

10-1-2009

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Recommended Citation

Neumann, Matthew D. (2009) "Is Indiana's Voter ID Law a Bridge to Nowhere," *North Carolina Central Law Review*: Vol. 32 : No. 1 , Article 5.
Available at: <https://archives.law.nccu.edu/ncclr/vol32/iss1/5>

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IS INDIANA'S VOTER ID LAW A BRIDGE TO NOWHERE?

MATTHEW D. NEUMANN*

INTRODUCTION

State laws requiring voters to show some form of identification before casting a ballot are more and more commonplace.¹ Despite their increasing prevalence, these laws are as controversial today as when first introduced.² With regard to controversy, Indiana's Voter ID law³ is no exception.⁴ Considered one of the most stringent voter identification⁵ laws in the country,⁶ litigation has hounded Indiana's Voter ID law since before taking effect on January 1, 2006.⁷ Despite surviving a challenge under the United States Constitution in April

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1. See Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 748 (2008) (stating that as of the end of 2007, thirty-four states have enacted some form of voter identification laws).

2. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J. L. & POL (stating that “the debate over [voter] identification laws remains far from any definitive conclusion”). See also Langholz, *supra* note 1, at 733 (“In recent years, no election-law issue has generated such a divided response in legislatures around the country [as voter identification laws] . . .”).

3. IND. CODE § 3-11-8-25.1 (2009); See also IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-1 to -8-30; 3-11.7-1-2 to -11.7-6-3; 9-24-16-10 (2009).

4. See *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 783 (S.D. Ind. 2006).

5. Commentators use “voter identification laws,” “photo identification laws,” “Voter ID laws,” and “Photo ID laws” interchangeably. This Note refers to both voter identification laws and photo identification law as “voter identification laws.” This Note refers to Indiana's photo identification law as “Indiana's Voter ID law.” Also, this Note will refer to Indiana's Voter ID law as though it is still in effect. Although the Indiana Court of Appeals struck down the law, its future is not exactly clear. The Indiana Supreme Court could grant transfer, vacate the opinion of the Court of Appeals, and hold that the law is constitutional. The Supreme Court could also do nothing and allow the decision of the Court of Appeals to remain intact. Even if this happens however, it is likely that the Indiana Legislature would simply re-enact the law to comport with the Court of Appeals' decision. Either way, this Note presumes that Indiana's Voter ID law will survive in one form or another. See discussion *infra* Part II.A.

6. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1758 n.46 (2008).

7. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1614 (2008).

2008,⁸ the League of Women Voters of Indiana, Inc. (hereinafter "League") once again challenged Indiana's Voter ID law.⁹ On September 17, 2009, the Indiana Court of Appeals struck down Indiana's Voter ID law for violating the Indiana Constitution.¹⁰ Currently, the case is pending before the Indiana Supreme Court.¹¹

League of Women Voters of Indiana, Inc. v. Rokita (hereinafter "*League of Voters*")¹² tests the validity of Indiana's Voter ID law under the Indiana Constitution.¹³ Because Indiana constitutional election jurisprudence provides no clear answers, the Indiana Supreme Court should use an alternative framework to decide the case. Using empiricism and pragmatism as analytic guideposts the Indiana Supreme Court should decide the constitutionality of Indiana's Voter ID law by answering one simple question: Does Indiana's Voter ID law do more harm than good? Application of this alternative framework requires the Indiana Supreme Court to consider new empirical evidence,¹⁴ revealing that Indiana's Voter ID law survives constitutional muster. Although it should be upheld under the Indiana Constitution, the virility of Indiana's Voter ID law should not be overstated. In truth, the Indiana Legislature probably did not have cause to pass Indiana's Voter ID law at the time it was enacted. On the other hand, the law hardly seems to cause enough problems to justify striking it down. Stuck in a proverbial no man's land where it creates little harm but accomplishes little good, Indiana's Voter ID law may ultimately be a bridge to nowhere.

Part I of this Note provides general background information about Indiana's Voter ID law. Part II of this Note examines the merits of this new state constitutional challenge to the law, *League of Voters*. Part III of this Note proposes an alternative framework with which the Indiana Supreme Court should decide this case. Part IV of this Note applies this alternative framework to resolve the constitutionality of Indiana's Voter ID law.

8. *Id.* at 1624.

9. Complaint for Declaratory Judgment at 3, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49D13-0806-PL-027627 (Ind. Super. Ct. filed June 20, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

10. *League of Women Voters of Ind., Inc. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

11. See Appellant's Petition to Transfer at 1, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49A02-0901-CV-00040 (Ind. filed Oct. 19, 2009); Appellee's Petition to Transfer at 1, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49A02-0901-CV-00040 (Ind. filed Oct. 19, 2009).

12. *League of Women Voters of Ind., Inc. v. Rokita*, No. 49D13-0806-PL-027627 (Ind. Sup. Ct. 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

13. Amended Complaint for Declaratory Judgment at 3, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49D13-0806-PL-027627 (Ind. Sup. Ct. filed July 29, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

14. See discussion *infra* Part IV.B.3.

I. GENERAL INFORMATION ABOUT INDIANA'S VOTER ID LAW

Polemical since its enactment, Indiana's Voter ID law is a "partisan legislative disagreement that has spilled out of the state house [and] into the courts."¹⁵ At least one commentator predicted that surviving challenge under the United States Constitution, rather than settle the debate over Indiana's Voter ID law, may have "breathe[d] additional life into the battle."¹⁶ This prediction proved to be accurate on September 17, 2009, when the Indiana Court of Appeals struck down Indiana's Voter ID law.¹⁷ As the Indiana Supreme Court decides whether to grant transfer and potentially prepares to decide the merits of the case, it is important to accurately frame the debate that surrounds Indiana's Voter ID law.¹⁸

A. *Passage of Indiana's Voter ID Law*

A perceived rise in voter fraud prompted an almost national movement by state legislatures to pass voter identification laws.¹⁹ This perceived rise in voter fraud reached a critical mass after the 2000 presidential election.²⁰ *Bush v. Gore* decided the unimaginably close 2000 presidential race and "reminded the nation that every vote counts in a closely divided political environment."²¹ On the heels of the United States Supreme Court's controversial decision in *Bush v. Gore*, Congress passed the Help America Vote Act (hereinafter "HAVA") in 2002.²² HAVA requires first-time voters registering by mail to provide identification at the polls before casting a ballot.²³ Spurred to action, between 2002 and 2007, thirty-four states passed voter identification laws that not only complied with but actually went beyond the mandates of HAVA.²⁴

15. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006).

16. Pitts, *supra* note 2, at 475-76 (noting that "no opinion garnered a majority as four separate Justices penned opinions"); See also *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1613 (2008).

17. *League of Women Voters of Ind., Inc. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

18. See *supra* note 11.

19. Langholz, *supra* note 1, at 748.

20. Langholz, *supra* note 1, at 745 (noting that after the 2000 presidential election "Congress turned its attention to election reform"); See also Evan D. Montgomery, *The Missouri Photo-ID Requirement for Voting: Ensuring Both Access and Integrity*, 72 Mo. L. Rev. 651, 651 (2007).

21. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 638 (2007) (noting that "George W. Bush received roughly one more vote than Al Gore for every 11,100 votes cast in Florida. . .").

22. Help America Vote Act of 2002, PUB. L. NO. 107-252, 116 STAT. 1666 (codified as amended in scattered sections of 5, 10, 36 and 42 U.S.C.); See also Langholz, *supra* note 1, at 745.

23. Overton, *supra* note 21, at 639.

24. Langholz, *supra* note 1, at 748.

In 2005, the Indiana Legislature followed suit and passed Indiana's Voter ID law.²⁵ Indiana's Voter ID law provides: "[A] voter who desires to vote an official ballot at an election shall provide proof of identification."²⁶ For example, on election day, the voter arrives at the polls, and the poll worker asks the voter to show identification.²⁷ If the voter does not offer valid identification, the poll worker challenges her by informing the voter that she cannot cast a regular ballot but may cast a provisional ballot instead.²⁸ Next, the voter casts a provisional ballot, which is a tentative paper ballot that will not officially influence the outcome of the election unless the voter later validates the ballot.²⁹ To validate the provisional ballot, the voter must return to the county election board—the board of local officials ultimately responsible for administering the election—within ten days of the election and provide proper identification.³⁰ If the voter returns with the proper ID, the county election board determines if the provisional ballot is valid.³¹

The most controversial aspect of Indiana's Voter ID law is that Indiana requires voters to present a very specific form of identification.³² An acceptable ID must meet several criteria.³³ First, the document must contain the individual's name.³⁴ Second, the document must contain the individual's photo.³⁵ Third, the document must contain an expiration date and must not be expired.³⁶ Fourth, the State of Indiana or the federal government must issue the document.³⁷ Despite the controversy stemming from these stringent requirements,³⁸ propo-

25. IND. CODE § 3-11-8-25.1 (2009); *See also* IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-1 to -8-30; 3-11.7-1-2 to -11.7-6-3 (2009); *See also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1614 (2008).

26. § 3-11-8-25.1.

27. §§ 3-11-8-25.1(b), (e), -10-1.2. Indiana's Voter ID law exempts two groups from its identification requirement: (1) persons voting in person at a polling place located at a state licensed care facility at which the voter lives and (2) absentee voters.

28. §§ 3-11-8-20, -8-25.1(c), -8-27.5.

29. § 3-11-8-22.1(f) (stating that the voter "shall be provided with a provisional ballot . . . rather than a regular official ballot if the voter wishes to cast a vote").

30. § 3-11.7-5-2.5(a).

31. § 3-11.7-5-2.5(b) (stating that the county election board validates the provisional ballot if the voter provides proper identification and executes an affidavit stating the voter is the same individual who filled out the provisional ballot in question).

32. § 3-11-8-25.1; *See also* Pitts, *supra* note 2, at 482 (noting that "not just any photo identification . . . will suffice").

33. § 3-11-8-25.1.

34. § 3-5-2-40.5 (requiring the "name conforms to the name in the individual's voter registration record").

35. § 3-5-2-40.5(2).

36. § 3-5-2-40.5(3)(A)-(B) (providing that identification is not expired for purposes of Indiana's Voter ID law if it was valid at the time of the last general election).

37. § 3-5-2-40.5(4).

