" under the prior law.[99] Instead, voters were required to present a Missouri driver's license, non-driver's license, or U.S. passport—identification that at least three to four percent of Missourians lacked.[100]

In a per curiam opinion, the Missouri Supreme Court struck down the voter ID law on state constitutional grounds.[101] More specifically, the Court held that the photo ID requirement "violate[d] Missouri's equal protection clause . . . and Missouri's constitutional guarantee of the right of its qualified, registered citizens to vote."[102] The Court was careful to distinguish these constitutional provisions—and the heightened protections they offer to voters—from their federal counterparts, writing ("These rights are at the core of Missouri's constitution and, hence, receive state constitutional protections *even more extensive* than those provided by the Constitution.")[103] Accordingly, the Court refused to apply the federal *Anderson-Burdick* balancing test (the deferential standard later applied in *Crawford*) to ascertain the constitutionality of the law, insisting that "here, the issue is constitutionality under Missouri's constitution, not under the United States Constitution."[104] Instead, the Court endeavored to apply a traditional equal protection

94 *Weinschenk*, 203 S.W.3d at 204; *Martin*, 444 S.W.3d at 852.
95 *Holmes*, 840 S.E.2d at 254.
96 *Applewhite*, 2014 WL 184988 at *24.
97 *Weinschenk*, 203 S.W. 3d at 201.
98 *Id.* at 204.
99 *Id.* at 205.
100 *Id.* at 205, 206.
101 *Id.* at 204.
102 *Id.* (citing to MO. CONST. art. I, §§ 2 & 25 and art. VIII, § 2).
103 *Id.* (emphasis added).
104 *Id.* at 216.

analysis—"to determine whether the statute . . . impinges upon a fundamental right" and, if so, to apply strict scrutiny review.[105]

According to the Court, the express guarantee of the right to vote and the free elections clause—both enshrined in the state constitution—"establish with unmistakable clarity that the right to vote is fundamental to Missouri citizens."[106] Again, the Missouri Supreme Court took special care to identify the unique protections offered by the state constitution, explaining that "the express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart . . . [, as] the right to vote in state elections is conferred under federal law only by implication, not by express guarantee."[107]

Upon establishing that the right to vote is "fundamental" under the state constitution, the Court explained that the voter ID law posed a significant burden on indigent and elderly voters.[108] In particular, the Court noted that *every kind* of voter ID cost money to obtain, yet "lack of funds or time to undertake the sometimes laborious process of obtaining a proper photo ID" did not exempt voters from the requirement.[109] Applying strict scrutiny review, the Court conceded that the state's interest in deterring voter fraud was "compelling," but *completely unsubstantiated by any evidence*. The Court wrote, "No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri . . . . In fact, the evidence that was presented indicates that voter impersonation is *not* a problem in Missouri."[110] "These facts," the Court concluded, "compel the conclusion that the Photo-ID requirement is not "necessary to accomplish a compelling state interest."[111] The Court also dismissed the state's argument that the photo ID requirement was necessary to combat "perceptions of voter fraud," stating that "where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement."[112] And so, the Missouri Supreme Court struck down the voter ID law as a violation of the state constitution.

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105 *Id.* at 210–11.

106 *Id.* at 211 (citing to MO. CONST. art. I, § 25 and art. VIII, § 2).

107 *Id.* at 211.

108 *Id.* at 213–15 (noting that citizens without photo IDs are generally ill-equipped to bear the costs of obtaining them, and that elderly voters may struggle to navigate lengthy, complex bureaucratic processes).

109 *Id.* at 206.

110 *Id.* at 217 (emphasis added).

111 *Id.* at 217 (internal quotations omitted).

112 *Id.* at 218.

Ten years later, Republican state legislators sought to override the Supreme Court's decision by proposing a constitutional amendment that would allow the legislature to enact voter ID legislation.[113] In the ten years that had passed, *no incidences* of in-person voter fraud occurred in Missouri.[114] Democratic Governor Nixon vetoed the early House version of the law, arguing that "[m]aking voting more difficult for qualified voters and disenfranchising certain classes of people is wrong."[115] Nonetheless, the Republican-dominated legislature overrode his veto, and Missouri voters approved the ballot initiative by sixty-three percent.[116] As a result, the state constitution was amended to provide that a "person seeking to vote in person in public elections may be required by general law to identify himself or herself . . . and verify his or her qualifications as a citizen . . . by providing election officials with a form of identification, which *may include valid government-issued photo identification*."[117]

Wielding their new constitutional authority, Republican legislators immediately enacted section 115.427, which required voters to either (1) present a photo ID at the polls; (2) present a non-photo ID and sign an affidavit swearing (under penalty of perjury) that they were unable to obtain identification; or (3) cast a provisional ballot, which is recorded *as long as* the voter returns with a photo ID.[118] In 2020, voting rights advocates challenged the affidavit requirement on state constitutional grounds—a challenge that made its way to the Missouri Supreme Court in *Priorities USA v. State*.[119]

Much had changed between 2006 and 2020. With the election of Governor Eric Greitens in 2016, the Missouri state government became a Republican trifecta for the first time in eight years.[120] The Missouri Constitution—which the state supreme court had interpreted to prohibit

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113 Mark Joseph Stern, *Missouri Supreme Court Kills a Catch-22 Voter ID Law*, SLATE (Jan. 15, 2020, 5:39 PM), https://slate.com/news-and-politics/2020/01/missouri-supreme-court-catch-22-voter-id-law.html [https://perma.cc/2EGL-C8GT].

114 *Id.*

115 *Id*.

116 *See Missouri Voter ID Requirement, Constitutional Amendment 6 (2016)*, BALLOTPEDIA https://ballotpedia.org/Missouri_Voter_ID_Requirement,_Constitutional_Amendment_6_(2016) [https://perma.cc/J35Y-9UM9] (last visited Apr. 20, 2022).

117 MO. CONST. art. VIII, § 11 (emphasis added).

118 Priorities USA v. State, 591 S.W.3d 448, 451 (Mo. 2020) (en banc).

119 *Id*. at 451–52 (citing to MO. CONST. art. I, § 25 and art. VIII, § 2).

120 *See Missouri Elections, 2016*, BALLOTPEDIA https://ballotpedia.org/Missouri_elections,_2016 [https://perma.cc/EV33-AKQB] (last visited Apr. 20, 2022) ("Missouri elected Eric Greitens (R) as governor in 2016" which "turned the state to a Republican trifecta"); *Party Control of Missouri State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Missouri_state_government [https://perma.cc/39S2-E2DZ] (last visited Apr. 20, 2022)

photo identification requirements in *Weinschenk*—now contained an amendment that explicitly contemplated such a requirement. And, of course, *Crawford v. Merrion County*—which upheld voter ID laws as constitutional under the federal Equal Protection Clause—came down in 2008.[121]

Apparently, the Missouri Supreme Court was not fazed by these developments. Citing to *Weinschenk*, the Court began its *Priorities USA* analysis with the rule that the Missouri Constitution establishes a fundamental right to vote, even where "some regulation of the voting process is necessary to protect the right to vote itself."[122] Eschewing the *Anderson-Burdick* standard applied by the Supreme Court in *Crawford*, the Court maintained that strict scrutiny review would be appropriate if the voter ID law impinged on Missourians' fundamental right to vote.[123] However, the court declined to even analyze the burden posed by the law "because the [affidavit] requirement does not satisfy *even rational basis review*."[124]

The affidavit requirement asked voters to swear—under penalty of perjury—that (1) the voter does not possess a form of ID to vote; (2) the voter understands that she could receive a voter ID for free in order to vote; (3) the voter acknowledges that she must present a personal ID in order to vote; and (4) the voter acknowledges that knowingly providing false information is a violation of the law that subjects her to possible criminal prosecution.[125]

Even the court could not make heads or tails of this requirement.[126] On the one hand, the language of the affidavit indicates that the voter must not have any form of ID, and yet she must present a form of non-photo ID to exercise the affidavit option.[127] At the same time, the voter must swear that she understands she cannot vote without a photo voter ID, even as she votes without a photo voter ID (by exercising the affidavit option). According to testimony from voters, the misleading affidavit requirement deterred voter participation because voters did not want to risk exposing themselves to criminal prosecution for signing a contradictory and confusing document.[128] Election officials did not understand the requirement either, and mistakenly

121 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008).
122 *Priorities USA*, 591 S.W.3d at 452 (citing *Weinschenk*, 203 S.W.3d at 212).
123 *Id.* at 459.
124 *Id.* (emphasis added)
125 *Id.* at 453.
126 *Id.* at 454.
127 *Id.*
128 *Id.* at 455.

turned away qualified voters in a 2017 election.[129] Even as the Missouri court acknowledged that the state "has an interest in combatting voter fraud," it held that "requiring individuals . . . to sign a contradictory, misleading affidavit is not a reasonable means to accomplish that goal."[130] The court declined to sever the offending option from the voter ID law because the remaining two options required voters to present a photo ID without exception. Notwithstanding the 2016 constitutional amendment, the Missouri court cited to *Weinschenk* for the rule that "*requiring individuals to present photo identification is unconstitutional.*"[131]

Pennsylvania

In 2012, the Pennsylvania legislature enacted Act 18, "one of the most restrictive" voter ID laws in the country.[132] The bill was pushed through by Republican legislators who insisted that the law was necessary to prevent in-person voter fraud, notwithstanding a complete lack of evidence that any such fraud had ever occurred in the Commonwealth.[133] Democrats protested the measure, pointing out that the photo ID requirement would disenfranchise hundreds of thousands of likely Democratic voters—particularly "the poor, the elderly, and the young."[134] In the months following the law's passage, state election officials released their findings that about 9.2% of the state's voters did not have a photo ID that would satisfy the new law,[135] a figure nine times higher than the Commonwealth's initial

129 Stern, *supra* note 113 ("If individuals trained in executing election law cannot decipher it, how could a layperson possibly decode this Kafkaesque word salad—under penalty of perjury, no less?")

