

Voter-ID Issues in Politics and Political Science

Editor's Introduction

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The simple act of voting—and its barriers, costs, benefits, and mobilization—continues to be central to politics and political science (Kelley and Mirer 1974). The Supreme Court case *Crawford vs. Marion County Election Board* (2008) and a well-attended panel on the topic at the 2008 APSA annual meeting in Boston highlight the pertinence of voter-ID issues to the polity and discipline for the 2008 and future elections. As simple as voting is, it is also “of the most fundamental significance under our constitutional structure” (*Burdick v. Takushi* 1992).

Concerns about voting rights, voter suppression, and election irregularities were intense in the lead-up to the 2008 presidential election. Among restrictive responses to those concerns, several states have passed voter-ID requirements; others are considering requiring that prospective voters document their American citizenship in order to vote, and these issues are likely to be of major importance in the future at the federal and state levels. The Supreme Court ruled on *Crawford* in April 2008, but the ruling left open the possibility of re-litigating this question as new empirical evidence becomes available. This seems a good time to review what scholars have learned so far about the impact of voter-ID requirements and voting turnout.

THE CRAWFORD CASE

The question in *Crawford* about the constitutionality of voter-ID laws was litigated up to the United States Supreme Court. Previously, the majority in the Seventh Circuit Court of Appeals, including after an en banc review, had ruled that the requirement to produce a government ID in order to vote in Indiana was constitutional. But the dissents in both the Seventh Circuit and Supreme Court questioned the fairness of and partisanship involved in the voter-ID rule.

The Supreme Court ruled against a facial challenge to the law as abridging the fundamental right of voting. The majority opinion by Justice John Paul Stevens held that the constitutionality rested partly on an empirical question: there was not

adequate evidence in the *Crawford* record that voter-ID requirements denied a basic right; if there were in the future, then the Court might reconsider the question of constitutionality.

The concurrence by Justice Antonin Scalia argued that the burden on voters' rights was “irrelevant” because it was minimal and justified as deferential to “important regulatory interests.” Scalia found it was a nondiscriminatory regulation that did not pose a significantly greater burden than existing voting regulations. Instead of requiring a standard for IDs or evidence of fraud or the discriminatory impact of the Indiana law, the concurrence focused on the pursuit of administrative efficiency. That basis did not compel the State of Indiana to present evidence of fraud, even though supporters of the law claimed its goal was to protect against fraud in justifying the demands for government ID.¹

The vigorous dissents, particularly by Justices David Souter and Ruth Bader Ginsburg, held, instead, that voting as a fundamental right was overly burdened by ID requirements, especially for minorities and the poor. The majority, they argued, did not meet the standard that the Court had previously set in *Burdick v. Takushi* (1992) for reviewing voting cases and failed to provide a rigorous assessment of the limited evidence of fraud to justify the burden on the fundamental right to vote. The concomitant costs in time required, lost work, and travel expenses for obtaining a government ID for those who lacked one previously, and who were least likely to afford the expense, constituted an unconstitutional burden. Hence, the law needed to be struck down.

The *Crawford* case has created a virtual cottage industry of voter-ID research and advocacy. Among the studies cited and amicus briefs connected to the case are the work of over three dozen political scientists and politically oriented legal scholars (www.brennancenter.org). Out of this group came the APSA panel on the topic. And out of the panel came an invitation for a fast-tracked PS symposium. This symposium identifies a variety of the issues raised by voter-ID requirements. The authors differ in their viewpoints and their findings, but they demonstrate how important it is to examine the extent to which the right to vote is significantly burdened by existing ID laws and those likely to be passed.

THE IMPACT OF VOTER-ID LAWS

Studies to this point suggest that voter-ID requirements may reduce voter turnout by 2–3 percentage points (Drew 2007;

Barreto, Nuño, and Sanchez 2009). This may seem to be a fairly small effect—but one vital to examine. Considering that voting is one of the most fundamental rights in a democracy, the exclusion of even a small proportion of voters, disproportionately in minority groups, is significant. The presidential elections of 2000 and 2004, as well as a number of Senate elections in recent years, have been decided by margins of less than 3% of the vote.