38. Montgomery, *supra* note 20, at 651 (characterizing the debate over voter identification as "partisan and ideological").

nents offer a number of justifications in support of Indiana's Voter ID law.³⁹

Proponents justify Indiana's Voter ID law as a fraud prevention measure.⁴⁰ Without requiring voters to present identification, a voter can cast a fraudulent vote by "showing up at the polls claiming to be someone else—someone who has left the district, or died too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day."⁴¹ If an election official forces the voter to prove his identity by presenting a government-issued ID card, this "in-person voter fraud" is less likely to occur.⁴²

Proponents also justify Indiana's Voter ID law as increasing public confidence in the integrity of the electoral process.⁴³ If the "specter of voter fraud"⁴⁴ is allowed to impend public confidence in our electoral system, it has potential to "breed distrust of our government."⁴⁵ The perception that one's legitimate vote will be overshadowed by fraudulent votes can conceivably drive "honest citizens out of the democratic process."⁴⁶ Therefore, a State has an interest in attempting to amplify public confidence in the integrity of the electoral process.⁴⁷

Finally, proponents argue that Indiana's Voter ID law is justified by the commonsense observation that carrying identification is necessary in our modern society.⁴⁸ A person must present identification to do a variety of activities in everyday life and voting should be no different.⁴⁹ Simply put, as Judge Richard Posner noted, "it is exceedingly

39. See Memorandum in Support of Defendant's Motion to Dismiss at 1-9, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49D13-0806-PL-027627 (Ind. Super. Ct. filed Sept. 15, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009); See also Crawford, 128 S. Ct. at 1613-24. See generally Overton, *supra* note 21, at 638-44; David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 492-501 (2008); Montgomery, *supra* note 20, at 651-52; Langholz, *supra* note 1, at 733-54.

40. Montgomery, *supra* note 20, at 651 (stating that voter identification laws are "arguably designed to prevent in-person voter fraud at the polls").

41. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 11 (citing Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007)).

42. See Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1637 (2008); See also Ansolabehere & Persily, *supra* note 6, at 1741.

43. Ansolabehere & Persily, *supra* note 6, at 1741.

44. Schultz, *supra* note 39, at 492.

45. Ansolabehere & Persily, *supra* note 6, at 1738-39 (quoting Purcell v. Gonzalez, 549 U.S. 1, 4 (2006)).

46. *Id.* at 1739.

47. See Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1620 (2008); See also Andrew N. DeLaney, Note, *Appearance Matters: Why the State has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847, 847 (2008).

48. But see Overton, *supra* note 21, at 644-50 (criticizing common sense arguments as a rhetorical device of voter identification advocates).

49. *Id.* at 650 (noting how photo-identification advocates argue that one must present ID to board a plane, enter a federal building, cash a check, use a credit card, rent a video, and buy alcohol).

difficult to maneuver in today's America without a photo ID."⁵⁰ Because identification is an ordinary part of daily life, requiring voters to present identification before casting a ballot is a logical and reasonable electoral precaution.⁵¹

Nonetheless, commentators and litigants have been tireless in their attacks on Indiana's Voter ID law.⁵² First, opponents attack Indiana's Voter ID law as burdening the right to vote.⁵³ The right to vote is a fundamental right under the United States Constitution.⁵⁴ Requiring a voter to present identification creates an additional obstacle that may prevent a potential voter from casting a ballot.⁵⁵ Thus, requiring voters to present government-issued ID cards before voting unnecessarily burdens their fundamental right.⁵⁶

Second, opponents attack Indiana's Voter ID law as a poll tax in disguise.⁵⁷ The Twenty-Fourth Amendment to the United States Constitution prohibits states from collecting a tax before allowing a voter to cast a ballot.⁵⁸ Most states with voter identification laws provide voters with free IDs because requiring an ID for voting purposes that can only be obtained by paying money is undoubtedly a poll tax.⁵⁹ Indiana is no exception, and although a fee is normally required to obtain a state-issued ID,⁶⁰ the Indiana Legislature, upon enactment of the Voter ID law, waived all fees for state-issued ID cards for those that cannot afford to pay.⁶¹ Regardless, opponents of Indiana's Voter ID law counter that a birth certificate or a passport, for which most

50. Crawford, 472 F.3d at 951.

51. *But cf.* Overton, *supra* note 21, at 651 (the costs of erroneous exclusion differ with voting as opposed to other daily activities).

52. See Amended Complaint for Declaratory Judgment, *supra* note 13, at 1-7; See also Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613-24 (2008); See generally Overton, *supra* note 21, at 663-73; Schultz, *supra* note 39, at 492-501; Langholz, *supra* note 1, at 754-86.

53. See Overton, *supra* note 21, at 664.

54. Crawford, 128 S. Ct. at 1628 (Souter, J., dissenting) (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'"); See U.S. CONST. amend. XIV, § 1; See U.S. CONST. amend. I. See also Reynolds v. Sims, 377 U.S. 533, 554-55 (1964).

55. See Schultz, *supra* note 39, at 483.

56. Overton, *supra* note 21, at 664 ("[A] photo-identification requirement may unduly burden the fundamental right to vote that stems from the First and Fourteenth Amendments").

57. Langholz, *supra* note 1, at 762 (noting Rep. Pelosi called voter ID laws a "modern day poll tax") (quoting 152 CONG. REC. H6769 (daily ed. Sept. 20, 2006) (statement of Rep. Pelosi)); *Id.* (noting then Senator, now President Obama, called Georgia's voter ID laws a "poll tax for the 21st century") (quoting 153 CONG. REC. S7059 (daily ed. June 5, 2007) (statement of Sen. Obama)); See Overton, *supra* note 21 at 669.

58. U.S. CONST. amend. XXIV; See also Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966); Langholz, *supra* note 1, at 761.

59. See, e.g., Langholz, *supra* note 1, at 762-66.

60. Indiana Bureau of Motor Vehicles: Identification Cards, <http://www.in.gov/bmv/4818.htm> (last visited Feb. 27, 2009) (listing \$13 as the price for obtaining or renewing an Indiana-issued identification card).

61. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1614 n.4 (2008).

states charge a fee, is necessary to obtain the free identification, and therefore voter identification laws are still a poll tax.⁶² Stated otherwise, providing free ID cards does not shield voter identification laws from poll tax claims because of the ancillary costs of obtaining the free ID.⁶³

B. *The First Challenge to Indiana's Voter ID Law*

Despite the best efforts of commentators and litigants, Indiana's Voter ID law survived challenge under the United States Constitution in *Crawford v. Marion County Election Board*.⁶⁴ Announcing the judgment of the Court, Justice John Paul Stevens declined to apply strict scrutiny and instead applied a balancing approach, the undue burden standard, in upholding Indiana's Voter ID law under the Fourteenth Amendment to the United States Constitution.⁶⁵ Cautioning courts to avoid applying a "litmus test," Justice Stevens stated that a "court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment.'"⁶⁶ Ultimately, Justice Stevens concluded the petitioners' facial challenge failed because Indiana's interest in protecting electoral integrity outweighs the burdens imposed by Indiana's Voter ID law.⁶⁷

C. *The Futility of Indiana's Voter ID Law*

Despite surviving challenge under the United States Constitution,⁶⁸ one should avoid overestimating the pertinence of Indiana's Voter ID law. In truth, close examination of the law's mechanics reveals that the Indiana Legislature may not have had cause to pass Indiana's Voter ID law in the first place.⁶⁹ Simply put, Indiana's Voter ID law may not be justified as a fraud prevention measure because in-person

62. *Id.* at 1631 (Souter, J., dissenting) (noting that Indiana counties charge anywhere from \$3 to \$12 for a birth certificate (and in some other States the fee is significantly higher)); *See also* Ind. Democratic Party, 458 F. Supp. 2d at 789-92 (discussing in-depth the procedures for obtaining state-issued identification in Indiana).

63. *See* Langholz, *supra* note 1, at 763 (discussing the argument that the "incidental costs associated with obtaining an identification card still constitute a poll tax").

64. *Crawford*, 128 S. Ct. at 1616.

65. *Id.* For a more in depth discussion of the undue burden standard *see* discussion *infra* note 230 and accompanying text.

66. *Id.*

67. *Id.* at 1623.

68. *See supra* text accompanying note 65.

69. *See* Ind. Democratic Party v. Rokita, 458 F. Supp.2d 775, 789-92 (S.D. Ind. 2006) (noting that challengers to Indiana's Voter ID law argued that its passage is "not justified by existing circumstances or evidence"); Myriad commentators posit that conservative leaning legislatures across the country have been unjustified in passing voter identification laws, Indiana included; *See, e.g.,* Overton, *supra* note 21, at 644-53.

voter fraud is merely used as a pretense for the law's enactment.⁷⁰ The ability of Indiana's Voter ID law to prevent in-person voter fraud, or "voter identity theft," is the most central justification supporting its enactment.⁷¹ Unfortunately for proponents, "actual evidence of voter impersonation fraud is rare and difficult to come by."⁷² In fact, in *Crawford*, Justice Stevens looked high and low for evidence of in-person voter fraud and found only two examples in the entire country in the last one hundred and forty years.⁷³ Commentators generally agree with this conclusion and posit that the prevalence of in-person voter fraud, if it occurs at all, is not widespread and has certainly never risen to the level of influencing the outcome of an election.⁷⁴ To overcompensate for this lack of comprehensive empirical evidence, proponents too often use anecdotal evidence to demonstrate the apparent prevalence of voter fraud.⁷⁵ This overcompensation is dangerous because "[v]oter-fraud anecdotes are often misleading, incomplete, and unrepresentative."⁷⁶ Unfortunately, these misleading anecdotes, despite their empirical shortcomings, are rhetorically effective because they inject a heated verbosity into the debate.⁷⁷

Despite the rhetorical savvy of those that support Indiana's Voter ID law, opponents are correct to impale the law for failing to solve the very problem at which it is aimed.⁷⁸ In truth, aimed at curing a non-existent problem, Indiana's Voter ID law is more accurately characterized as a "solution in search of a problem."⁷⁹ As the debate inevitably rages on, a new challenge to Indiana's Voter ID law is before the Indiana Supreme Court.⁸⁰ Ultimately, as the Indiana Supreme Court prepares to issue the final word on Indiana's Voter ID law,⁸¹ the Court should not discount the combative overtones of this partisan

70. Ansolabehere & Persily, *supra* note 6, at 1737 (stating that "actual evidence of voter impersonation fraud is rare and difficult to come by").

71. Pitts, *supra* note 2, at 500-01; *See generally supra* text accompanying notes 41-43.

72. Ansolabehere & Persily, *supra* note 6, at 1738; *See also* Pitts, *supra* note 2, at 500 ("Some opponents of photo identification take the position that voter impersonation fraud (i.e. voter identity theft) almost never occurs at America's polling places.").

73. Pitts, *supra* note 2, at 500 (discussing Justice Stevens' scouring of the evidentiary record).

74. *See* Schultz, *supra* note 39, at 501.

75. *See* Overton, *supra* note 21, at 644-45 ("[A]necdotes about voter fraud . . . fail to indicate the frequency of the alleged fraud.").

76. *Id.* at 644.

77. *See* Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613, 626 (2008) (discussing the "heated rhetoric that has inflated the debate over voter ID requirements in the United States").

78. *See supra* text accompanying note 70.

79. Langholz, *supra* note 1, at 733 (quoting 152 CONG. REC. H6777 (daily ed. Sept. 20, 2006) (statement of Rep. Holt)).

80. *See* discussion *infra* Part II.