130 *Priorities USA*, 591 S.W.3d. at 455.

131 *Id*. at 458–59 (citing to *Weinschenk*, 203 S.W.3d at 219) (emphasis added) (explaining that voter ID requirements constitute a substantial and unconstitutional burden on the right to vote because "some individuals, due to their personal circumstances, experience hurdles when attempting to obtain photo identification . . . . Obtaining photo identification requires appropriate documentation, time, and the ability to navigate bureaucracies.")

132 *Press Release: Pennsylvania's Voter ID Law Found Unconstitutional*, ACLU (Jan. 17, 2014), https://www.aclupa.org/en/press-releases/pennsylvanias-voter-id-law-found-unconstitutional [https://perma.cc/4DBP-GXX2].

133 *Update: Judge Rules Voter ID Law Unconstitutional*, PUB. INT. L. CTR., https://www.pubintlaw.org/cases-and-projects/judge-rules-voter-id-law-unconstitutional/ [https://perma.cc/474B-YZM9] (last visited Apr. 20, 2022).

134 Bob Warner, *Voter ID Law May Affect More Pennsylvanians Than Previously Estimated*, PHILA. INQUIRER (July 4, 2012), https://www.inquirer.com/philly/news/politics/state/20120704_Voter_ID_law_may_affect_more_Pennsylvanians_than_previously_estimated.html [https://perma.cc/X7CT-YH34].

135 *Id*.

estimates.[136] In Philadelphia—a Democratic stronghold—"about eighteen percent of voters . . . lack sufficient ID" to comply with the new law.[137] House Republican leader Mike Turzai openly acknowledged the political ramifications of the voter ID law at that summer's Republican State Committee event, boasting "voter ID—which is going to allow Governor Romney to win the state of Pennsylvania—done!"[138]

Act 18 required in-person voters to present particular forms of photo identification—namely, government-issued photo IDs or identification issued by a Pennsylvania educational institution, an assisted living facility, or the military.[139] The legislature coupled this requirement with an affirmative duty on the Pennsylvania Department of Transportation (PennDOT) to provide *free* non-driver IDs to registered electors, as well as a duty on the legislature to effectively educate the public about the new voting requirements.[140] The Commonwealth did not fulfill either of these obligations.[141] Instead, PennDOT required all voters seeking a "free" PennDOT ID to provide "a series of identifying records, including a birth certificate with a raised seal, a social security card, and two proofs of residency."[142] Recognizing that voters could not fulfill these requirements, PennDOT delegated its authority to issue IDs to the Department of State ("DOS"), which "was designed to provide liberal access under Section 2(b) of the Voter ID Law where the PennDOT voting ID did not."[143] However, the DOS ID presented its own challenges, requiring voters to make multiple trips to remote bureaucratic offices (without drivers licenses or public transportation) and jump through numerous administrative hoops to receive the identification they needed.[144]

In July 2012, voting rights advocates filed a motion for preliminary injunction on the basis that thousands of voters would be unable to obtain

136 *Update: The Truth Continues to Emerge About Pennsylvania's Photo ID Law*, PUB. INT. L. CTR., https://www.pubintlaw.org/cases-and-projects/the-truth-continues-to-emerge-about-pennsylvanias-photo-id-law/ [https://perma.cc/2BAA-F4DF] (last visited Apr. 20, 2022).

137 Warner, *supra* note 134.

138 *Id.*

139 Applewhite v. Commonwealth, No. 333 M.D. 2012, 2014 WL 184988, at *2 (Pa. Commw. Ct. Jan. 17, 2014).

140 *Id.*

141 *Id.* at *10.

142 *Id.* at *2.

143 *Id.* at *3.

144 *Id.* at *11.

the required photo ID prior to the 2012 election.[145] Following a trial in the Commonwealth Court, Judge Simpson denied petitioners' request for an injunction on the basis of "a predictive judgment that the Commonwealth's efforts to educate the voting public, coupled with the remedial efforts being made to compensate for the constraints on the issuance of a PennDOT identification card, [would] ultimately be sufficient" to prevent disenfranchisement.[146] Petitioners immediately appealed to the Pennsylvania Supreme Court.[147]

In 2012, the Pennsylvania Supreme Court was rated the 24th most liberal state supreme court in the United States, and its justices were generally considered to have more liberal political views than their counterparts in the Commonwealth court.[148] Accordingly, the Pennsylvania Supreme Court's decision was significantly more protective of voting rights. The high court established that the right to vote is "fundamental" under the Pennsylvania state constitution[149] and held that *if* Act 18 impedes eligible, registered voters from casting their vote, it is necessarily unconstitutional.[150] The court observed that Act 18 established "a policy of liberal access" to free voter IDs for all, but that the Commonwealth had been unable to actually provide such liberal access.[151] Although agency officials "testified under oath that they [were] in the process of implementing several remedial measures" to comply with Act 18's liberal access requirement, the court was "not satisfied with a mere predictive judgment based primarily on the assurances of government

145 *Update: Petitioners File Pre-Trial Brief for Motion for Preliminary Injunction*, PUB. INT. L. CTR., https://www.pubintlaw.org/cases-and-projects/petitioners-file-pre-trial-brief-for-motion-for-preliminary-injunction/ [https://perma.cc/E4T8-RNJ9] (last visited Apr. 20, 2022).

146 Applewhite v. Commonwealth, 54 A.3d 1, 4 (2012) ("Applewhite II") (describing the decision in Applewhite v. Commonwealth, Pa. Cmwlth., No. 330 M.D. 2012, filed Aug. 15, 2012 (single judge) (PI Opinion 2012)).

147 *Update: Preliminary Injunction Denied, But Fight Continues*, PUB. INT. L. CTR., at https://www.pubintlaw.org/cases-and-projects/preliminary-injunction-denied-but-fight-continues/ [https://perma.cc/7TR6-5C7Z] (last visited Apr. 20, 2022).

148 *See Pennsylvania Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Supreme_Court [https://perma.cc/3LXV-NB2H] (last visited Apr. 20, 2022) (explaining a 2012 study that concluded the Pennsylvania Supreme Court was "the 24th most liberal court" among state supreme courts).

149 Applewhite v. Commonwealth, 54 A.3d 1 (2012) ("The Declaration of Rights set forth in the Pennsylvania Constitution prescribes that elections must be free and equal and "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." (citing PA. CONST. art. I., § 5)).

150 *See id*. at 4–6 (observing the voter ID law was "enforced in a manner that prevents qualified and eligible electors from voting" and holding that "if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future").

151 *Id.* at 3.

officials . . . ."[152] Instead, the court remanded the matter to the Commonwealth Court to assess the actual availability of free voter IDs and "whether the procedures being used for the deployment of the cards comport with the requirement of liberal access . . . ."[153] If the Commonwealth failed to ensure liberal access by that time, or if the Commonwealth Court "is still not convinced . . . . that there will be no voter disenfranchisement arising out of the Commonwealth's implementation of a voter identification requirement," then "that court is *obliged to enter a preliminary injunction*."[154]

And so, Act 18 returned to the Commonwealth Court one last time in 2014.[155] The court began by responding to the state supreme court's instruction—to determine whether the Commonwealth's implementation of DOS voter IDs and public education campaign fulfilled its duties to ensure "liberal access" to the polls. On both counts, the court held, "respondents neglected their statutory duties under the Voter ID Law, and fail to furnish liberal access."[156] The court observed that the Department of State did not even have the administrative authority to issue IDs under state law, and further that the DOS ID solution "limits rather than liberalizes [voter] access" by creating additional, unnecessary obstacles.[157] For example, voters must appear in person at a PennDOT Drivers Licensing Center (DLC) in order to obtain a DOS ID.[158] There are *no such centers* in nine Pennsylvania counties. In nine other counties, DLCs are open only one day a week. [159] In an additional thirteen counties, DLCs are only open two days per week, which "leaves about half of Pennsylvania without DLCs for five days a week, imposing a significant barrier to accessing the "free ID"—the only ID to which voters are statutorily entitled."[160] Requiring voters "who lack compliant photo ID, (and thus have no driver's license), to get to a DLC that may . . . be several miles away and unreachable by public transport is untenable."[161] The Commonwealth's DOS ID solution, therefore, did "not comport with liberal access"—a prerequisite to constitutionality.[162]

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152 *Id.*

153 *Id.*

154 *Id.* at 5 (emphasis added).

155 Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

156 *Id.* at 10.

157 *Id.* at 11.

158 *Id.* at 14.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at *14, *10.