Voter-ID issues have a personal impact. The lead plaintiff in the Supreme Court case, Indiana state representative William Crawford, stated eloquently what was at stake for him and many minority voters and politicians: “I am personally offended about having to show identification to people who know me and in a polling place where I have voted for years. Being required to show the identification is direct injury. Furthermore, I have spent my entire adult life working for civil rights. I have a personal interest in insuring that the most precious of rights, the right to vote, is maximized and not reduced” (*Crawford v. Marion* 2007, Joint Appendix).

Voter-ID issues also have a partisan edge. Republicans tend to fear widespread voter fraud, while Democrats fear voter suppression under allegations of fraud. Republican legislators tend to vote for voter-ID laws, while Democrats, particularly minorities, have opposed them vigorously. Republican judges tend to vote to uphold them, while Democrats file dissents. These partisan conflicts were apparent in the 2008 presidential campaign in the form of Republican allegations that groups such as ACORN were committing registration fraud, though the dispute tended to confuse possible registration irregularities with illegal voting.

THE VOTER-ID SYMPOSIUM

This symposium consists of revisions of some of the research, pleadings, and briefs presented in the *Crawford* case. It also includes revised research such as Hershey’s, which was part of the background appendix of the case. The article by William Groth (2009), an attorney for the plaintiff, draws on the participants’ experiences and previous pleadings. Three of the other articles (Chandler 2009, Smith and Sobel 2009, and Sobel and Smith 2009) started out as amicus briefs for the plaintiffs.

The symposium begins with theoretical and constitutional issues. Subsequent articles examine evidence of the impact of voter-ID requirements on voter turnout, and they reach mixed conclusions.

What do the papers say? Hershey’s (2009) review of the long history of political science and economic theory finds that the added burden of requirements related to registration or voting is expected to reduce turnout. Registration itself, along with re-registration, purges of voting rolls, and poll taxes, have long been seen as barriers that the Court often struck down for their negative and disparate impact on voting.

Davidson (2009) maintains that voter-ID laws are simply latter-day resurrections of a historical collection of disenfranchising techniques, such as the poll tax and grandfather clauses. The costs of getting an ID for those without them constitute an unconstitutional infringement on the right to vote under the Twenty-Fourth Amendment. Considering strict voter-ID requirements as a poll or “other tax” prohibited by the Twenty-

Fourth Amendment derives from the costs of obtaining the documents needed to procure identification.

The poll tax in 1964 was small in monetary terms (about \$1.50), but the idea that it could be used systematically to disenfranchise a particular set of citizens made it indefensible. Considering the larger impact on lower-socioeconomic citizens of the costs of obtaining background documents to obtain a government identification card, strict voter-ID requirements function similarly.

Certainly a strict requirement such as the Indiana voter-ID law that requires a government-issued photo identification card would be expected to reduce turnout, and to be challenged in court. *Crawford* attorney William Groth claims that whatever the strengths or weaknesses of the case as presented in an initially more favorable judicial climate, the increased politicization of the conservative era led the Court to ignore its own precedents in making an essentially partisan decision. While the issue presented in the case was the fundamental right to vote, changes in the country and the Court after the case was filed precluded its success. Whether the appeal should have been extended to the Supreme Court under these changed conditions, particularly after the factual record’s limited evidence of direct harm was criticized by the lower courts, however, remains open to question.

In the revised amicus briefs, Smith and Sobel argue that there should be a constitutional standard that must be met before government officials may demand voter identification. This standard might consist, for instance, in requiring evidence constituting reasonable suspicion that someone was trying to vote illegally before ID could be required. Across-the-board ID demands fail to meet that constitutional standard.

Rather than addressing the standards issues, or requiring evidence of fraud or the discriminatory impact of the Indiana law, the Court focused on the issue of administrative efficiency. That basis did not compel the State of Indiana to present evidence of fraud in order to justify the demands for government ID.

The Sobel and Madden article also asks whether the impact of the voter-ID law fell disproportionately on minorities and if so, whether it violated the Civil War Amendments (Thirteenth through Fifteenth) and the Voting Rights Act of 1965. Complementing that analysis was the elucidation of the little-known constitutional remedy in the Fourteenth Amendment for abridging the voting rights of minorities by the reducing congressional representation.