81. Amended Complaint for Declaratory Judgment, *supra* note 13, at 8-9.

debate.⁸² A prescient peek behind the proverbial curtain may reveal the battle over Indiana's Voter ID law for what it is, a struggle for political control.⁸³

II. THE MERITS OF THE *LEAGUE OF WOMEN VOTERS OF INDIANA, INC. v. ROKITA*

A. *Introduction to the Case*

On June 20, 2008, the League of Women Voters of Indiana, Inc. filed a lawsuit in Marion County Superior Court, against Todd Rokita in his official capacity as the Indiana Secretary of State (hereinafter "the State").⁸⁴ The League challenged Indiana's Voter ID law as violating the Indiana Constitution.⁸⁵ The League moved for an expedited status conference in hopes of resolving the case before the November 2008 general election.⁸⁶ This motion went undecided, and the trial court dismissed the case on December 17, 2008.⁸⁷ On January 15, 2009, the League filed its appeal with the Indiana Court of Appeals.⁸⁸ On September 17, 2009, the Indiana Court of Appeals struck down Indiana's Voter ID law for violating the Indiana Constitution.⁸⁹ Currently the State of Indiana is preparing to file its appeal to the Indiana Supreme Court.⁹⁰

It is not an understatement to say that the decision of the Indiana Court of Appeals came as a surprise to most.⁹¹ At first glance the

82. See Schultz, *supra* note 39, at 494-500 ("[W]hipp[ing] up hysteria that droves of dead people, illegal immigrants, vote brokers, and ex-felons are cheating their way into voting booths, stealing elections from honest decent Republicans, and diluting the votes of red, white, and blue Americans.").

83. See *id.* at 500 (noting that underlying voter identification laws may be "partisan Republican efforts to suppress voting").

84. Complaint for Declaratory Judgment, *supra* note 9, at 1.

85. Amended Complaint for Declaratory Judgment, *supra* note 13, at 7.

86. Motion for Expedited Status Conference at 1, League of Women Voters of Ind., Inc. v. Rokita, No. 49D02-0806-PL-027627 (Ind. Super. Ct. filed July 29, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009) (noting that its goal was to have "this litigation resolved before the general election").

87. Order Granting Defendant's Motion to Dismiss at 1, League of Women Voters of Ind., Inc. v. Rokita, No. 49D13-0806-PL-027627 (Ind. Super. Ct. Dec. 17, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

88. Notice of Appeal at 1, League of Women Voters of Ind., Inc. v. Rokita, No. 49D13-0806-PL-027627 (Ind. Super. Ct. filed Dec. 17, 2008), *rev'd*, 915 N.E.2d 151 (Ind. Ct. App. 2009).

89. League of Women Voters of Ind., Inc. v. Rokita, 915 N.E.2d 151 (Ind. Ct. App. 2009).

90. Immediately after the Court of Appeals issued their September 17, 2009 opinion declaring Indiana's Voter ID law unconstitutional, Indiana Secretary of State Todd Rokita stated that "I have already requested that the Indiana Solicitor General seek immediate transfer of the case to the Indiana Supreme Court for review." Jim Shella, *Court: Voter ID law unconstitutional, Daniels calls ruling act of judicial arrogance*, Sept. 17, 2009, http://www.wishtv.com/dpp/news/indiana/Court_declares_voter_ID_unconstitutional_20090917.

91. See Michael W. Hoskins, *COA strikes down law: Attorneys will ask Indiana Supreme Court to intervene*, Sept. 30, 2009, http://www.theindianalawyer.com/html/detail_page_Full.asp?

Court of Appeals' decision seems to be quite dramatic. Closer examination, however, reveals that the opinion is not as sweeping as many believe. Ultimately, the Indiana Court of Appeals did not find any problem with requiring voters to show identification. Stated another way, the Court of Appeals has not said that requiring voters to show identification before casting a ballot violates the Indiana Constitution.⁹² Therefore, the essence of voter identification survives. The Court of Appeals simply held that Indiana's Voter ID law—as currently drafted—creates different classes of voters in violation of the Indiana Constitution.⁹³ Arguably the decision of the Court of Appeals is limited because the problems identified by the court are easily fixable. Ultimately, if the Indiana Legislature simply removes the exceptions—i.e. removes the classes of voters created by the law—and requires *every* Hoosier voter to show identification, Indiana's Voter ID law would seemingly be constitutional in the eyes of the Indiana Court of Appeals.

To recognize the limits of the Indiana Court of Appeals' decision is not to deemphasize its importance. Quite the opposite, the Indiana Court of Appeals' decision serves two important functions. First, the reaction of public officials in the wake of the Court of Appeals' decision demonstrates the highly partisan nature of the debate surrounding voter identification. Second, the opinion of the Court of Appeals provides insight into how the Indiana Supreme Court will analyze the case.

The reaction of public officials in the wake of the Court of Appeals' decision demonstrates the highly partisan tone of the debate surrounding voter identification. Within days, three officials in Indiana made public comments about the decision. Governor Mitch Daniels stated: "It's a preposterous decision, an extreme decision and came in this case from a judge who's been reversed before and I expect that to happen again. . . . It's just bad law. It's an act of judicial arrogance. . . .

content=04603 ("Not often does an Indiana appellate court invalidate a state statute the way the Indiana Court of Appeals did Sept. 17.").

92. League of Voters, 915 N.E.2d 151. The issue turned on whether Indiana's Voter ID law is a regulation or a qualification. *Id.* at 157; If the Court of Appeals had held that the law is a qualification, presumably they would have said that voter identification, in and of itself, is unconstitutional. Instead, the Court held: "the Voter I.D. Law is not a qualification, but is rather a regulation of the time, place, or manner in which otherwise qualified voters must cast their votes. Therefore, if the Voter I.D. Law is to run afoul of our constitution, it is not for the reason that it imposes a qualification upon our electorate in the absence of constitutional provision." *Id.* at 161. This means that requiring voter to show ID is constitutionally permissible, just not the way the Indiana Legislature drafted the law. *Id.* at 151-69.

93. The court struck down the law "because it regulates voters in a manner that is not uniform and impartial." *Id.* at 169.

the ruling [is] transparently [political].”⁹⁴ Indiana Secretary of State Todd Rokita stated: “Some continue to force us to use taxpayer dollars on an issue that has already been reviewed by the US Supreme Court. The gamesmanship going on here is irresponsible and needs to stop.”⁹⁵ Finally, Indiana Attorney General Greg Zoeller stated: “The state’s long-held view is that the voter ID law is constitutional, and we will vigorously defend the statute in arguing that position before the Indiana Supreme Court.”⁹⁶ These statements did not go unnoticed. The Indiana State Bar Association issued the following in response to Governor Daniels statements:

[C]omments such as those attributed to the governor are not helpful in advancing appropriate respect for the courts and the judicial process, and honoring the separation of powers doctrine. The ISBA respects the governor’s, and every citizen’s, right to disagree with the decision. There are rules, however, that govern judicial conduct and appropriate procedures for dealing with complaints about the judiciary. Comments about individual judges are not the way to express disagreement with any court opinion.⁹⁷

With pointed clarity, these reactions to the Indiana Court of Appeals’ decision highlight the partisan nature of the debate surrounding voter identification.

More importantly, the opinion of the Court of Appeals provides insight into how the Indiana Supreme Court may analyze the case. Although the Indiana Supreme Court may have the final word, the Court of Appeals’ opinion previews the analysis of the three legal issues presented in *League of Voters*: (1) whether the League’s challenge is justiciable; (2) whether Indiana’s Voter ID law violates Article I, Section 23 of the Indiana Constitution; and (3) whether Indiana’s Voter ID law violates Article II, Section 2 of the Indiana Constitution.⁹⁸

The Court of Appeals held that the League’s challenge is justiciable.⁹⁹ Rokita argued that as the Secretary of State he is not responsible for enforcement of election laws.¹⁰⁰ The court pointed out that the League’s case was a declaratory judgment and that Indiana law intends “to settle and to afford relief from uncertainty and insecurity

94. Jim Shella, *Politics rule voter ID ruling reaction, Court strikes down controversial law*, Sept. 17, 2009, http://www.wishtv.com/dpp/news/politics/Politics_rules_voter_ID_ruling_reaction_20090917; see also Hoskins, *supra* note 91.

95. See Shella, *supra* note 90.

96. Bill Ruthhart, *Voter ID decision resurrects debate*, Sept. 18, 2009, <http://www.indy.com/posts/voter-id-decision-resurrects-debate>.

97. Hoskins, *supra* note 91.

98. *League of Voters*, 915 N.E.2d at 154.

99. See *id.* at 156-57.

100. *Id.* at 156.

with respect to rights, status and other relations; and is to be liberally construed and administered.”¹⁰¹ The court also pointed out that “Rokita is the ‘chief election official’ for the State of Indiana.”¹⁰² Accordingly, the court held that “the League named a proper defendant in this matter.”¹⁰³

Turning to the second issue, the Court of Appeals held that Indiana’s Voter ID law, as enacted, runs afoul of Article I, Section 23 of the Indiana Constitution.¹⁰⁴ In short, the Indiana Court of Appeals struck down the law “because it regulates voters in a manner that is not uniform and impartial.”¹⁰⁵ Article I, Section 23 of the Indiana Constitution provides: “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.”¹⁰⁶ Statutes run afoul of Article I, Section 23 when “the lines drawn appear arbitrary or manifestly unreasonable, and the challenger must negate every reasonable basis for the classification.”¹⁰⁷ In particular, the court found that the law impermissibly creates two classes of voters.

The first class of voters impermissibly created by the law is absentee voters, i.e. mail in voters.¹⁰⁸ In Indiana, “[a]n absentee voter is not required to provide proof of identification when: (1) mailing, delivering, or transmitt[ing] an absentee ballot under Section 1 of this chapter; or (2) voting before an absentee board under Section 25 of this chapter.”¹⁰⁹ The League cited language from the Indiana Supreme Court that recognized that “the legislature believed it in the interest of Indiana voters to more stringently govern absentee balloting.”¹¹⁰ The League argued therefore “it is irrational for our legislature to require identification of in-person voters but not require an affidavit affirming the identity of mail-in voters.”¹¹¹ The court agreed and concluded that the statute was unreasonable for that reason.¹¹²

The second problematic class of voters created by the law are those voters residing at a state licensed care facility.¹¹³ In Indiana, “[a] voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to

101. *Id.* at 157 (quoting IND. CODE § 34-14-1-2 (2009)).

102. *Id.*

103. *Id.*

104. *See id.* at 161-69.

105. *Id.* at 169.

106. IND. CONST. art. I, § 23.

107. *W.C.B. v. State*, 855 N.E.2d 1057, 1063 (Ind. Ct. App. 2006).

108. *League of Voters*, 915 N.E.2d at 162.

109. *Id.* (quoting § 3-11-10-1.2) .

110. *Id.* at 163 (quoting *Horseman v. Keller*, 841 N.E.2d 164, 173 (Ind. 2006)).