The Commonwealth Court could have stopped there—however, it proceeded to strike down Act 18 as *facially unconstitutional* under Pennsylvania law, holding that "[a]s a constitutional prerequisite, *any voter ID law must contain a mechanism for ensuring liberal access* to compliant photo IDs so that the requirement of photo ID does not disenfranchise valid voters."[163] "In other words, a state cannot require (A) proof of identification . . . *without also* mandating (B), the government provide the new proof of identification."[164] Notwithstanding any state interest in regulating elections, the court held, the Pennsylvania constitution "does not permit regulation of the right to vote when such regulation denies the franchise, or 'makes it so difficult as to amount to a denial."[165]

Like the Missouri Supreme Court, the Commonwealth court began its analysis with the rule that the right to vote is "fundamental" under the state constitution.[166] Because Act 18 undeniably infringed on voters' access to the franchise—and failed to provide a non-burdensome means of acquiring an ID, as established—the court subjected the law to strict scrutiny review.[167] (This test, it bears mentioning, imposes a significantly higher burden on the state than does the *Anderson-Burdick* balancing test, which the U.S. Supreme Court applied in *Crawford*.) Under this standard of review, "the burden is on the government to demonstrate that the law infringing upon a fundamental right is narrowly tailored to achieve a compelling governmental interest."[168]

First, the court assessed the state's asserted interests in the voter ID law—namely, preventing voter fraud and building public confidence in elections.[169] In stark contrast to *Crawford*, the Pennsylvania Commonwealth court rejected the state's alleged interest in preventing voter fraud, arguing instead that "there were no specific incidents of voter fraud underlying the passage of the Voter ID law . . ." and "a vague concern about voter fraud does not rise to a level that justifies the burdens constructed here." On this basis, the Court held that unsubstantiated concerns about in-person voter fraud are *not* a compelling interest under the Pennsylvania constitution.

Second, the court determined that the voter ID law was not narrowly tailored to prevent voter fraud because prior elections without the voter ID

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163 *Id.* at *18.

164 *Id.*

165 *Id.* at *19 (citing to Winston v. Moore, 244 Pa. 447, 457 (1914)).

166 Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *19 (Pa. Commw. Ct. Jan. 17, 2014) ("In Pennsylvania, the right of qualified electors to vote is a fundamental one.")

167 *Id.* at *20 (citing Petition of Berg, 712 A.2d 340, 342 (Pa. Cmwlth. 1998)).

168 *Id.*

169 *Id.*

requirement had not been influenced by voter fraud, undermining the need for such a measure, and because the law imposed unnecessary burdens on voters' fundamental rights.[170] The voter ID law's provisions for absentee or provisional ballots did not correct the constitutional violation.[171]

In the end, Act 18 was struck down as facially unconstitutional pursuant to state precedent and the Commonwealth court's independent interpretation of the state constitution. However, the court's opinion contains one final twist that merits close analysis—a reliance on *Crawford* to deny Petitioners' equal protection claims. Although this part of the opinion did not impact the final outcome, the court's decision to "lockstep" its interpretation of the Pennsylvania Constitution's equal protection clauses with its federal counterpart in the U.S. Constitution offers an important lesson. Citing to extensive state law precedent, the court explained that "[e]qual protection under the Pennsylvania Constitution is coextensive with the Equal Protection Clause in the United States Constitution."[172] In other words, the court was bound by state law to apply federal precedent to equal protection challenges. Applying federal precedent, the court found that Act 18 is facially neutral, and "while the inherent statutory and constitutional flaws" in the law "may have disproportionate impact on particular groups, 'that impact must be traceable to purposeful discrimination in order to be constitutionally valid.'"[173] Citing to *Crawford*, incredibly, the Commonwealth court held that because "federal case law applies as to an equal protection claim . . . the distinction between voters who lack compliant photo ID and those who have it commands only rational basis review, and does not violate equal protection."[174] Notwithstanding the Pennsylvania courts' commitment to protecting the "fundamental" right to vote under its state constitution, voting advocates must beware the risk that those same courts may "lockstep" their interpretations of state equal protection provisions with federal precedent—even if doing so undermines voter access.

Governor Corbett declined to appeal the decision.[175]

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170 *Id.* at *21.

171 *Id.* at *23 (reasoning that absentee and provisional ballots can be challenged and rejected after the fact).

172 *Id.* at *24.

173 *Id.* at *25 (citing Klesh v. Com., Dep't of Pub. Welfare, 55 Pa. Cmwlth. 587, 423 A.2d 1348, 1351 (1980)).

174 *Id.* at *26.

175 *Update: Governor Declines to Appeal Loss in PA Voter Fraud Lawsuit*, PUB. INT. L. CTR., https://www.pubintlaw.org/cases-and-projects/governor-declines-to-appeal-loss-in-pa-voter-id-lawsuit/ [https://perma.cc/6ZZW-XW76] (last visited Apr. 20, 2022).

Arkansas

Also in 2014, the Arkansas Supreme Court struck down Act 595—a voter ID law—as facially unconstitutional under article III, section 1 of the Arkansas Constitution.[176] The law required voters to present photo identification issued either by the U.S. government, the Arkansas government, or an Arkansas postsecondary educational institution.[177] Although the Republican-dominated legislature claimed that the law was necessary to prevent voter fraud, Democratic Governor Beebe—who vetoed the legislation—called it "an expensive solution in search of a problem" that "would negatively impact one of our most precious rights as citizens."[178] Legislators overrode the veto, nonetheless.[179] Voting rights advocates immediately brought a challenge to the law on state constitutional grounds, which found its way to the Arkansas Supreme Court—the ninth most liberal state supreme court in the country[180]—six months later.[181]

The law was unconstitutional, the Court held, because it imposed an additional qualification on the right to vote.[182] Article III, section 1 of the Arkansas Constitution provides that *any person* in the state may vote provided that she is (1) a citizen of the United States; (2) an Arkansas resident; (3) at least 18 years old; and (4) lawfully registered to vote.[183] These four qualifications, the court held, "simply do not include any proof-of-identity requirement."[184] Relying on state supreme court precedent, the court held that the requirements of article III must be interpreted "strictly," and that to allow the legislature to create additional qualifications would "declare that part of the constitution . . . absolutely nugatory."[185] Instead, the court

176 Martin v. Kohls, 2014 Ark. 427, 444 S.W.3d 844, 846 (2014).

177 *Id*.

178 *Id*.

179 *Id*.

180 *Arkansas Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Supreme_Court [https://perma.cc/LJU7-AY8A] (last visited Apr. 20, 2022) (explaining that a 2012 political study found the Arkansas Supreme Court was the ninth most liberal state supreme court in the United States, based upon campaign contributions by the judges themselves, the partisan leanings of contributors to the judges' campaigns, and the ideology of the appointing body).

181 *See List of Judges of the Arkansas Supreme Court*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_justices_of_the_Arkansas_Supreme_Court [https://perm a.cc/BV9F-6B35] (last visited Apr. 20, 2022); *see also Arkansas Supreme Court: Political Outlook*, BALLOTPEDIA, https://ballotpedia.org/Arkansas _Supreme_Court#Political_outlook [https://perma.cc/34NS-CNL8] (last visited Apr. 20, 2022) (finding that the Arkansas Supreme Court is "the 9th most liberal state court in the United States.").

182 *Kohls*, 444 S.W.3d at 851–52.

183 *See* ARK. CONST. art. III, § 1.

184 *Kohls*, 444 S.W.3d at 852.

185 *Id*. at 851.

"adhere[d] to the framer's intent conferred in article [III], section 1 of the Arkansas Constitution to require the foregoing four qualifications of voters in an Arkansas election and nothing more."[186]

In argument, the Arkansas government relied on *Crawford* for the proposition that photo voter IDs are a "much-needed regulation[]" to prevent voter fraud, and not an additional qualification.[187] The Arkansas Supreme Court rejected this argument because *Crawford* was decided under the U.S. Constitution, and "here, we address the present issue solely under the Arkansas Constitution."[188]

Unfortunately for voting rights advocates, the Arkansas Constitution is easily amended.[189] Four years later, the Republican-dominated legislature responded to the *Kohls* decision by proposing a new "Voter ID Amendment," that would add possession of a voter ID to the list of constitutional voting qualifications.[190] Voters approved the amendment by seventy-nine percent.[191] In the next voter ID challenge to come before the Arkansas Supreme Court, the Court upheld the requirement on the basis that the Arkansas Constitution had been amended to include voter ID as a voting qualification.[192]

North Carolina

In 2020, voting rights advocates successfully petitioned the North Carolina Court of Appeals to enjoin SB 824—the state's voter ID law—on the premise that it violated the Equal Protection Provision of the North Carolina Constitution.[193] This resulting decision is unique for five key reasons.

First, SB 824 was enacted to give full effect to a constitutional amendment enacted by ballot initiative two years earlier. The new constitutional amendment provided that "voters offering to vote in person shall present

186 *Id*. at 852.

187 *Id*. at 853.

188 *Id*.

189 *Amending State Constitutions: Arkansas*, BALLOTPEDIA https://ballotpedia.org/Amending_state_constitutions [https://perma.cc/S546-KFGK] (last visited Apr. 20, 2022) (explaining that the Arkansas Constitution can be amended through multiple avenues, including legislatively referred amendments; ballot initiatives, and in some cases, powers given to the General Assembly to amend the constitution without voter approval).

190 *See* ARK. ISSUE 2, VOTER ID AMENDMENT 2018, *supra* note 183.

191 *Id*.

192 Martin v. Hass, 2018 Ark. 283, 556 S.W.509, 517 (upholding a voter ID requirement as a qualification to vote because it is consistent with the policy and purpose of the voter ID amendment).