The first two (of four) empirical papers find that voter-ID requirements burden voting, and have a differential impact on certain minority voters. Barreto, Nuño, and Sanchez find that minority voters are significantly less likely to have driver’s licenses, and are less able to bear the costs of getting them or state IDs, and hence are burdened in voting. Among black voters who voted in the 2002, 2004, and 2006 elections, about 80% had a valid photo ID with their full legal name versus 85% of white likely voters (2009). In short, about 20% of black and 15% of white voters lacked the IDs needed to cast a vote in person under the Indiana law.

Vercellotti and Anderson provide additional evidence of this differential effect of voter-ID laws in lesser-Hispanic

and lower-income turnout. They suggest, moreover, that a learning curve about how to get a government ID could lessen the impact of ID requirements over time (2009).

Two other empirical papers suggest that voter-ID requirements do not create a problem for turnout. Mycoff, Wagner, and Wilson (2009) hold that voter-ID laws do not reduce aggregate or individual levels of turnout, at least not significantly. Their aggregate-level analysis of primary data, and individual-level analysis of national survey data indicate that political interest and motivation variables are much stronger predictors of turnout.

Ansolabehere finds in surveys after the 2006 general and 2008 primaries that about half of voters report being asked for photo ID (2009). Four of five voters in states that allow poll workers to request identification were asked for ID, and one in five in states that do not. Workers request ID more from blacks and Hispanics than whites. Far less than half of 1% of voters in the surveys of the electorate in the 11 states (not including Indiana) were unable to vote because they lacked IDs. The practice of asking most voters for IDs seem to have little influence on public confidence in elections. The impact of voter-ID laws appears in this analysis to be politically insignificant.

QUESTIONS FOR THE FINDINGS

How can there be such a disparity between long-standing political theory and previous evidence about the negative impact of the costs of registration and voting barriers, the legal arguments presented by the plaintiffs to the Supreme Court, and some, but not all, of the empirical results? As in the early stages of any litigation involving complex political and partisan issues, the evidence can be mixed or interpreted differently. More study is clearly needed on these conundrums.

While my leanings in the *Crawford* challenge are represented in the Albano et al. (2007) amicus, I am struck by the differences between theory and certain findings. Although there is evidence that blacks and other minorities are less likely to have drivers' licenses and other required photo IDs, there is less evidence that strict ID requirements affect voter turnout at least in those midterm and primary elections surveyed. Perhaps other studies using different methods will find more or less people disenfranchised by the requirement for IDs. Here are some alternative approaches.

First, the proportion of the population that does not have a government ID appears significantly larger in the Barreto, Nuño, and Sanchez data (15%) than the figure the *Crawford* Court cited (1%). Second, there is fairly consistent evidence that the lack of an ID disproportionately affects Hispanics, a growing proportion of the population (Barreto, Nuño, and Sanchez 2009). Third, the evidence of a negative impact of ID requirements on lower-income persons suggests that, while race per se may not be a factor, the higher concentration of African Americans among lower socioeconomic groups may have similar results.

There may also be as yet unexplored methodological and empirical questions here about how to obtain the evidence of voter discouragement. For instance, there is some evidence that transient persons, who lack a permanent address, have

been deterred from voting as a result of strict photo-ID laws (Orenstein 2008). Yet people like this, who are least likely to have the required ID—the poor, minorities, and homeless people—may also be the least likely to respond to polls. If surveys do not reach poorer citizens who might otherwise vote, they cannot report their problems in voting. Thus the impact on these “invisible” groups would not be reflected in the studies that rely on survey research.

Second, since we know that people do not always accurately report voting or their complete reasons for failing to go to the polls, current data may not fully reflect the effects of voter-ID laws. In a reversal of the over-reporting of turnout figures, the impact of IDs may be underreported, perhaps because some people may not be willing to reveal that they lack the required identification or are discouraged from obtaining one.