111. *Id.*

112. *Id.*

113. *Id.* at 163-65.

provide proof of identification before voting.”¹¹⁴ The State argued that self-evident realities of residing at a state licensed care facility justified the exception in the law.¹¹⁵ The court disagreed and held that the special treatment was based upon “an arbitrary or unnatural characteristic which grants an unequal privilege or immunity to residents of state licensed care facilities which also happen to be polling places.”¹¹⁶ Accordingly, given the two impermissible classes of voters, the Indiana Court of Appeals held that Indiana’s Voter ID law violates Article I, Section 23 of the Indiana Constitution and must be declared void.¹¹⁷

Faced with the Court of Appeals decision—which at first glance appears quite remarkable given that it reaches a different result than the United States Supreme court—it is important to recognize the limits in the Court of Appeals’ decision. To be precise, it is important to recognize what the Indiana Court of Appeals did not say. The Court of Appeals did not say that requiring voters to show identification before voting violates the Indiana Constitution. Therefore, according to the Court of Appeals, voter identification, in and of itself, does not run afoul of the Indiana Constitution. Ultimately, the Court of Appeals struck down Indiana’s Voter ID law because of the “(1) the disparate treatment between mail-in absentee voters and in-person voters; [and] (2) the disparate treatment between voters who reside at state licensed care facilities that by happenstance are polling places and elderly and disabled voters who do not reside at state licensed care facilities that also happen to be polling places.”¹¹⁸ Arguably these problems are fixable, even *easily* fixable. To remedy these problems the Indiana Legislature need only remove the disparate treatment. Absentee voters must be required to fill out an affidavit. Residents of state licensed care facilities must be required to show identification like all other Hoosier voters. If the Indiana Legislature makes these two relatively simple changes, then Indiana’s Voter ID law is presumably constitutional in the eyes of the Indiana Court of Appeals.

Ultimately, the Indiana Court of Appeals’ decision is not as sweeping as many headlines seem to indicate. In short, the holding of the Court of Appeals was rather limited. In the end, Indiana’s Voter ID law—despite being held unconstitutional by the Court of Appeals—seems to have escaped largely unscathed. Even if the Court of Appeals’ decision is affirmed by the Indiana Supreme Court, the Indiana

114. *Id.* (quoting §§ 3-10-1-7.2; 11-8-25.2).

115. *Id.* at 164.

116. *Id.* at 165.

117. *Id.*

118. *Id.* at 161-62.

Legislature need only require *every single* Hoosier voter to show identification before casting a ballot. If the Indiana Legislature can make these changes, voter identification will survive in Indiana.

B. *The Heart of Indiana's Voter ID Law*

Any broad pronouncement about the (un)constitutionality of Indiana's Voter ID law will stem—not from Article I, Section 23—but instead from Article II, Section 2 of the Indiana Constitution. If the Indiana Supreme Court is to hold that requiring voters to show identification before voting violates the Indiana Constitution, it will have to happen under Article II, Section 2. Thus, the heart of Indiana's Voter ID law lies in Article II, Section 2.

The Article II, Section 2 issue is summarized as follows: Whether Indiana's Voter ID law is a legitimate exercise of the Indiana Legislature's power to administer and regulate elections or unconstitutionally imposes an additional requirement for voter eligibility.¹¹⁹ With regard to this issue, the Court of Appeals found no problem, stating that "if the Voter I.D. Law is to run afoul of our constitution, it is not [because it violates Article II, Section 2]."¹²⁰ In truth this issue is convoluted and actually touches on *three* provisions of the Indiana Constitution.

1. *The Power of the Indiana Legislature to Regulate and Administer Elections.* – The League argued that the Indiana Constitution defines the requirements a Hoosier must satisfy before she is eligible to vote.¹²¹ Working in concert, Article II, Section 2 and Article II, Section 14 together set forth four basic prerequisites that must be satisfied before a Hoosier is eligible to vote: (1) the person must be a U.S. citizen; (2) the person must be at least eighteen years old; (3) the person must have lived in the precinct for at least 30 days; and (4) the person must be registered to vote.¹²² The League argued that the Indiana Legislature is prohibited from imposing additional voting requirements beyond those four without passing a constitutional amendment.¹²³ Because Indiana's Voter ID law adds a fifth requirement, that voters possess and present a government-issued ID card, Indiana's Voter ID law is unconstitutional.¹²⁴

119. See Amended Complaint for Declaratory Judgment, *supra* note 13, at 1-7; Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 1-9.

120. League of Voters, 915 N.E.2d at 161.

121. *Id.*

122. IND. CONST. art. II, § 2; IND. CONST. art. II, § 14.

123. Amended Complaint for Declaratory Judgment, *supra* note 13, at 5 (relying on *Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890)).

124. *Id.* at 6.

Indiana courts have repeatedly struck down additional voting requirements imposed by the legislature.¹²⁵ In *Board of Election Commissioner v. Knight*,¹²⁶ the Indiana Legislature granted women the right to vote, even though the Indiana Constitution did not include women as part of the electorate.¹²⁷ Indianapolis citizens brought an action to enjoin election officials from allowing women to vote.¹²⁸ The Indiana Supreme Court agreed and held that the law granting women suffrage was unconstitutional because the law would allow persons to cast a ballot who are not part of the electorate as defined by Article II, Section 2.¹²⁹

While *Knight* demonstrates that the legislature is constrained by the election provisions of the Indiana Constitution, this case presents two problems.¹³⁰ First, it is awkward for the League to argue that a case so blatantly about disenfranchising women now supports the argument that Indiana's Voter ID law should be struck down because of its disenfranchising effect on voters.¹³¹ Second, *Knight* can be distinguished because, unlike the League's challenge to Indiana's Voter ID law, the Indiana Constitution spoke directly to the issue in *Knight*.¹³² At that time, Article II, Section 2 only conferred the right to vote on white males, while the challenged law gave women in Indianapolis the right vote.¹³³ By the language of the constitution it was self-evident that the Indiana Legislature had overstepped its bounds.¹³⁴ In contrast, *League of Voters* presents an issue about which the Indiana Constitution is silent.¹³⁵ The Indiana Constitution provides nothing about requiring voters to present government-issued ID, and therefore, the boundary of the legislature's power with regard to Indiana's Voter ID law is ambiguous. In short, the League cannot successfully argue that Indiana's Voter ID law is outside the power of the Indiana Legislature without defining the boundaries of that power.

In response to the League's Article II, Section 2 argument, the State countered that Indiana's Voter ID law is constitutional because the Indiana Legislature passed the Voter ID law pursuant to its constitutional power to regulate elections.¹³⁶ The State cited two different

125. See *Bd. of Election Comm'r v. Knight*, 117 N.E. 565, 575 (Ind. 1917).

126. 117 N.E. 565.

127. *Id.* at 567.

128. *Id.*

129. *Id.* at 575.

130. See *id.*

131. See U.S. CONST. amend. XIX (conferring on women the right to vote).

132. *Bd. of Election Comm'r v. Knight*, 117 N.E. 565, 566-67 (Ind. 1917) (quoting IND. CONST. art. II, § 2).

133. *Id.*

134. *Id.*

135. See IND. CONST. art. II, § 14 (discussing voting requirements).

136. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 2-3.

constitutional provisions as sources of this legislative power.¹³⁷ One source of this power is Article II, Section 1 of the Indiana Constitution, which provides “[a]ll elections shall be free and equal.”¹³⁸ A second source is Article II, Section 14, which commands “[t]he General Assembly shall provide for the registration of all persons entitled to vote.”¹³⁹

Relying on Article II, Section 1, the State argued “[i]nherent in the requirement of holding ‘free and equal’ elections lies the power of the state to protect the rights of citizens to a fair and reliable electoral system.”¹⁴⁰ This argument was based on the premise that in-person voter fraud cannot occur if the voter is required to prove their identity.¹⁴¹ Although the State failed to clearly articulate its point, the State essentially argued that fraud prevention is a conduit to a reliable electoral system and a reliable electoral system is a conduit to a free and clear election.¹⁴² Therefore, because preventing fraud ensures that elections are free and clear, passing Indiana’s Voter ID law is a legitimate exercise of the Indiana Legislature’s Article II, Section 1 power.¹⁴³

Interestingly, despite the availability of colorable arguments to both sides, neither party offered a definition of “free and clear.”¹⁴⁴ The State would have been wise to define “free and clear” to mean that all elections should be free and clear of fraudulent voting practices, which is the purpose of Indiana’s Voter ID law. The League would have been prudent to define “free and clear” to mean that all elections shall be free and clear from overly burdensome laws, like Indiana’s Voter ID law, that discourage voters from participating in the electoral process. Nonetheless, neither party explicitly provided a definition, and presumably left the Indiana Supreme Court to define “free and clear.”

Next, grounding the legislative power to enact Indiana’s Voter ID law in the voter registration provision of Article II, Section 14, the State argued that “[Indiana’s Voter ID law] is merely a procedure of verifying the identity of a registered voter—the most fundamental pre-existing voter eligibility criterion.”¹⁴⁵ Essentially, the State was

137. *Id.* at 2.

138. IND. CONST. art. II, § 1.

139. IND. CONST. art. II, § 14.

140. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 3.

141. *Id.* at 7, 11.

142. *Id.* at 2-3. The State fails to set forth and connect each premise of the argument but instead cursorily states without elaboration that “[b]y preventing voter fraud, the identification requirement ensures compliance with the Article II, Section 1 mandate that each vote equally influence the result of an election.” *Id.*

143. *Id.* at 2-3.

144. IND. CONST. art. II, § 1. See Amended Complaint for Declaratory Judgment, *supra* note 13, at 1-7; Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 1-9.

145. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 3-4.

positing that identifying voters is part of the registration process.¹⁴⁶ Accordingly, because the Indiana Legislature has the power to register voters and identifying voters is part of that registration process, Indiana's Voter ID law is a legitimate exercise of that legislative power.¹⁴⁷

Previously, the Indiana Supreme Court held that the registration system the Indiana Legislature imposes on the electorate is presumptively constitutional.¹⁴⁸ In *Simmons v. Byrd*,¹⁴⁹ citizens challenged Indiana's voter registration laws as unconstitutional.¹⁵⁰ The argument in *Simmons*, very similar to the League's argument in *League of Voters*, was that although the Indiana Legislature passed registration laws pursuant to Article II, Section 14, the registration laws impose additional voting qualifications as defined by Article II, Section 2.¹⁵¹ The court rejected this argument and upheld the registration laws as constitutional, finding that Article II, Section 2 and Article II, Section 14 are not in conflict.¹⁵² The court, discussing Article II, Section 14, recognized that "it is made the duty of the [Indiana] General Assembly by the [Indiana] Constitution to enact a law providing . . . for the registration of all voter. . . ."¹⁵³ In discussing the importance of registration laws the court also stated, "[w]hen the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed."¹⁵⁴ Seemingly validating both arguments of the State, *Simmons* appears to announce two principles that provide the Indiana Legislature with the power to enact Indiana's Voter ID law.¹⁵⁵ However, the broad principles announced by *Simmons* do not provide guidance about the constitutionality of Indiana's Voter ID law.¹⁵⁶

The Indiana Constitution explicitly authorizes the Indiana Legislature to enact a voter registration system, and *Simmons* confirms this principle.¹⁵⁷ However, both the Indiana Constitution and *Simmons* are silent as to whether requiring voters to show government-issued ID is part of the registration process.¹⁵⁸ Similarly, *Simmons* does es-

146. *Id.*

147. *Id.*

148. See *Simmons v. Byrd*, 136 N.E. 14, 14-17 (Ind. 1922).

149. 136 N.E. 14.