193 Holmes v. Moore, 840 S.E.2d 244, 251 (N.C. Ct. App. 2020).

photographic identification before voting [and] the General Assembly shall enact general laws governing the requirements of such photographic identification . . . ."[194] SB 824 was intended to be one of those "general laws."[195] Therefore, the North Carolina court actually struck down a voter ID law that was *specifically provided for by the state constitution itself*.

Second, the petitioners' claims against SB 824 are unique because they allege that the law was enacted with racially discriminatory intent and wielded a disparate impact on voters of color.[196] In contrast, none of the petitioners in Pennsylvania, Arkansas, Missouri, or Indiana could successfully identify a discriminatory motive for the voter ID laws in question.[197]

Third, because petitioners' voter ID claim was based on allegations of racially discriminatory intent, a more favorable line of federal precedent directly applied to their case—*Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).[198] Under that precedent, the Court explained, "a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination" that is "just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race."[199] The *Arlington Heights* analysis directs courts to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent" to determine whether discriminatory purpose was "*a* motivating factor" for the law, considering factors such as (1) the historical background of the law; (2) the sequence of events leading to the law; (3) departures from the normal legislative procedure; (4) the legislative history of the decision; and (4) whether the law wields a disproportionate impact on one race over another.[200]

Fourth, the North Carolina Court of Appeals relied heavily upon a recent favorable Fourth Circuit case[201] that struck down an almost identical North Carolina voter ID law—based on very similar circumstances and legislative

194 *Id*. at 250 (citing to N.C. CONST. art. VI, §§ 2(4), 3(2)).

195 *Id*. at 250-51. SB 824 does not differ significantly from the voter ID laws contested in Pennsylvania, Missouri or Arkansas—it requires voters to present a particular form of photo identification, provides for some exceptions based on religious objection or indigency, and promises to provide voters with a form of ID "for free."

196 *Id.* at 254-62 (analyzing petitioners' claims that the North Carolina state legislature intentionally enacted SB 824 to disenfranchise African American voters).

197 In contrast, Pennsylvania, Montana, and Arkansas did not consider claims that the law was enacted with discriminatory intent.

198 *Id*. at 254 (holding that "the United States Supreme Court's decision in *Arlington Heights v. Metropolitan Housing Corp.* and its progeny control the question of whether Plaintiffs are entitled to a preliminary injunction based on their Discriminatory-Intent claim.")

199 *Id*.

200 *Id*. at 254–55.

201 *Id*. at 255 (citing to N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016)).

history– two years earlier. Citing frequently to the Fourth Circuit's holdings in *McCrory* (which also applied the *Arlington Heights* test), the North Carolina Court of Appeals identified the following *Arlington Heights* factors—(1) North Carolina has "a long history of race discrimination generally and race-based vote suppression in particular";[202] (2) prior to the enactment of SB 824, the North Carolina legislature compiled racial data on the types of voter IDs commonly possessed by black voters;[203] (3) SB 824 explicitly excluded "many of the alternative photo IDs commonly possessed by African Americans";[204] (4) the North Carolina legislature engaged in a highly expedited, abridged form of debate and legislative deliberation to pass SB 824 during a lame-duck legislative session;[205] and (5) "the burdens of obtaining a free ID are significant . . . and fall disproportionately on voters of color."[206] Taken together, the Court concluded, these *Arlington Heights* factors suggested that the true motive lying behind SB 824 was racially discriminatory.[207] Pursuant to *Arlington Heights* precedent, the burden then shifted to the North Carolina government to give a legitimate, nondiscriminatory reason for the law.

Fifth, unlike every other state defendant in these voter ID cases, the North Carolina government *did not allege that the law was necessary to prevent or deter voter fraud* in the state. Instead, respondents alleged only that the law was necessary "to fulfill our Constitution's newly added mandate that North Carolinians must present ID before voting."[208] The Court held that this interest was not sufficient to justify the significant, disparate burden that the law imposed on black voters and remanded the case to the lower court with instructions to enjoin SB 824.[209]

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202 *Id.* at 257.

203 *Id.* at 258.

204 *Id*. at 261.

205 *Id*. at 259 (noting "the legislature's failure to consider public input, failure to use updated data, failure to allow a thorough debate, and failure to take into account all implications of the bill's potential impacts on voters")

206 *Id*. at 263 (quoting Brief of Plaintiffs-Appellant, Holmes v. Moore, 840 S.E.2d 244 (2020) (No. COA-19-762); *see also id*. at 262 ("[T]his legislative history supports Plaintiffs' claim of an underlying motive of discriminatory intent in the enactment of S.B. 824.").

207 *Id*. at 264.

208 *Id*. at 265; *see also id*. ("[T]he General Assembly's history with voter-ID laws, the legislative history of the act, the unusual sequence of events leading to its passage, and the disproportional impact on African American voters likely created by S.B. 824 all point to the same conclusion that discriminatory intent remained a primary motivating factor behind S.B. 824, not the Amendment's directive to create a voter ID law.").

209 *Id.* at 266-67.

V. LESSONS FROM THE POST-*CRAWFORD* STATE COURT DECISIONS

Although all of these state courts considered very similar voter ID laws—and applied state constitutional provisions with very similar language[210]—the resulting analyses were "decidedly mixed."[211] In the sections that follow, I discuss the lessons that voting rights litigators may draw from these state court decisions.

A. "Friendly" state forums often—but do not necessarily—engage in independent analysis of state constitutions.

Voting rights scholars hypothesize that "friendly" state courts invalidate voter ID laws by independently analyzing the right to vote under the state constitution, while "hostile" state courts uphold voter ID laws by analyzing state constitutions in "lockstep" with federal precedent.[212] Although they represent a small sample size, the four "pathbreaking" state court decisions described above refute this hypothesis. As discussed prior, three of the four (Pennsylvania, Arkansas, and Missouri) struck down voter ID laws as violative of the "fundamental right to vote" enshrined in their respective state constitutions. Each of these decisions looked to the text of state constitutional provisions and state precedent to find that the right to vote received *greater* protections thereunder than under the federal constitution. Curiously, however, the North Carolina court *did not* cite any particular provision in the state constitution to strike down a voter ID law, instead relying entirely on recent, relevant federal precedent.

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210 *See* Appendix 1 for a complete chart of the state constitutional provisions.

211 Douglas, *State Judges*, *supra* note 46, at 16.

212 *See, e.g.*, *id*. at 15:

> Underlying most decisions sustaining a voter ID law is a constricted interpretation of the state-based constitutional right to vote that simply follows narrow federal jurisprudence. By contrast, courts that have invalidated strict voter ID requirements often give independent, broader force to the state constitution's explicit conferral of the right to vote.

This observation is also borne out by the state courts that *upheld* voter ID laws post-*Crawford*—Indiana,[213] Tennessee,[214] Georgia,[215] Oklahoma[216] and Wisconsin.[217] Two of these five state courts—Tennessee and Oklahoma—relied entirely on independent analysis of state constitutional provisions—*not Crawford*—to ultimately uphold voter ID laws.

In *City of Memphis v. Hargett*, the Tennessee Supreme Court upheld a photo voter ID law because the Tennessee Constitution contained an "anti-voter fraud" provision that explicitly empowered the legislature to enact such laws.[218] The court held "the same constitutional provisions that guarantee the right to vote also charge the state with ensuring that elections are 'free and equal,'… and authorize the General Assembly 'to enact . . . laws to secure . . . the purity of the ballot box"—even in the absence of evidence that voter fraud had occurred in the state.[219] In response to Plaintiffs' argument that the voter ID requirement created an additional qualification on the right to vote—which the Tennessee Constitution expressly prohibits[220]—the court reasoned that requiring a voter ID "functions merely as an election regulation to verify the voter's identity" and was thus "more properly classified as a regulation pertaining to an existing voting qualification."[221] Instead of the *Anderson-Burdick* balancing test applied in *Crawford*, the Tennessee Supreme Court upheld the law under strict scrutiny review,

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213 *See* League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 767, 772 (Ind. 2010). The Indiana Supreme Court "lockstepped" with *Crawford* to hold that requiring voter IDs is not an additional qualification to vote, but merely a "method of establishing a voter's qualification to vote." *Id.* at 767 (quoting *Crawford* at 193).

214 *See generally* City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013) (upholding the state's voter ID law under strict scrutiny).

215 *See generally* Dem. Party of Ga. v. Perdue, 707 S.E.2d 67 (Ga. 2011) (upholding a voter ID law as a reasonable and nondiscriminatory restriction warranted by important state interests).

216 *See generally* Gentges v. State Election Bd., 419 P.3d 224, 228-229 (Okla. 2018) (holding that the proper inquiry for whether a voter ID law is unconstitutional considers "whether the law was designed to protect the purity of the ballot, not as a tool . . . to impair constitutional rights," and, after reviewing the legislative history, concluding that "the Voter ID law was intended . . . to prevent future in-person voter fraud . . . [and not] with the intent to impair the right to vote.").

217 *See* Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014) (holding that Act 23 survives rational basis review under *Crawford* because it is justified by an interest in preventing voter fraud and does not impose a severe burden on the right to vote).

218 *Hargett* at 103, 105 (citing to TENN. CONST. art. IV, § 1).

219 *Id.* at 103; *id.* at 104 ("[W]hile in-person voter fraud may be rare . . . it is within the authority of the General Assembly to guard against the risk of such fraud in this state . . . .")