The issue of discretionary enforcement of voter-ID requirements, as findings on widespread requests for IDs suggest, may also be critical. Election officials ask for IDs, including photo IDs, of more people than many state laws require (and sometimes permit) (Ansolabehere 2009), and request it disproportionately of minorities. This leaves too much discretion in the hands of local officials. Voter-ID laws facilitate discrimination because they provide a reason that local election officials can use to bar access to voting.

In addition, the supposition that the few people directly affected by voter-ID laws do not constitute a significant problem conflicts with the significance of struggle for over a century to obtain suffrage, particularly for African Americans and women. Outcomes in close elections must not be determined by voting procedures that suppress turnout among any group in the population.

ALLEGATIONS OF IRREGULARITIES

Government and media investigations have repeatedly questioned periodic allegations of in-person fraud (Lipton and Urbina 2007; Iglesias 2008). Indiana records do not show a single proven case of in-person voter fraud in recent decades, so voter-ID requirements seem to be solving a non-existent problem with a law that has spillover costs. The *New York Times* editorialized that, despite claims over the years of voting and registration irregularities, “there is virtually no evidence—anywhere in the country, going back many elections—of people showing up at the polls and voting when they are not entitled to” (*New York Times* 2008). Instead, the real concern needs to be about the third of eligible voters who are not registered.

The concurrence in *Crawford* stated that the lack of evidence of in-person voter fraud was not relevant to the issue of good election administration. Yet it seems odd for the Court to validate a supposed solution to a problem for which there is little or no evidence. If attempts at in-person fraud were to occur, then existing procedures, including appropriate felony penalties, can aptly deal with them. And voter-ID requirements are unlikely to prevent fraud in absentee ballots or election fraud perpetrated by officials, which are the major types of election fraud that do appear to exist.

THE ROLE OF PERCEPTIONS AND CHANGING STANDARDS

The *Crawford* case and this symposium's articles also raise constitutional and scholarly issues about the use of perception and subjective feelings and their measurement in deciding on legislative and judicial policies about the electoral process. While the concurrence claimed that fear of fraud discourages voting, there is little evidence that the presence or absence of ID requirements affects voters' level of confidence in the electoral process (Ansolabehere 2009). Raising the specters of fraud and stolen elections may instead mobilize some partisans and discourage others from voting.²

LOOKING AHEAD

The goal of this symposium is to review existing and generate new research into essential areas of American electoral participation. This introduction began by outlining what we know, do not know, and need to know on the spectrum of issues and approaches to understanding the effects of voter-ID legislation on political participation. Clearly many other publications need to address these issues. Congress might ask the Government Accountability Office to develop a meta-analysis for evaluating literature and surveys about voter IDs and consider whether government-ID requirements conflict with the Voting Rights Act or the Twenty-Fourth Amendment (see Eggen 2005). These might create a basis for evaluating whether government photo-identification requirements are more efficient means of administering elections, or more modern modes of complicating and diminishing voting as a simple act of citizenship. ■

NOTES

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1. The suggestion in the *Crawford* concurrence that a neutral administrative approach to efficient elections can justify voter-ID burdens parallels the weakening of the First Amendment protections of religious freedom in *Employment Division v. Smith* (1990). There, rather than requiring a compelling state interest in abridging religious freedom, the majority opinion by Justice Scalia upheld any facially neutral law affecting religion. Only laws intended to discriminate against religion would be unconstitutional. Similarly the *Crawford* concurrence would implement a parallel abridgement on the fundamental right to vote, unless the voter-ID laws were intended to reduce, for example, minority participation.
2. Voter-ID laws could increase the pressure for a national identification system, such as a "Real ID" card, which is now opposed by a number of states on the grounds that it would be an unfunded mandate that violates the principle of federalism (Bosworth 2007; Rushing 2008). The impact of IDs on privacy and civil liberties needs to be more widely debated in communities and legislatures. The questions about the impact of IDs on the relationship of citizens to governments in privacy and civil liberties debates needs to be added to the agendas of social scientists and human-rights advocates concerned with wider questions about citizenship, democratic politics, and liberties (Sobel 2002; 2008; Sobel and Fennel 2007).

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