150. *Id.* at 14.

151. *Id.* at 14-15.

152. *Id.* at 16-17.

153. *Id.* at 16. (internal quotations omitted) (citing *Morris v. Powell*, 25 N.E. 221, 222 (Ind. 1890)).

154. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 3-4 (quoting *Simmons*, 136 N.E. at 18).

155. See *Simmons*, 136 N.E. at 16-18.

156. See *id.*

157. See IND. CONST. art. II, § 14; See *Simmons*, 136 N.E. at 16-18.

158. See IND. CONST. art. II, § 14; See *Simmons*, 136 N.E. at 16-18.

tablish that the Indiana Legislature has power to ensure elections are free and clear, but *Simmons* does not define “free and clear.”¹⁵⁹ Furthermore, even if a “free and clear” election is defined as a fraud-free election, *Simmons* does not establish that requiring voters to present government-issued ID is necessary to ensure that elections are free and clear.¹⁶⁰ Mirroring the shortcomings of the League’s first argument, the State argued that Indiana’s Voter ID law is within the power of the legislature without defining the contours of that power.¹⁶¹

2. *Procedural Regulations v. Substantive Qualifications.* – Both parties turned to the distinction between substance and procedure as a way to define the contours of the Indiana Legislature’s power to regulate elections.¹⁶² The League argued that Indiana’s Voter ID law is unconstitutional because it adds an additional “substantive qualification” outside the Indiana Constitution.¹⁶³ In response, the State argued that Indiana’s Voter ID law is not a “substantive qualification” but is instead a “procedural regulation.”¹⁶⁴ Accordingly, the State argued that the Indiana Legislature only has the authority to add procedural regulations, not substantive qualifications.¹⁶⁵ According to the State, the outer limits of the Indiana Legislature’s power to regulate elections lies at the line between procedural regulations and substantive qualifications, with substantive qualifications being beyond the reach of the Indiana Legislature.¹⁶⁶

In *Rosario v. Rockefeller*,¹⁶⁷ the United States Supreme Court explained the distinction.¹⁶⁸ The Court defined substantive voting qualifications as laws that “totally den[y] the electoral franchise to a particular class of residents, and there is no way in which the members of that class could [make] themselves eligible to vote.”¹⁶⁹ In contrast, the Court defined procedural election regulations as laws that leave some responsibility with the voter but “[do] not absolutely disen-

159. See *Simmons*, 136 N.E. at 16-18.

160. *Id.*

161. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 3-4.

162. Plaintiff’s Response in Opposition to Defendant’s Motion to Dismiss at 16, *League of Women Voters of Ind., Inc. v. Rokita*, No. 49D13-0806-PL-027627 (Ind. Super. Ct. filed Oct. 17, 2008), *rev’d*, 915 N.E.2d 151 (Ind. Ct. App. 2009) [hereinafter Plaintiff’s Opposition to Defendant’s Motion to Dismiss]; Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 3.

163. See *supra* discussion Part II.B.

164. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 3.

165. *Id.*

166. *Id.*

167. 410 U.S. 752 (1973).

168. *Id.* at 757; See Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 4.

169. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 4 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973)).

franchise the class to which the petitioners belong.”¹⁷⁰ For example, a sixteen-year-old Hoosier cannot vote for failure to meet the age requirement and realistically has no way of becoming eligible to vote.¹⁷¹ This example illustrates a substantive qualification. However, a Hoosier who does not have valid identification, although meeting the other age, citizenship, residency, and registration requirements, is not absolutely disenfranchised but is instead prevented from casting a ballot due to the voter’s “own failure to take timely steps to effect [her] enrollment.”¹⁷² This example illustrates a procedural regulation. Because the voter without ID is not absolutely disenfranchised from voting, unlike the sixteen-year-old Hoosier, Indiana’s Voter ID law is a procedural regulation not a substantive qualification.¹⁷³

While the Indiana Supreme Court does not have to adopt *Rosario*’s bifurcated treatment of election rules,¹⁷⁴ textual analysis of the Indiana Constitution seems to validate this distinction between substantive qualifications and procedural regulations.¹⁷⁵ As Article II, Section 2 provides, when a person meets the necessary qualifications of age, citizenship, and residence, that person is entitled to vote.¹⁷⁶ Article II, Section 14 provides: “The General Assembly shall oversee the registration of all those entitled to vote.”¹⁷⁷ This language reveals that voter registration is distinct from being *entitled* to vote. To illustrate, if a person entitled to vote under Article II, Section 2 is properly registered, the poll worker permits the voter to cast a ballot on election day.¹⁷⁸ If a person entitled to vote under Article II, Section 2 is unregistered, the poll worker prohibits the voter from casting a ballot.¹⁷⁹ However, by stopping the unregistered voter from casting a ballot, the poll worker cannot take away the person’s Article II, Section 2 *entitlement*. By the language of the Indiana Constitution, voter registration does not affect whether a person is *entitled* to vote. Arguably, this distinction between voter registration and *entitlement* could be recast in the language of *Rosario*. An unregistered voter is not stripped of his *entitlement* or “absolutely disenfranchised” from

170. *Rosario*, 410 U.S. at 757.

171. See IND. CONST. art. II, § 2.

172. *Rosario*, 410 U.S. at 758; See IND. CONST. art. II, § 14.

173. See Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 4.

174. See *Holder v. State*, 847 N.E. 2d 930, 935 (Ind. 2006).

175. To be clear, in *League of Voters*, neither party grounds the distinction between substantive qualifications and procedural regulations on the language of the Indiana Constitution; See Amended Complaint for Declaratory Judgment, *supra* note 13, at 1-7; Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 1-9.

176. IND. CONST. art. II, § 2.

177. IND. CONST. art. II, § 14.

178. IND. CODE § 3-7-48-1 (2009).

179. See *id.*

voting; instead the person's "own failure" to register prevents the person from casting a ballot.¹⁸⁰

In response, the League attempted to bypass this distinction drawn by the State with an argument based on functionality, meaning that regardless of the label you attach to Indiana's Voter ID law, functionally it can prevent a voter from casting a ballot just like an age, residency, citizenship, or registration requirement.¹⁸¹ First, Indiana does not allow persons to vote who fail to meet the age, residency, and citizenship requirements.¹⁸² Second, Indiana does not allow non-registered persons to vote.¹⁸³ Finally, Indiana does not allow persons lacking valid identification to vote.¹⁸⁴ In all three situations the outcome is the same; the voter is not allowed to cast a meaningful ballot.¹⁸⁵ From a functional standpoint, application of all three laws produces the same result, rendering the procedural-substantive distinction meaningless.¹⁸⁶

Nonetheless, the League's functionality argument cannot end the analysis. Taking the League's functionality argument to its logical conclusion would require the Indiana Supreme Court to strike down as unconstitutional every election law that can potentially prevent a voter from casting a ballot.¹⁸⁷ According to the League's theory, every single election law with the potential to prevent a voter from casting a ballot is unconstitutional unless the Indiana Constitution explicitly authorizes the Indiana Legislature to pass the law.¹⁸⁸ As one might surmise, the League's functionality theory is shortsighted, as many Indiana election laws, although not explicitly addressed by the Indiana Constitution, pass constitutional muster despite having potential to prevent a voter from casting a ballot.¹⁸⁹

Most importantly, before the Indiana Legislature passed Indiana's Voter ID law, election officials verified the identify of Indiana voters by signature matching, meaning if a voter's signature did not match the signature that appeared in the poll book the poll worker would challenge the voter, in the same way a poll worker today would chal-

180. IND. CONST. art. II, § 14; *See* Rosario v. Rockefeller, 410 U.S. 752, 758 (1973).

181. Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 162, at 20-22.

182. *Id.* at 21.

183. *Id.*

184. *Id.* (explaining that the voter can cast a provisional ballot, but without valid identification the vote will not influence the outcome of the election).

185. *Id.*

186. *Id.*

187. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 5-6.

188. *Id.*

189. *See id.* The State provides two examples. First, Indiana law limits the amount of time a voter may spend in the voting booth. IND. CODE §§ 3-11-11-10.5, -11-13-32.5, -11-14-26 to -28 (2009); Second, Indiana law prohibits a voter from divulging his or her ballot after marking it but before casting it. IND. CODE §§ 3-11-11-16, -11-13-32.8, -11-14-29 (2009).

lenge a voter with invalid identification.¹⁹⁰ Naturally, because both laws are used to prove the identity of voters, the State analogized signature matching to presenting government-issued ID, arguing that because signature matching is constitutional Indiana's Voter ID law is also constitutional.¹⁹¹ Here, the State was correct that "no principled constitutional distinction separates" signature matching from Indiana's Voter ID law, meaning the Indiana Constitution does not explicitly address either.¹⁹² Nonetheless, one very important difference remains – the Indiana Supreme Court has upheld the constitutionality of signature matching, while it has said nothing about the constitutionality of Indiana's Voter ID law.¹⁹³

Of course, the Indiana Supreme Court could buy the analogy between the two, but practically speaking signature matching and presenting government-issued ID are very different."¹⁹⁴ First, a voter cannot forget her signature at home. Second, a voter's signature cannot expire. Third, a voter does not have to present a birth certificate to obtain her signature from the state of Indiana or the federal government. Because the Indiana Constitution addresses neither signature matching nor requiring voters to present government-issued ID, these practical distinctions are all that remain to guide the analysis of the Indiana Supreme Court.¹⁹⁵

3. *Legal Standards.* – Both parties address the legal standard that should decide the constitutionality of Indiana's Voter ID law.¹⁹⁶ While the League and the State argued that *Simmons* provides the standard, the parties disagreed about which standard from *Simmons* controls.¹⁹⁷ The State posited that an election law is constitutional unless it is "*so grossly unreasonable that compliance therewith is practically impossible.*"¹⁹⁸ The League argued that an election law is consti-

190. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 5.

191. *Id.* at 5-6.

192. *Id.* at 5.

193. *Blue v. State*, 188 N.E. 583, 591 (Ind. 1934), *overruled by*, 40 N.E.2d 115 (Ind. 1942), *explained by*, 72 N.E.2d 225 (Ind. 1947).

194. Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 162, at 19 n.5 (noting that "requiring voters to . . . identify themselves by name and signature [is not] remotely equivalent to requiring a voter to produce a specific form of governmental-issued identification").

195. *See* IND. CONST. art. II, § 2; IND. CONST. art. II, § 14 (discussing voting qualifications and voter registration).

196. Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 162, at 39; Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 7.

197. Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 162, at 39; Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 7.

198. Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 39, at 7 (internal quotations omitted) (quoting *Simmons v. Byrd*, 136 N.E. 14, 18 (Ind. 1922) (emphasis added)).

tutional if it is “reasonable, uniform, and impartial.”¹⁹⁹ While individually each standard presents problems, collectively, the result is worse.

First, the two standards are very different. The standard proposed by the State is much lower than the standard offered by the League. If the court applies the language of the State’s standard literally, the Indiana Legislature would essentially have unchecked power to regulate elections. Under the standard proposed by the State, Indiana’s Voter ID law is constitutional unless it is “so grossly unreasonable that compliance therewith is practically impossible.”²⁰⁰ “Practically impossible” seems to encompass very little. It is hard for anyone to argue that Indiana’s Voter ID law is “so grossly unreasonable that compliance therewith is practically impossible.” Indiana provides IDs free of charge.²⁰¹ If one has the required documents, a prospective voter only needs a ride to the Bureau of Motor Vehicles (hereinafter “BMV”) to obtain the free ID.²⁰² It is hard to argue that obtaining a ride to the BMV is “practically impossible.” Even if one does not have a birth certificate, it is hard to argue that it is “practically impossible” to obtain one.

Second, while both sides offer strong arguments to uphold or strike down Indiana’s Voter ID law, neither party provides any helpful guidance as to how each standard should be applied.²⁰³ The standards are radically different, and therefore the choice of which to apply may be outcome-determinative. If the Indiana Supreme Court chooses to apply one of the two available standards from *Simmons*, the Court will still not have an analytical framework with which to decide *League of Voters*.

To illustrate, the League offered a series of arguments in support of its conclusion that Indiana’s Voter ID law is not “reasonable, uniform, and impartial.”²⁰⁴ First, Indiana’s Voter ID law discourages participation in the electoral process.²⁰⁵ Second, in 2008, the Voter ID law disenfranchised twelve nuns in St. Joseph County.²⁰⁶ Third, in 2007, the Voter ID law disenfranchised thirty-two voters in Marion

199. *Simmons v. Byrd*, 136 N.E. 14, 16-17 (Ind. 1922). (emphasis added); See also Plaintiff’s Opposition to Defendant’s Motion to Dismiss, *supra* note 162, at 39; To be clear, the League never articulates a precise standard that should govern *League of Voters*, however the League does indirectly reference this standard from *Simmons*. *Id.*

200. *Simmons*, 136 N.E. at 18 (emphasis added).

201. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1614 n.4 (2008).

202. *Id.* at 1621.

203. See Plaintiff’s Opposition to Defendant’s Motion to Dismiss, *supra* note 162, at 1-24; Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 1-9.

204. *Simmons*, 136 N.E. at 16-17; See also Plaintiff’s Opposition to Defendant’s Motion to Dismiss, *supra* note 162, at 39.

205. Plaintiff’s Opposition to Defendant’s Motion to Dismiss, *supra* note 162, at 17.

206. *Id.* at 18.

County.²⁰⁷ Finally, the ancillary cost of obtaining a birth certificate creates additional burdens on the right to vote.²⁰⁸ All of these arguments are certainly relevant to whether the Voter ID law is “reasonable, uniform, and impartial.” However, these arguments alone do not establish when a law becomes “too unreasonable.” These arguments do not provide a definition for “uniform or impartial.” Does “uniform” mean that the Voter ID law is constitutional if it is facially neutral? Does “impartial” mean the Voter ID law is unconstitutional if it has a disparate impact on certain classes of voters?

Similarly, the State offered a series of arguments in support of its conclusion that the Voter ID law is “not so grossly unreasonable that compliance therewith is practically impossible.”²⁰⁹ First, almost everyone carries government-issued ID.²¹⁰ Second, Indiana will issue the voter an ID for free.²¹¹ Third, if the voter does not have ID or forgets ID, Indiana provides the voter ten days to validate her ballot.²¹² All of these arguments certainly are factors in determining whether Indiana’s Voter ID law is “so grossly unreasonable that compliance therewith is practically impossible.” However, these arguments alone do not establish when a law becomes “grossly unreasonable.” These arguments alone do not establish the number of people for whom “compliance therewith [would be] practically impossible” before the law is “grossly unreasonable.” Is the Voter ID law unconstitutional if compliance is impossible for one person? Is the Voter ID law constitutional until compliance is impossible for everyone?

C. Conclusion to the Case

Ultimately, the Indiana Supreme Court—assuming transfer is granted—can resolve this case in a variety of ways. This case presents multiple legal issues, and the legal landscape is convoluted. Any broad pronouncement about Indiana’s Voter ID law will stem from Article II, Section 2 of the Indiana Constitution. However, it is possible that the Indiana Supreme Court will reach an unsatisfactory result if it confines its analysis to the language of the Indiana Constitution, Indiana precedent, and general election policy.²¹³ The parties’ arguments place three provisions of the Indiana Constitution in equi-

207. *Id.*

208. *Id.* at 15.

209. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 1-9 (internal quotations omitted) (quoting Simmons, 136 N.E. at 18).

210. *Id.* at 8.

211. *Id.*

212. *Id.*

213. See *supra* discussion Part II.A–C.

poise.²¹⁴ A handful of Indiana cases, all but one from before 1930, are on point.²¹⁵ However, like the Constitution, these dusty cases simultaneously provide ammunition for both the League and the State.²¹⁶ In hopes of avoiding an unsatisfactory result and with the aim of probing the real-world impact of the law, the Indiana Supreme Court should apply an alternative framework to decide the constitutionality of Indiana's Voter ID law.

III. A NORMATIVE APPROACH TO *LEAGUE OF WOMEN VOTERS, INC. v. ROKITA*

In hopes of arriving at a satisfactory conclusion the Indiana Supreme Court should use an alternative framework to decide *League of Voters*. This alternative approach should be simple and practical. The goal of the Court should be to evaluate the real-world impact the law has on individual voters and elections in general.²¹⁷ The standard the court should use is very simple: Does Indiana's Voter ID law do more harm than good?²¹⁸ If Indiana's Voter ID law does more harm than good, it is unconstitutional. Conversely, if Indiana's Voter ID law does more good than harm, it is constitutional.

To answer this question, the Court should use a simple balancing approach.²¹⁹ This balancing approach should occur in three steps. Step one requires the Court to articulate the benefits and burdens of Indiana's Voter ID law.²²⁰ Step two requires the Court to individually

214. See *supra* discussion Part II.A.

215. See *supra* discussion Part II.A–B.

216. See *supra* discussion Part II.A–C.

217. Overton, *supra* note 21, at 653 (“Policy-makers need data on both fraud and access to the polls to determine whether a photo-identification requirement would lead to fewer erroneous election outcomes . . .”).

218. In one of the preeminent articles about voter identification, Professor Spencer Overton inquires about “whether a photo-identification requirement would do more harm than good” – while Professor Overton has not proposed this should be the legal standard governing voter identification laws, he does imply that this is the most basic, foundational inquiry in deciding whether voter identification laws should be struck down. Overton, *supra* note 21, at 635, 648, 651, 653. Another important article states that (1) the extent of vote fraud and (2) the extent of vote denial are “the central empirical questions that should guide the decision over constitutionality of voter ID laws.” Ansolabehere & Persily, *supra* note 6, at 1740. See also Christopher S. Elmendorf, *Undue Burden on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 654–59 (2008) (arguing that an “aggregate-consequences” model should be used to determine the constitutionality of voter participation claims).

219. A balancing approach is not a novel concept. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008); See also *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952–53 (7th Cir. 2007); See generally *supra* note 219 and accompanying text.

220. Balancing “benefits” and “burdens” of voter identification laws is not a novel concept. See *Crawford*, 128 S. Ct. at 1616; *Crawford*, 472 F.3d at 952–953; See also Overton, *supra* note 21, at 653; Pitts, *supra* note 2, at 500 (referring to “the debate over the benefits and burdens of photo identification.”); See generally *supra* note 219 and accompanying text.

scrutinize each benefit and burden to determine its relative weight.²²¹ Stated otherwise, if the first step in the analysis asks *what good does this law accomplish*, the second step in the analysis asks *how much good does this law accomplish*. At step three in the analysis, the court must weigh the good against the bad and make a decision.²²²

The analytic guideposts throughout the Court's analysis should be empiricism²²³ and commonsense.²²⁴ In a perfect world, empiricism would be the only necessary guidepost and all the burdens and benefits created by Indiana's Voter ID would be quantified.²²⁵ Once quantified, the burdens would be pitted against the benefits, and the constitutionality of Indiana's Voter ID law would be clear.

In reality, not every effect of Indiana's Voter ID law can be quantified, because unfortunately, the debate surrounding voter identification "presents a series of largely unanswered, and in some respects, unanswerable empirical questions."²²⁶ Ultimately, empiricism is not enough.²²⁷ Therefore, where empiricism is not available to guide the analysis, commonsense is the only alternative. Opponents often criticize voter identification laws as inadequately justified by "common sense popular notions"²²⁸ and warn that "wrapping an argument 'in the mantle of common sense [is] certainly cause for suspicion.'"²²⁹ Taking a realist approach to the shortcomings of empiricism, the Indiana Supreme Court should acknowledge that commonsense is all that remains to guide the analysis in some circumstances. Applying this alternative framework, an empirical-realist model, the Indiana Su-

221. Crawford, 128 S. Ct. at 1628 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). This step is akin to considering the "the character and magnitude of the asserted injury." *Id.*

222. *Id.* at 1616. This step is akin to making the "hard judgment" our adversary system demands." *Id.*

223. Using empiricism as an analytical guidepost is not a novel concept. Myriad commentators have called for and taken up efforts to increase the availability of empirical data about voter identification laws. See Pitts, *supra* note 2, at 500 (conducting a comprehensive phone survey and provisional ballot collection to determine the impact of Indiana's Voter ID law on Hoosiers); Overton, *supra* note 21, at 631 (calling for better empirical data to understand the extent of voter fraud and the exclusion of legitimate voters caused by voter identification laws); Ansolabehere & Persily, *supra* note 6, at 1738 (conducting a national survey "to assess how widespread fear of . . . election fraud is").

224. Commentators often criticize the use of commonsense. See Overton, *supra* note 21, at 652 ("[P]olicy-makers should resist the temptation to rush to adopt [voter identification laws] based solely on anecdotes, analogy, and 'common sense' popular assumptions . . .").

225. See *id.* at 663 ("Empirical data is not perfect . . . it allows for a better understanding of the true costs and benefits of a photo-identification requirement and permits a more honest debate about the democratic values at issue.").