220 *Id.* at 108 ("[A]rticle IV, section I of the Tennessee Constitution enumerates several voting qualifications," including age, citizenship, residency and registration requirements, and "[t]here shall be no other qualification attached to the right of suffrage")

221 *Id.* at 109.

finding that the law achieved the "compelling" interest of preventing voter fraud without unduly burdening voter access.[222]

The Oklahoma Supreme Court applied a similar analysis when it upheld a photo voter ID law in *Gentges v. State Election Board.* Like the Tennessee Constitution, the Oklahoma Constitution contains an explicit anti-voting fraud provision,[223] which empowers the legislature to "enact such laws as may be necessary to detect *and punish* fraud in such elections."[224] To determine whether the voter ID passed constitutional muster, the Oklahoma court asked whether the law "was designed to protect the purity of the ballot [and was] not a tool or instrument to impair constitutional rights and whether the measure "reflects a conscious legislative intent for electors to be deprived of their right to vote." The court acknowledged the complete absence of evidence that any voter fraud had occurred in the state, and yet affirmed that the law was intended to prevent voter fraud and not to disenfranchise voters.[225] Although the court referred to the *Crawford* decision for the propositions that (1) actual evidence of voter fraud is not necessary to justify voter ID laws and (2) photo voter IDs do not impose a severe burden on the right to vote; the court applied a completely unique state constitutional provision—and test—to ultimately uphold the law.[226]

Therefore, independent review of state constitutions does not necessarily lead to a more favorable result— and "lockstepping" with federal precedent does not necessarily doom a voting rights challenge.

B. Voting rights advocates should avoid bringing equal protection claims—or bring additional claims—in courts that analyze state equal protection clauses in "lockstep" with federal precedent.

The Pennsylvania Commonwealth Court ultimately struck down the voter ID law for unconstitutionally burdening the fundamental right to vote, which is guaranteed by article I, section 5 of the state's constitution.[227] At the same time—and in a fascinating twist—the court held that the law *did not violate* the equal protection guarantees of the state constitution under *Crawford*.[228] This is because Pennsylvania courts have long followed a general

222 *Id.* at 109, 114.

223 *Gentges* at 228.

224 *Id.* (quoting OKLA. CONST. art. III, § 4) (emphasis added).

225 *Id.* at 229.

226 *Id.* at 230–31.

227 Applewhite v. Commonwealth, 2014 WL 184988 at *18, *24 (2014) (citing to PA. CONST. art. I, § 5).

228 *Id.* at *24–26.

rule of interpreting the state equal protection provisions *in complete lockstep* with the Fourteenth Amendment of the federal constitution. As previously discussed, the *Crawford* decision established that voter ID laws do *not* constitute a violation of equal protection under the federal constitution. Therefore, it was predictable—and perhaps inevitable—that the Commonwealth Court would rely on the *Crawford* decision to reject the petitioners' equal protection claims.

This rule was also borne out by the Georgia voter ID case, where voting rights advocates argued that "the Georgia Constitution provides greater protections under its equal protection clause than does the United States Constitution, and, therefore, Georgians should enjoy enhanced equal protection of their right to vote."[229] The Georgia Supreme Court dismissed this argument, holding instead that "this Court has repeatedly stated that the Georgia clause is generally 'co-extensive' with and 'substantially equivalent' to the federal equal protection clause, and that we apply them as one."[230] From there, the Georgia Supreme Court relied on *Crawford* to hold that the voter ID law did not violate equal protection under the state constitution.[231]

These cases offer an important lesson for voting rights advocates. Namely, advocates should pay attention to whether state courts interpret the equal protection guarantees of their state constitutions in lockstep with federal equal protection jurisprudence, and either avoid—or bring alternate claims—in courts that do.[232]

C. Recognize the "pull" of recent federal precedent.

State supreme courts often follow federal jurisprudence—even as they interpret their own state constitutions—because "they are subject to the 'gravitational pull' of federal norms."[233] In other words, state judges are

229 Dem. Party of Ga. v. Perdue, 707 S.E.2d 67, 74 (Ga. 2011) .

230 *Id*.

231 *Id*. at 75 (citing to *Crawford* and other federal cases for the proposition that preventing voter fraud is an important state interest, that the voter ID requirement is not a significant burden, and that the law at issue was actually less burdensome than the law upheld by the Supreme Court).

232 *See also* Milwaukee Branch of NAACP v. Walker, 851 N.W.2d 262 (Wis. 2014) (holding that a voter ID law did not violate equal protection pursuant to *Crawford*); Dem. Party of Ga., Inc. v. Perdue (same).

233 Devins, *supra* note 27, at 1133 (2019).

likely to "lockstep" with federal precedent "because of the perceived superiority of federal court interpretations." [234]

The North Carolina case illustrates how voting rights advocates might utilize this principle in their favor. In that case, petitioners asserted claims that the voter ID law (which closely resembled the voter ID laws upheld by other states) was motivated by a racially discriminatory—and thus unconstitutional—intent.[235] Petitioners argued that the circumstances of the case fit squarely with the federal *Arlington Heights* analysis, a favorable test that allows voting rights advocates to introduce various circumstantial and direct evidence that suggests racially discriminatory motives. The petitioners also cited to the recent *NAACP v. McCrory* case—a Fourth Circuit decision that applied the *Arlington Heights* factors to a virtually identical voter ID law that had been enacted under almost identical (racially discriminatory) circumstances.[236] Clearly, the North Carolina Court of Appeals found this comparison persuasive, agreeing that the law was likely motivated by racially discriminatory intent and ought to be enjoined.[237] In this case, at least, the existence of a recent, favorable federal decision in a virtually identical context was an invaluable tool for striking down a voter ID law.

At the same time, relevant, recent federal precedent can obviously undermine a voter ID challenge. The Indiana Supreme Court's decision in *League of Women Voters v. Rokita* demonstrates this principle. In that case, the Supreme Court considered the constitutionality of *the very same voter ID law* that had been upheld as constitutional in *Crawford v. Marion County*. [238] Although the Indiana Supreme Court acknowledged that "a federal court's interpretation of Indiana law is not binding on Indiana state courts," the court nonetheless relied heavily on the *Crawford* opinion to uphold the ID law.[239] From this case, one might conclude that a state supreme court is *very unlikely* to strike down a voter ID law as unconstitutional under the state

234 *Id*. at 1144; *see also id*. ("Federal law is [seen as] prestigious, pervasive, and highly visible . . . . It is no wonder then that state actors are drawn to it.") (quoting Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 739 (2016)).

235 Brief of Plaintiffs-Appellants at 15, *Holmes v. Moore*, 840 S.E.2d 244 (2020) (No. COA–19–762).

236 *Id.* at 9–14.

237 Holmes v. Moore, 840 S.E.2d, 244 at 265 (N.C. App. 2020).

238 League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758 at 761–62 (Ind. 2010).

239 *Id*. at 763. *See also id*. at 767 (citing to *Crawford* for the proposition that requiring voter IDs are not an additional qualification to vote but instead an "effective method of establishing a voter's qualification to vote"); *and* 768–69 (citing to *Crawford* for the holding that the voter ID law "imposes only a limited burden on voters' rights" that are justified by state interests in modernizing elections and preventing voter fraud) (internal citations omitted).

constitution where a federal decision recently upheld a similar law. The "pull," unfortunately, is likely too great for a state supreme court to resist.

VI. CHOOSING A FRIENDLY FORUM: SHARED CHARACTERISTICS OF STATE COURTS THAT STRIKE DOWN VOTER ID LAWS

Voting scholars have hypothesized that factors such as the risk of political backlash, the risk of subsequent constitutional amendment, and judges' partisan leanings may influence state courts' receptiveness to voting rights claims.[240] In the following section, I analyze how these factors correlate with the outcomes in the post-*Crawford* voter ID cases. By looking for trends among the "friendly" and "hostile" state courts, I aim to offer a means of predicting which state courts are likely to strike down voter ID laws in future challenges.

A. Partisanship is a very strong indicator of whether a state court will uphold or invalidate a voter ID law.

As the chart demonstrates below, almost every state court to strike down a voter ID law post-*Crawford* leaned liberal. It bears noting that the only "pathbreaking" court to stray from this pattern—the Pennsylvania Commonwealth Court—had already been overturned once by the more liberal Pennsylvania Supreme Court when it finally struck down Act 18.[241] It is possible, therefore, that the Commonwealth Court felt pressured to strike down the rule in order to avoid yet another reversal.

At the same time, almost every state court to uphold a voter ID law post-*Crawford* leaned conservative.

Chart 1: Voter ID Laws and Partisanship

State	**Upheld/Struck Down Voter ID Law?**	**Contemporary Political Ideology of the Judges**

240 Devins, *supra* note 27, at 1135 (explaining that state court justices are more likely to "pathbreak" to advance individual rights when they are more politically insulated and face less risk of backlash); Douglas, *State Judges*, *supra* note 46, at 33 ("[A judge's] ideology often correlates with the outcome in a case, especially on highly partisan issues such as election law and voting rights.").

241 *See* Applewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) (discussing the Pennsylvania Supreme Court's initial remand of the *Applewhite* case).