226. Ansolabehere & Persily, *supra* note 6, at 1738.

227. See Overton, *supra* note 21, at 669 (noting that "empirical data does not answer all questions").

228. *Id.* at 652 (internal quotations omitted).

229. *Id.* at 652 (quoting Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094-95 (1996)).

preme Court should aim to evaluate the real-world impacts of Indiana's Voter ID law.

In truth, this empirical-realist framework does not differ drastically from the "undue burden" standard used by the United States Supreme Court in *Crawford*.²³⁰ In *Crawford*, the undue burden standard was stated as follows: "[A] court evaluating a constitutional challenge to an election regulation [should] weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'" ²³¹ In truth, inquiring whether Indiana's Voter ID law does more harm than good is not a radical departure from weighing the "asserted injury" against the "precise interests" of the State. Nonetheless, the two standards are not identical. To be exact, the empirical-realist framework is in some ways *similar to* and other ways *different from* the undue burden standard. Both the similarities and the differences are important. In fact, the normative design of this empirical-realist framework intends four important consequences.

First, the empirical-realist framework mitigates the indeterminacy of the undue burden standard, meaning it attempts to make the undue burden standard less nebulous and easier to apply in a consistent manner.²³² Despite their similarities, the empirical-realist framework is conceptually much simpler than the undue burden standard. Commentators often criticize the undue burden standard as "an indeterminate framework [which allows courts to] reach seemingly partisan decisions."²³³ Providing conceptual simplicity to the undue burden standard is an attempt to answer this criticism. This conceptual simplicity is possible because in the context of voter identification laws, the analysis *can* be distilled to a very simple inquiry: Does the voter identification law do more harm than good? By balancing the extent of voter fraud against the extent of vote denial, the Indiana Supreme Court can distill the inquiry to the two "central empirical questions" relevant to the constitutionality of Indiana's Voter ID law.²³⁴

230. The United States Supreme Court has used the undue burden standard to decide election law issues since the 1970s. Overton, *supra* note 21, at 654-59 (providing a comprehensive history of the development of the undue burden standard). See generally *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Storer v. Brown*, 415 U.S. 724 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

231. *Crawford*, 128 S. Ct. at 1616 (internal quotations omitted) (quoting *Burdick*, 504 U.S. at 434).

232. Elmendorf, *supra* note 218, at 651.

233. *Id.* (noting that the partisan divide in voter identification litigation calls into question the ability of American courts to set aside partisan prejudice when faced with political-process questions which causes judges to appear as "de facto agents for their political party of choice").

234. Ansolabehere & Persily, *supra* note 6, at 1740.

Second, the normative design of this empirical-realist framework forces the Indiana Supreme Court to take a one-tiered approach.²³⁵ Courts have applied the undue burden standard in two very different ways—a two-tiered approach and a one-tiered approach.²³⁶ Courts taking the two-tiered approach apply “strict scrutiny for severe burdens and something else for lesser ones,” while courts taking the open-ended, one-tiered approach consider all laws under the same level of scrutiny.²³⁷ Because the undue burden standard fails to guide courts toward the appropriate choice, this empirical-realist framework further mitigates the indeterminacy of the undue burden by rescinding the Indiana Supreme Court’s choice between the one and two-tiered approach.²³⁸ This rescission forces the Court to apply an “open-ended balancing [test]” using one level of scrutiny, which provides additional simplicity.²³⁹ However, to understand why the one-tiered approach is preferred to the two-tiered approach, one must consider competing theories of the right to vote.²⁴⁰

The normative design of this alternative framework intends an important third consequence, funneling the Indiana Supreme Court toward a structural approach to the right to vote.²⁴¹ Two competing theories are often used to explain the right to vote. One theory considers the right to vote as an individual right, i.e., a right possessed by an individual, while another theory considers the right to vote as a structural-collective right, i.e. the right of “the people” to elect a representative government.²⁴² Giving a court unchecked freedom to oscillate between one and two-tiered scrutiny and both theories of the right to vote can encourage hyper-partisan decisions, meaning courts have wiggle room to decide cases exactly as they please, often in step with partisan loyalty.²⁴³ By constraining the Indiana Supreme Court to one-tiered scrutiny and funneling the Court towards a structural theory of the right to vote, this empirical-realist framework is an attempt to remove from the table any partisan temptations.²⁴⁴ The empirical-realist framework imports a structural theory of the right to vote and forces the Indiana Supreme Court to consider the macro-

235. Elmendorf, *supra* note 218, at 656.

236. *Id.* (articulating two different approaches courts have used in applying the undue burden standard).

237. *Id.* (noting Judge Richard Posner uses the one-tiered and the United States Supreme Court uses the two-tiered approach).

238. *Id.*

239. *Id.*

240. *Id.* at 643-46.

241. *Id.* at 644-45.

242. *Id.*

243. *Id.* at 656-57.

244. *Id.* at 656.

level effects of Indiana's Voter ID law.²⁴⁵ Afterwards, however, the simple balancing test of this alternative framework forces the Court to focus on the micro-level impact of the law.²⁴⁶ By providing the Indiana Supreme Court with a means of panning between a micro and macro-level perspective, the design of this empirical-realist framework aims to avoid seemingly partisan decisions.²⁴⁷

Finally, the normative design of this empirical-realist framework charts a centrist course, meaning *Crawford*²⁴⁸ is neither fully rejected nor fully embraced. Designing the empirical-realist framework similar to the undue burden standard acknowledges that the analytical approach of *Crawford* was correct; a balancing approach is the appropriate framework to analyze Indiana's Voter ID law, albeit in the simpler manner proposed by this Note.²⁴⁹ Furthermore, application of this empirical-realist framework reveals the outcome of *Crawford* was correct: Indiana's Voter ID law should have survived challenge under the federal constitution. However, the reasoning on which *Crawford* rests its conclusion was incorrect. Undoubtedly, Indiana's Voter ID law is valid under the United States Constitution—*Crawford* was right about this much. What *Crawford* failed to acknowledge was the thin ground on which the Indiana Legislature stood when it passed Indiana's Voter ID law.²⁵⁰ Accordingly, gratuitous agreement with *Crawford* about the validity of Indiana's Voter ID law under the United States Constitution is replaced by the sobering realization that the law occupies a legislative dead zone where it manages to accomplish little good but survives nonetheless by causing little harm. *Crawford* was not wrong, but *Crawford* was not completely right either. Discovering the surprising firmness of this middle ground is important to recognize as the debate surrounding Indiana's Voter ID law lurches forward.

IV. APPLYING THE ALTERNATIVE FRAMEWORK TO *LEAGUE OF WOMEN VOTERS, INC. v. ROKITA*

Application of the empirical-realist framework helps demonstrate the firmness of this middle ground by revealing Indiana's Voter ID law as constitutionally valid but legislatively dubious. Acclimation to this centrist position inevitably brings to light the larger implications that attach to recognizing both the futility and the constitutionality of Indiana's Voter ID law.

245. *Id.* at 702-03.

246. *Id.* at 702.

247. *Id.* at 656-57.

248. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616-24 (2008).

249. See *supra* text accompanying note 216-224.

250. See *infra* discussion Part IV.

A. *Articulating the Benefits and Burdens of Indiana's Voter ID Law*

Deciding whether Indiana's Voter ID law does more harm than good requires the Indiana Supreme Court to articulate the potential benefits and burdens of the law.²⁵¹ Regarding the good it creates, the following benefits potentially justify upholding Indiana's Voter ID law. First, Indiana's Voter ID law potentially prevents voters from casting fraudulent votes.²⁵² Second, Indiana's Voter ID law potentially increases public confidence in the electoral process.²⁵³ Regarding the harm it causes, Indiana's Voter ID law potentially prevents legitimate voters from casting ballots.²⁵⁴

B. *Scrutinizing the Benefits and Burdens of Indiana's Voter ID Law*

The second step in this alternative framework requires the Court to individually scrutinize each benefit and burden enumerated in step one to determine its relative weight.²⁵⁵ At step two in the analysis, the Indiana Supreme Court should be particularly mindful of the two analytical guideposts central to this framework—empiricism and commonsense.²⁵⁶

1. *How much fraud does Indiana's Voter ID law prevent?* – The analysis begins with empiricism. Authorities have not discovered any cases of in-person voter fraud in Indiana.²⁵⁷ However, this empirical insight overlooks two problems. First, “successful fraud goes undetected,” meaning that if a voter successfully casts a fraudulent vote, authorities will struggle to detect it short of a confession from the voter.²⁵⁸ Second, many cases of in-person voter fraud prevented or deterred by Indiana's Voter ID law may also go undetected, meaning that when a poll worker asks a would-be fraudulent voter to present identification, that would-be fraudulent voter is likely to leave the polling place immediately, claiming to have forgotten her ID, rather than stay and risk prosecution.²⁵⁹ In both situations, successful and pre-

251. See *supra* discussion Part III.

252. See *supra* text accompanying notes 40–42.

253. See *supra* text accompanying notes 43–47.

254. See *supra* text accompanying notes 52–57.

255. See *supra* discussion Part III.

256. See *supra* text accompanying notes 222–223.

257. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618–1619 (2008) (noting that the “record contains no evidence of [in person voter fraud] actually occurring in Indiana at any time in its history.”).

258. Ansolabehere & Persily, *supra* note 6, at 1738.

259. Timothy J. Ryan, *Voter ID Laws Need Measured Implementation*, AEI-BROOKING ELECTION REFORM PROJECT NEWSLETTER, (AEI-Brooking Election Reform Project, Washing-

vented voter fraud, the fraud goes undetected and causes authorities to underreport the prevalence of in-person voter fraud in Indiana and elsewhere. Ultimately, given these empirical roadblocks, the prevalence of in-person voter fraud may be an “unanswerable question” presented by Indiana’s Voter ID law.²⁶⁰ Nonetheless, one final commonsense observation is important: in-person voter fraud is an “inefficient method of influencing the outcome of an election.”²⁶¹ Ultimately, the prevalence of in-person voter fraud is probably not widespread because it is easier to influence the outcome of an election by running an absentee ballot scheme or by rigging a voting machine.²⁶² Stated otherwise, if an in-person voter fraud scheme is to have any chance of influencing the outcome of an election, an entire army of fraudulent voters would need to be turned loose on election day.

2. *How much does Indiana’s Voter ID law increase public confidence in elections?* – Proponents justify Indiana’s Voter ID law because it arguably increases public confidence in the electoral process.²⁶³ Stated otherwise, regardless of whether it actually prevents voter fraud, Indiana’s Voter ID law may still prevent the “appearance” of voter fraud.²⁶⁴ This potential to increase public confidence in electoral integrity “presents a testable empirical proposition.”²⁶⁵ Commentators have tested this empirical proposition and concluded “voter identification requirements will [not] raise levels of trust in the electoral process.”²⁶⁶ Nonetheless, a related study indicates that three in every four voters support voter identification requirements.²⁶⁷ Seemingly these surveys reach contradictory re-

ton, D.C.), April 17, 2007, <http://www.tcf.org/list.asp?type=NC&pubid=1555> (last visited Feb. 27, 2009) (stating that authorities “only know about fraud when it is caught; who knows how much fraud escapes our attention”).

260. See *supra* text accompanying note 227.

261. Schultz, *supra* note 39, at 498.

262. *Id.* Professor David Schultz, relying on an Election Assistance Commission report, observes that “impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election.” *Id.*

263. Memorandum in Support of Defendant’s Motion to Dismiss, *supra* note 39, at 2-3.

264. DeLaney, *supra* note 47, at 847-49.

265. Ansolabehere & Persily, *supra* note 6, at 1739 (conducting a national survey to determine the relationship between forcing a voter to identify themselves and the likelihood that the voter perceives fraud in the electoral process).

266. *Id.* at 1759. This comprehensive study examined “survey data from 2006, 2007, and 2008 to calculate how pervasive Americans believe vote fraud to be. . . .” *Id.* at 1742.

267. Ansolabehere, *supra* note 77, at 618-20 (reporting that over 75% of survey respondents support voter identification laws). This study examined survey data collected in 2006 that “asked whether respondents approved of laws requiring voter identification.” *Id.* at 616.

sults.²⁶⁸ At best, the only firm conclusion the Indiana Supreme Court can reach is that despite failing to increase public confidence in the electoral process, well over half of all Hoosiers approve of Indiana's Voter ID law.

3. *How many legitimate voters does Indiana's Voter ID law prevent from casting a ballot?* – Importantly, comprehensive data about the impact of Indiana's Voter ID law on Hoosier voters is available.²⁶⁹ In fact, this data is the first attempt to conclusively determine the number of Indiana voters that show up at the polls without valid identification.²⁷⁰ Although the data is not perfect,²⁷¹ it nonetheless provides empirical insight into the impact of Indiana's Voter ID law.²⁷²

In Indiana's 2008 primary election, Indiana voters cast 1,727,023 total ballots, and Indiana's Voter ID law prevented 321 voters from casting ballots that influenced the outcome of the election.²⁷³ In Indiana's 2008 general election, Indiana voters cast 2,805,902 total ballots, and Indiana's Voter ID law prevented 902 voters from casting a ballot that influenced the election.²⁷⁴ Therefore, in Indiana's 2008 primary election, Indiana's Voter ID law prevented .019% of Indiana voters from casting a meaningful ballot.²⁷⁵ In Indiana's 2008 general election, Indiana's Voter ID law prevented .032% of Indiana voters from casting a meaningful ballot.²⁷⁶ Collectively, in Indiana during the 2008 primary and 2008 general elections, Indiana's Voter ID law prevented .027% of Indiana voters from casting a meaningful ballot.²⁷⁷

C. *Making a Decision*

After scrutinizing the benefits and burdens of Indiana's Voter ID law, the third and final step in the analysis requires the court to weigh

268. *Id.* at 626 ("These findings undercut much of the heated rhetoric that has inflated the debate over voter ID requirements . . .").

269. See Pitts, *supra* note 2, at 478-80.

270. See *id.* at 478-80; In truth, this is the only such data for any state with a photo identification requirement. *Id.*

271. *Id.* at 480 (admitting that the survey "may not provide a perfect data set. . .").

272. *Id.* at 504.

273. *Id.* at 499-500 n. 89 (reporting that 321 Indiana voters cast a provisional ballot because they lacked identification and ultimately failed to return to the county election board to validate their provisional ballot).

274. Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification at Indiana's 2008 General Election* (forthcoming 2009) (manuscript at 9 n.42) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465529 (reporting that 902 Indiana voters cast a provisional ballot because they lacked identification and ultimately failed to return to the county election board to validate their provisional ballot).

275. See Pitts, *supra* note 2, at 480.

276. See Pitts & Neumann, *supra* note 274 (manuscript at 22).

277. See Pitts, *supra* note 2, at 499-500 n. 89.

the evidence and make a decision.²⁷⁸ After step two, the Indiana Supreme Court is left with three relatively firm conclusions. First, the prevalence of in-person voter fraud in Indiana is probably minimal.²⁷⁹ Second, although studies indicate that Indiana's Voter ID law does not increase public confidence in the electoral process, a large majority of Hoosiers probably approve of Indiana's Voter ID law.²⁸⁰ Third, in 2008 during Indiana's primary and general elections, Indiana's Voter ID law prevented approximately .027% of Hoosier voters from casting a meaningful ballot.²⁸¹

Ultimately, the Indiana Supreme Court should uphold Indiana's Voter ID law as valid under the Indiana Constitution. First, Indiana's Voter ID law is constitutional because it affects a very small number of voters.²⁸² In 2008, over 99.9% of Indiana voters that arrived at the polls had their government-issued identification.²⁸³ Even if this empirical study underestimated by ten fold the number of disenfranchised voters (an error rate of 1000%), still over 99.7% of Indiana voters showed up to the polls with identification.²⁸⁴ Accordingly, the fundamental reason that the Indiana Supreme Court should uphold Indiana's Voter ID law is because its bottom-line impact is minimal. To return to the standard, Indiana's Voter ID law causes very little harm.

Second, Indiana's Voter ID law should be upheld because Indiana provides free IDs. Simply put, the available data reveals that most Hoosiers have government-issued identification cards.²⁸⁵ For the small number of prospective voters without an ID, Indiana waives the fee.²⁸⁶ The only legitimate attack remaining in the arsenal of opponents is that birth certificates are required to obtain the free ID, and birth certificates still cost between \$3 and \$12.²⁸⁷ In the context of a facial attack on Indiana's Voter ID law, ancillary costs to obtaining identification is a potentially "fixable" problem. If the Indiana Supreme Court found the ancillary costs constitutionally problematic, the Indiana Legislature could correct the problem by statutorily waiv-

278. See *supra* discussion Part III.

279. See *supra* discussion Part IV.B.1.

280. See *supra* discussion Part IV.B.2.

281. See *supra* discussion Part IV.B.3.

282. See Pitts, *supra* note 2, at 480 (anticipating that proponents of Indiana's Voter ID law, whether right or wrong, will use the data to argue a very small percentage of the electorate is affected by Indiana's Voter ID law).

283. See *supra* discussion Part IV.B.3.

284. See *supra* discussion Part IV.B.3.

285. See *supra* text accompanying notes 58–64.

286. See *supra* text accompanying notes 58–64.

287. See *supra* text accompanying notes 58–64.

ing the fee for Indiana issued birth certificates for those that cannot afford to pay.

Third, Indiana's Voter ID law is constitutional because the reason 1,218 Hoosiers showed up at the polls without identification is unknown.²⁸⁸ On one hand, it is certainly plausible that some, perhaps most, of the 1,218 voters were disenfranchised because of indigence.²⁸⁹ However, it is equally plausible that some, potentially many, of the 1,218 voters were disenfranchised because of laziness, forgetfulness, and apathy.²⁹⁰ The former group is appropriately labeled disenfranchised, but the latter group is certainly not. Without inquiring into the reason the voter failed to present valid identification, it is short-sided to label them all as "disenfranchised."²⁹¹

Upholding Indiana's Voter ID law under the Indiana Constitution will undoubtedly leave a sour taste in the mouths of many. This sour taste is not without meaning; in fact it demonstrates why voter identification laws present such a thorny issue. Indiana's Voter ID law places access and integrity, the competing cornerstones of election law jurisprudence, on a collision course.²⁹² However, research continues to reveal that Indiana's Voter ID law has a minimal impact on both access and integrity.²⁹³ One might wonder why the debate continues if Indiana's Voter ID law neither increases electoral integrity nor burdens voter access.²⁹⁴ Seemingly this minimal impact on access and integrity should lower the stakes of the debate—while in reality it often appears the inverse is true.²⁹⁵ Importantly, reading between the lines reveals the subtext of this fevered debate; voter identification is a symptom of the battle for the control of electoral mechanics.²⁹⁶

In the end, despite concluding that Indiana's Voter ID law is destined to survive challenge under the Indiana Constitution, continued

288. See Pitts, *supra* note 2, at 480 (noting that the "data does not tell us why prospective voters who appeared at the polls lacked photo identification").

289. See *id.* at 503 (noting that "It's not known if (or how many) persons were indigent").

290. See *supra* note 288 and accompanying text.

291. See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008) (noting that "life's vagaries," such as a lost identification or a stolen wallet, do not implicate the constitutionality of Indiana's Voter ID law). See also Pitts, *supra* note 2, at 503.

292. See Ansolabehere, *supra* note 77, at 628 ("It is commonplace to debate election regulations as a tradeoff between access and integrity."); See Muhammad At-Tauhidi, Note, *Access v. Integrity: Determining the Constitutionality of Voter ID Laws under Anderson v. Celebrezze*, 17 Temp. POL. & CIV. RTS. L. REV. 215, 216 (2007) (referring to "the fundamental tension between access and integrity underlying the voter ID debate").

293. See Ansolabehere, *supra* note 77, at 629 (concluding "the values of access and integrity simply do not seem to have much play in the actual use of ID requirements").

294. See *supra* text accompanying notes II.B.3.

295. See *supra* text accompanying note 16.

296. See At-Tauhidi, *supra* note 292, at 220 (characterizing voter identification laws as "designed to maximize partisan advantage"). See also Elmendorf, *supra* note 218, at 646-47.

research is the only remedy that will settle this debate.²⁹⁷ Most importantly, research must uncover the reason why voters are arriving at the polls without their IDs. If laziness or forgetfulness, rather than indigence, is the barrier, as this author suspects, Indiana's Voter ID law may be here to stay. If indigence is the primary force at work, the constitutionality of Indiana's Voter ID law will need to be reevaluated.

CONCLUSION

Inevitably, the Indiana Supreme Court will have the final word on Indiana's Voter ID law. Unfortunately, Indiana constitutional election jurisprudence provides a somewhat unsatisfactory framework. Accordingly, the Indiana Supreme Court should use an empirical-realist framework to decide *League of Women Voter of Indiana, Inc. v. Rokita*. By forcing the Indiana Supreme Court to pragmatically consider the real-world impact of the law, application of this empirical-realist framework will reveal that Indiana's Voter ID law passes muster under the Indiana Constitution. Undoubtedly critics and litigants will disagree with this decision. These critics and litigants should not be deterred from their efforts to invalidate the law because close examination reveals that the efficacy of Indiana's Voter ID rests on fragile ground. In truth, the Indiana Legislature probably did not have cause to pass Indiana's Voter ID law at the time it was enacted. On the other hand the law hardly seems to cause enough problems to justify striking it down. Stuck in a proverbial no man's land where it causes little harm but accomplishes little good, Indiana's Voter ID law may ultimately be a bridge to nowhere.

297. See Pitts, *supra* note 2, at 505 (stating that "it is only with additional research that we can begin to come to more definitive conclusions as to the costs and benefits of photo identification").