Pennsylvania (Commonwealth Court)	Struck down	Slightly conservative-leaning[242]
Arkansas	Struck down	Liberal-leaning[243]
North Carolina (Court of Appeals)	Struck down	Liberal-leaning[244]
Missouri	Struck down	Liberal-leaning[245]
Indiana	Upheld	Slightly liberal-leaning[246]

242 At the time of decision, the Commonwealth Court had a Republican majority. *Compare Historical List of Commonwealth Court Judges*, UNIFIED JUD. SYS. OF PA., http://www.pacourts.us/learn/history/historical-list-of-commonwealth-court-judges/ [https://perma.cc/J6NP-PTE7] (last visited Apr. 20, 2022) (listing dates Commonwealth Court judges assumed office) with *Pennsylvania Commonwealth Court*, https://ballotpedia.org/Pennsylvania_Commonwealth_Court [https://perma.cc/8KED-8435] (last visited Apr. 20, 2022) (indicating Judge P. Kevin Brobson, Judge Anne Covey, Judge Renée Cohn Jubelirer, Judge Mary Hannah Leavitt and Judge Patricia McCoullough are Republicans and were on the Court at the time of the decision); *see also* Tom Infield, *Voter ID Case Puts Spotlight on Pa. Judge*, PHILA. INQUIRER (Aug. 13, 2012) https://www.inquirer.com/philly/news/politics/20120813_Voter-ID_case_puts_spotlight_on_Pa__judge.html [https://perma.cc/7NHS-D888] (last visited Apr. 20, 2022) (describing Judge Robert J. Simpson as a Democrat-turned Republican); ASSOCIATED PRESS, *Rendell's High Court Pick Would Tip Balance for D's*, PENN LIVE (Jun. 20, 2008) (identifying Judge Johnny J. Butler as a Republican).

243 *See Supreme Court Justices*, ARK. JUDICIARY, https://www.arcourts.gov/courts/supreme-court/justices [https://perma.cc/5XNM-L4EU] (last visited Apr. 20, 2022) *see also Arkansas Supreme Court: Political Outlook*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Supreme_Court [https://perma.cc/3A3W-93MX] (last visited Apr. 20, 2022) (finding that the Arkansas Supreme Court was the ninth most liberal state supreme court in the United States).

244 *See North Carolina Court of Appeals*, WIKIPEDIA (June 7, 2020), https://web.archive.org/web/20200607125635/https://en.wikipedia.org/wiki/North_Carolina_Court_of_Appeals [https://perma.cc/8J9Q-7YHD] (showing that at the time of the decision, the Court of Appeals had eight Democrats and seven Republicans).

245 *See Missouri Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Supreme_Court_elections,_2020 [https://perma.cc/G23Y-RMB7] (last visited Apr. 20, 2022) (showing that at the time of the decision, four Democratic appointees and three Republican appointees made up the Missouri Supreme Court); *see also* Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L. J. 1, 34 (2016) (explaining that "[m]ost of the Supreme Court judges in the 6–1 majority that invalidated the state's voter ID law had liberal backgrounds.")

246 *See Justices of the Indiana Supreme Court*, STATE OF INDIANA, https://www.in.gov/courts/supreme/files/justice-bios.pdf [https://perma.cc/89HE-VYU4] (last visited Apr. 20, 2022) (showing that at the time of the decision, the Indiana Supreme Court had three Democratic appointees and two Republican appointees); *see also Bonica and Woodruff Campaign Finance Scores of State Supreme Court Justices, 2012*, BALLOTPEDIA, https://ballotpedia.org/Bonica_and_Woodruff_campaign_finance_scores_of_state_supreme_court_justices,_2012 [https://perma.cc/QZV7-SFSP] (last visited Apr. 20, 2022) (designating Indiana as a conservative-leaning Supreme Court two years after the decision).

Tennessee	Upheld	Liberal-leaning[247]
Georgia	Upheld	Conservative-leaning[248]
Oklahoma	Upheld	Conservative-leaning[249]
Wisconsin	Upheld	Conservative-leaning[250]

Clearly, voting rights is a highly partisan issue, and "a judge's analysis of the constitutional right to vote often correlates with his or her ideology."[251] However, it bears noting that political partisanship is an *even stronger predictor* of outcome in voter ID cases than in other voting rights litigation.[252] In fact, "*most* (although not all) of the state judges ruling on voter ID laws in the past decade have followed their ideological predilections."[253] In the majority of voter ID cases, "[l]iberal judges most often construe the constitutional right to vote broadly and therefore view voter ID laws skeptically, while conservative judges tend to do the opposite."[254] For this reason, voting rights advocates should try to discern—whether by campaign donations, partisan elections, or gubernatorial appointments—the partisan leaning of a potential state forum.

247 *See Bonica and Woodruff Campaign Finance Scores of State Supreme Court Justices, 2012*, *supra* note 246 (indicating that the Tennessee Supreme Court leans slightly liberal).

248 *See Georgia Supreme Court Justice Vacancy (March 2020)*, BALLOTPEDIA, https://ballotpedia.org/Georgia_Supreme_Court_justice_vacancy_(March_2020) [https://perma.cc/UF4W-2CGY] (last visited Apr. 20, 2022) (explaining a study that examined campaign contributions disclosed by Georgia justices; the partisan leanings of those contributors; and the ideology of the appointing body to find that the Georgia Supreme Court generally leans conservative).

249 *See Bonica and Woodruff Campaign Finance Scores of State Supreme Court Justices, 2012*, *supra* note 246 (identifying Oklahoma as the fourteenth most conservative state supreme court in the United States).

250 *See State Supreme Court Partisanship, 2016*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_court_partisanship,_2016 [https://perma.cc/9CPQ-YKVZ] (last visited Apr. 20, 2022) (identifying the Wisconsin Supreme Court as conservative leaning); *Bonica and Woodruff Campaign Finance Scores of State Supreme Court Justices, 2012*, *supra* note 246 (identifying Wisconsin as the eleventh most conservative state supreme court in the United States).

251 Douglas, *supra* note 46, at 33.

252 *Id.* ("The link between ideology and interpretation of the constitutional right to vote is most poignant in decisions on voter ID laws.").

253 *Id.* at 33–34.

254 *Id.* at 34.

B. "Friendly" state courts are highly likely to sit in divided governments, while "hostile" state courts are likely to sit in Republican trifecta state governments.

As the chart demonstrates below, *almost every* state court to strike down a voter ID law post-*Crawford* sat within a divided government, [255] and *almost every* state court to uphold a voter ID law sat within a Republican trifecta state government.[256]

Chart 2: Voter ID and Party Control Over State Government

State	**Upheld or Struck Down Voter ID Law?**	**Divided Government/ Republican Trifecta**
Pennsylvania	Struck down	Republican trifecta[257]
Arkansas	Struck down	Divided government[258]
North Carolina	Struck down	Divided government[259]
Missouri	Struck down	Divided government[260]
Indiana	Upheld	Divided government[261]
Tennessee	Upheld	Republican trifecta[262]

255 The only exception to this rule—Pennsylvania—became a divided government in the following year with the election of Governor Tom Wolf. *See Party Control of Pennsylvania State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Pennsylvania_state_government [https://perma.cc/79HV-MGT8] (last visited Apr. 20, 2022) (showing that Pennsylvania became a divided government in 2015 with the election of Democratic Governor Tom Wolf).

256 The lone exception in this category—Indiana—became a Republican trifecta the following year. *See Party Control of Indiana State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Indiana_state_government [https://perma.cc/6XHU-UWYH] (last visited Apr. 20, 2022) (showing that Indiana became a Republican trifecta in 2011 after the party gained control of the House of Representatives).

257 *See Party Control of Pennsylvania State Government*, *supra* note 255 (showing a Republican trifecta in 2014).

258 *See Party Control of Arkansas State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Arkansas_state_government [https://perma.cc/WJ6J-MQ9A] (last visited Apr. 20, 2022) (showing a divided government in 2014).

259 *See Party Control of North Carolina State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_North_Carolina_state_government [https://perma.cc/6FH3-LQWB] (last visited Apr. 20, 2022) (showing a divided government in 2020).

260 *See Party Control of Missouri State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Missouri_state_government [https://perma.cc/2EFN-MPYQ] (last visited Apr. 20, 2022) (showing a divided government in 2014).

261 *See Party Control of Indiana State Government*, *supra* note 256 (showing a divided government in 2010).

262 *See Party Control of Tennessee State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Tennessee_state_government [https://perma.cc/6F H3-LQWB] (last visited Apr. 20, 2022) (showing a Republican trifecta in 2013).

Georgia	Upheld	Republican trifecta[263]
Oklahoma	Upheld	Republican trifecta[264]
Wisconsin	Upheld	Republican trifecta[265]

This correlation is intuitive because state court judges serving in Republican-controlled state governments are "likely to come from the dominant political party and likely to agree with the political establishment."[266] For this reason, state courts sitting in Republican trifectas are unlikely to "slap down the dominant party" by invalidating voter ID laws.[267] At the same time, state courts sitting in Democratic trifectas are also unlikely to act as major players in voter ID litigation namely because Democratic legislatures are less likely to enact such legislation in the first place.[268] Therefore, the only state governments in which voter ID challenges are likely to succeed are in those states with governments that are either *currently* divided or recently enough divided that the state court justices could still harbor Democratic leanings.

C. State court judges facing contested reelections may feel more pressure to uphold a politically-divisive voter ID law or follow federal precedent.

In general, state court justices are far more vulnerable to political influence than federal judges because they do not enjoy life tenure and must face regular reelections.[269] For this reason, fear of political backlash (i.e., losing reelection) is a significant factor that may influence state judges' decisions to follow federal precedent in politically divisive cases—especially

263 *See Party Control of Georgia State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Georgia_state_government [https://perma.cc/4MLX-EW5G] (last visited Apr. 20, 2022) (showing a Republican trifecta in 2011).

264 *See Party Control of Oklahoma State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Oklahoma_state_government [https://perma.cc/4MLX-EW5G] (last visited Apr. 20, 2022) (showing a Republican trifecta in 2018).

265 *See Party Control of Wisconsin State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Wisconsin_state_government [https://perma.cc/ H4YE-SHQP] (last visited Apr. 20, 2022) (showing a Republican trifecta in 2014).

266 Devins, *supra* note 27, at 1147, 1162 ("[R]ed and blue state courts are likely to agree with red and blue state legislatures.").

267 *Id.* at 1164.

268 *See id.* ("[S]tate lawmakers [in Democratic states] are likely to enact and the governor likely to sign rights-expanding legislation—so that state supreme courts will have fewer opportunities to fill the void . . . .").

269 *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 457, 462 (2010) ("In total, 89% of state supreme court justices face voters . . . .").

voter ID challenges.[270] Voting scholars have hypothesized that the *method* of judicial retention may impact the likelihood of a state court to "break paths" from federal precedent.[271] For example, a state judge facing a contested reelection may be more likely to follow federal precedent for fear of political backlash in the polls, whereas a judge facing a retention election (which judges win ninety-nine percent of the time) is more likely to "take the lead in extending rights" through expansive interpretations of the state constitution.[272] The chart below applies this hypothesis to the post-*Crawford* voter ID decisions, illustrating three main findings:

Chart 3: Voter ID and Judicial Retention Method

State	**Upheld or Struck Down Voter ID Law?**	**Judicial Selection Method**	**Risk of Losing Reelection (Based on Judicial Selection Method)**	**Were justices facing re-election at time of decision?**
Pennsylvania (Commonw. Court)	Struck down	Partisan election, then retention elections every 10 years.[273]	**Low risk.**	**No.**
Arkansas	Struck down	Contested non-partisan election every 8 years.[274]	**High risk.**	**No.**

270 *See* Devins, *supra* note 27, at 1134 (observing that the threat of losing reelection "make[s] state court judges cautious when interpreting state law"); Devins & Mansker, *supra* note 269, at 477 ("[J]ustices subject to some form of reelection are likely to be risk averse and, consequently, will steer clear of issues that arguably run reelection risks.").

271 Devins, *supra* note 27, at 1135 ("More than anything, judicial selection and retention influence state justices.").

272 Devins & Mansker, *supra* note 269, at 455, 477–78 (explaining that justices subject to contested reelection "will steer clear of issues that arguably run reelection risks," whereas "[j]ustices subject to retention election (where justices win 99% of the time) will pay limited attention to public opinion" and "take the lead in extending rights").

273 *Pennsylvania Commonwealth Court*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Commonwealth_Court [https://perma.cc/6QTV-9AXC] (last visited Apr. 20, 2022).

274 *Judicial Selection in Arkansas*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Arkansas [https://perma.cc/9ERB-29RB] (last visited Apr. 20, 2022).

North Carolina (Appeals)	Struck down	Contested partisan election, then run for reelection every eight years.[275]	**High risk.**	**Yes.**
Missouri	Struck down	Assisted appointment, then non-partisan retention election one to three years into term, then retention election every 12 years.[276]	**Low risk.**	**Yes.**
Indiana	Upheld	Justices are appointed by a governor, face non-partisan retention election during next general election and again every ten years.[277]	**Low risk.**	**Yes.**
Tennessee	Upheld	Governor appoints justices, then	**Low risk.** (Only one justice has	**Yes.**

275 *North Carolina Court of Appeals*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_Court_of_Appeals [https://perma.cc/2MKX-D65S] (last visited Apr. 20, 2022).

276 *Judicial Selection in Missouri*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Missouri [https://perma.cc/3PX2-KRXY] (last visited Apr. 20, 2022).

277 *Judicial Selection in Indiana*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Indiana [https://perma.cc/RUC2-BB67] (last visited Apr. 20, 2022).

		the justices must win non-partisan retention elections every eight years.[278]	ever lost a retention election in the state.[279])	
Georgia	Upheld	Contested non-partisan elections every six years.	**Low risk.** (No sitting Georgia Supreme Court justice has ever lost an election in the 175-year history of the court.[280])	**No.**
Oklahoma	Upheld	Governor appoints one of three nominees identified by legislature, then judge is subjected to retention elections every six years.[281]	**Low risk.**	**Yes.**

278 *See Judicial Selection in Tennessee*, BALLOTPEDIA, https://ballotpedia.org/ Judicial_selection_in_Tennessee [https://perma.cc/KGU9-SBXR] (last visited Apr. 20, 2022) (detailing how justices are elected in Tennessee).

279 *See Tennessee Supreme Court Elections 2014*, BALLOTPEDIA, https://ballotpedia.org/ Tennessee_Supreme_Court_elections,_2014 [https://perma.cc/D4N6-Q8AM] (last visited Apr. 20, 2022) ("[O]nly one Tennessee Supreme Court justice had ever been voted out of office during a retention election—Justice Penny White . . . in 1996.").

280 *See Georgia Supreme Court Elections 2020*, BALLOTPEDIA, https://ballotpedia.org/ Georgia_Supreme_Court_elections,_2020 [https://perma.cc/6A44-69BY] (last visited Apr. 20, 2022) (detailing election results for Georgia Supreme Court Elections in 2020).

281 *See Judicial Selection in Oklahoma*, BALLOTPEDIA, https://ballotpedia.org/ Judicial _selection_in_Oklahoma [https://perma.cc/AJ9V-QGP2] (last visited Apr. 20, 2022) (detailing the judicial selection process in Oklahoma).

Wisconsin	Upheld	Contested nonpartisan elections every ten years. [282]	**High risk.**	**No.**

First, the majority of the "pathbreaking" court judges—those sitting in Pennsylvania, Arkansas and Missouri—did not face a significant threat of losing reelection when they struck down the voter ID laws. In each of these states, judges either faced retention elections (which they were almost guaranteed to win) or did not face reelection at all. Therefore, the post-*Crawford* cases lend some support to the hypothesis that "pathbreaking" state courts often face less risk of political backlash.

Second, the North Carolina Court of Appeals—the only "pathbreaking" state where justices faced risky contested reelections—was *also the only state decision to rely completely on federal precedent* to strike down a voter ID law. Even as the North Carolina Court of Appeals "broke" with federal norms by striking down a voter ID law as unconstitutional, it also chose to do so by strictly adhering to federal precedent—a strategy that typically insulates state courts from political backlash because of the perceived superiority of federal norms. Although it is impossible to conclude how the risk of political backlash may have influenced the court's decision, the coincidence that these judges relied *exclusively* upon federal precedent to strike down a politically divisive law *during an election year* in which *five justices* faced contested elections suggests that the fear of losing reelection may have played some part in their ultimate decision-making. [283]

The third point of interest lies with the Tennessee judicial election. As noted, the Tennessee Supreme Court—a liberal-leaning court—voted *unanimously* to uphold the state's voter ID law in 2014. This chart suggests at least a partial explanation for that decision—three justices were facing a contentious reelection at the time of the decision. Those justices faced retention elections (which typically pose little risk to justices) and only one justice has ever failed to win a bid for reelection in the state's history. Still,

282 *See Wisconsin Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court [https://perma.cc/QW6T-CMCZ] (last accessed Feb. 2, 2022) (detailing the judicial selection process for the Wisconsin Supreme Court).

283 *See North Carolina Court of Appeals: Judicial Selection*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_Court_of_Appeals#cite_note-system-4 (last accessed Dec. 20, 2020) (explaining the judicial selection process for the North Carolina Appellate Courts).

the justices faced an unusual threat in 2014—a highly partisan, extremely well-funded campaign by Lieutenant Governor Ron Ramsay to oust them from the court for being "too liberal."[284] Although it is impossible to determine exactly how this campaign—which publicly criticized the justices "liberal record"— entered into the court's final ruling, it is likely that the unusual threat of losing reelection may have influenced the justices' unanimous decision to uphold the voter ID law.

D. "Pathbreaking" courts are not deterred by the risk of subsequent constitutional amendment—though voting rights advocates should still take notice.

Because state constitutions are "far easier to amend" than the federal constitution, state courts that "break paths" with federal precedent face a significant risk that a subsequent constitutional amendment—initiated either by the legislature or citizen initiative—will effectively erase their decisions.[285] State lawmakers can propose state constitutional amendments in all fifty states, and twenty five states allow voters to "strike against state supreme court decisions they dislike" via ballot initiatives.[286] For this reason, some voting rights scholars hypothesize that state courts are less likely to "break paths" from federal precedent if their decisions are likely to be subsequently nullified by a constitutional amendment. For example, scholars Neal Devins and Nicole Mansker suggested that "Assuming that state supreme court justices seek to maximize their legal policy preferences, the risk of constitutional override is clearly something to take into account."[287] Accordingly, "justices might be more attentive to public opinion in states with direct democracy initiatives than in states with hard-to-amend constitutions."[288] However, the post-*Crawford* voter ID cases clearly refute

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284 *See* Maya Srikrishnan, *Conservatives Nationwide Target Tennessee Supreme Court Justices*, L.A. TIMES (Aug. 6, 2014), https://www.latimes.com/nation/nationnow/la-na-tennessee-supreme-court-20140805-story.html (describing an unprecedented mailing and media campaign by Lt. Governor Ron Ramsay to oust three of the five state supreme court justices because they are "too liberal for Tennessee.").

285 Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 457-58 (2010) ("[S]tate constitutions are far easier to amend than the Federal Constitution . . . .").

286 Devins, *supra* note 27, at 1137 ("Voters too can strike against state supreme court decisions they dislike; twenty-five states allow for voters to amend their constitutions through initiatives. In all fifty states, lawmakers can propose state constitutional amendments.").

287 *See* Devins, *supra* note 27, at 1137 (explaining the author's assumption that because state supreme court justices seek to maximize their legal policy preferences, justices take into account risks of constitutional override).

288 Devins & Mansker, *supra* note 269, at 471 ("[S]tate justices might take public opinion into account if they thought there was a link between public opinion and the possible nullification of their

this hypothesis, as illustrated by the chart below.

Chart 4: Voter ID and the Risk of Constitutional Amendment

State	**Upheld or Struck Down Voter ID Law?**	**How to Amend the Constitution**	**Risk of Const. Amend.**	**Has state amended the const. to require voter IDs?**
Pennsylvania (Commw. Court)	Struck down	To place a legislatively referred amendment on the ballot, a majority vote is required in 2 successive sessions of the PA General Assembly.[289]	**Low risk.**	**No.**
Arkansas	Struck down	To place a legislatively referred amendment on the ballot, a majority vote is required in both chambers of the state legislature.[290] Citizens may also initiate amendments.[291]	**High risk.**	**Yes.**[292]

decisions through constitutional amendments or, alternatively, perceived that elected officials would be unwilling to implement a decision of which the public disapproves. For example, justices might be more attentive to public opinion in states with direct democracy initiatives than in states with hard-to-amend constitutions.").

289 *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Legislatively_referred_constitutional_amendment [https://perma.cc/5XR9-MS7U] (last visited Apr. 20, 2022).

290 *Id*.

291 *Initiated Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Initiated_constitutional_amendment [https://perma.cc/Y8AX-9YLM] (last accessed Feb. 2, 2022).

292 *See* ARKANSAS ISSUE 2, VOTER ID AMENDMENT (2018), BALLOTPEDIA, https://ballotpedia.org/Arkansas_Issue_2,_Voter_ID_Amendment_(2018) [https://perma.cc/ C4WL-JUYH] (last accessed Feb. 2, 2022) (detailing Arkansas' voter ID constitutional amendment passed in 2018).

North Carolina (Appeals)	Struck down	To place a legislatively referred amendment on the ballot, it must receive a 60 percent vote in each house of the state legislature.[292]	**High risk**.	**Yes.**[293]
Missouri	Struck down	To place a legislatively referred amendment on the ballot, it must receive a majority vote in both chambers of the MO state legislature.[294] Citizens may also initiate amendments.[295]	**High risk.**	**Yes.**[296]
Indiana	Upheld	To place a legislatively referred amendment on the ballot, a majority vote is required in two successive sessions of the	**Low risk.**	**No.**

293 *Legislatively Referred Constitutional Amendment*, *supra* note 289.

293 *See North Carolina Voter ID Amendment (2018)*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_Voter_ID_Amendment_(2018) [https://perma.cc/ 686H-UKWE] (last visited Apr. 20, 2022). The North Carolina legislature referred the measure to ballot, and North Carolina voters approved the measure in the November 2018 election. The measure added language to section 2 (qualifications of a voter) and section 3 (voting in person) of article VI of the North Carolina Constitution.

294 *Id.*

295 *Initiated Constitutional Amendment*, *supra* note 291.

296 *See Missouri Voter ID Requirement, Constitutional Amendment 6 (2016)*, BALLOTPEDIA, https://ballotpedia.org/Missouri_Voter_ID_Requirement,_Constitutional_Amendment_6_(2016) [https://perma.cc/THK5-78C4] (last visited Apr. 20, 2022). Voters approved this amendment in November 2016 election, added a section 11 to art. VIII of Missouri Constitution.

		Indiana General Assembly.[297]		
Tennessee	Upheld	To place a legislatively referred amendment on the ballot, the General Assembly must approve the proposed amendment by majority vote in one session, and then by 2/3 in a second session.[298]	**Low risk.**	**No.**
Georgia	Upheld	To place a legislatively referred amendment on the ballot, it must be approved by a 2/3 vote in each chamber of the General Assembly.[299]	**High risk.**	**No.**
Oklahoma	Upheld	To place a legislatively referred amendment on the ballot, it must receive a majority vote in the state legislature.[300] Citizens may also initiate amendments.[301]	**High risk.**	**No.**

297 *Legislatively Referred Constitutional Amendment*, *supra* note 289.

298 *Id.*

299 *Id.*

300 *Id.*

301 *Initiated Constitutional Amendment*, *supra* note 291.

Wisconsin	Upheld	To place a legislatively referred amendment on the ballot, it must receive a majority vote in two successive sessions of the state legislature.[302]	**Low risk.**	**No.**

Three of the four "pathbreaking" state courts invalidated voter ID laws *notwithstanding* the high risk of subsequent constitutional amendment. In North Carolina and Missouri, as discussed prior, the state courts struck down the voter ID provisions *even after* the state had amended its constitution to allow for such voter ID laws, effectively rebutting the amendments. Clearly, "pathbreaking" states do not fear subsequent reversal by constitutional amendment. In fact, this pattern suggests that state courts may be *more willing* to strike down a voter ID law when they know that their decision can still be reversed by voters' endorsement of a subsequent constitutional amendment.

CONCLUSION

The 2020 election was the highest turnout for a presidential election in fifty years.[303] In response, Republican state lawmakers across the country "are moving swiftly" to enact legislation that will restrict voter access—including voter ID laws.[304] Their justification for these increasingly stringent requirements, unsurprisingly, is "voter fraud."[305] The need to challenge voter ID laws—and to start to form a consensus against their constitutionality among several states—is more urgent than ever before.

As this analysis illustrates, the success of voting rights challenges in state courts is often "mixed." This has always been a critique of judicial federalism. However, the fact remains that our federal judiciary is no longer a friendly forum, and likely will not be for some time. Voting rights

302 *Legislatively Referred Constitutional Amendment*, *supra* note 291.

303 Anthony Izaguirre & Acacia Coronado, *GOP Lawmakers Seek Tougher Voting Rules After Record Turnout*, AP NEWS (Jan. 31, 2021), https://apnews.com/article/bills-voting-rights-elections-coronavirus-pandemic-voter-registration-0e94844d72d2a2bf8b51b1c950bd64fc [https://perma.cc/P5QE-PQAL].

304 *Id.*

305 *Id.*

challenges cannot wait. Even if judicial federalism "fails to fulfill its promise as an alternative to a progressive Supreme Court protecting individual rights and liberties," it still serves as a means to an end—here, protecting voting rights in individual states, with the hope that sister state courts (and eventually, a more progressive federal court) will someday take notice and follow suit. [306]

306 *See* Christine L. Nemacheck, *The Path to Obergefell: Saying "I Do" to New Judicial Federalism?*, 54 WASH. U. J.L. & POL'Y 149, 154 (2017) (explaining the merits of judicial federalism to the decades-long effort to win same-sex marriage battles in state courts, with the hope that the Supreme Court would eventually take note of the trend and nationalize the right).

APPENDIX

State Constitutional Provisions on the Right to Vote

State	State Constitutional Provisions
Pennsylvania	**Art. I. § 5**: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." **The Equal Protection Provisions:** **Art. I, § 1:** "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty . . . and of pursuing their own happiness." **Art I, § 26:** Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."
North Carolina	**Art. I, § 19:** "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."
Missouri	**Art I, § 25:** "all elections shall be free and open . . . " **Art. I, § 2:** "All persons are created equal and are entitled to equal rights and opportunity under the law." **Art. VIII, § 11:** "A person seeking to vote in person in public elections may be required to identify himself or herself and verify his or her qualifications . . . by providing election officials with a form of identification."
Arkansas	**Article III, § 1**: any person in the state may vote provided she is (1) a citizen of the United States; (2) an Arkansas resident; (3) at least 18 years old; and (4) lawfully registered to vote.
Indiana	**Art II, § 1:** "All elections shall be free and equal." **Art II, § 2:** "A citizen of the United States, who is at least 18 years of age and who has been a resident of a precinct 30 days immediately preceding an election may vote in that precinct at the election."

	Art I, § 23: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."
Tennessee	**Art. IV, § 1:** Every person, being 18 years of age, being a resident of the State . . . and being duly registered in the county of residence . . . shall be entitled to vote in all federal, state, and local elections held in the county or district in which the person resides. All such requirements shall be equal and uniform across the state, and there shall be no other qualification attached to the right of suffrage. The General Assembly shall have power to enact laws . . . to secure the freedom of elections and the purity of the ballot box . . . **Art I, § 5** "The elections shall be free and equal . . . "
Georgia	**Art II, § 2:** "Every person who is a citizen of the United States and a resident of Georgia . . . who is at least 18 years of age . . . and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of the electors." **Art. I, § 1:** No person shall be denied the equal protection of the laws.
Oklahoma	**Art. 2, § 4, art 3, § 5:** provides that elections "shall be free and equal" **Art 3, § 4:** grants legislature the power to "prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections."
Wisconsin	**Article III, § 1:** Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.