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As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws after Crawford v. Marion County Election Board

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AS-APPLIED CONSTITUTIONAL CHALLENGES, CLASS ACTIONS, AND OTHER STRATEGIES: POTENTIAL SOLUTIONS TO CHALLENGING VOTER IDENTIFICATION LAWS AFTER *CRAWFORD V. MARION COUNTY ELECTION BOARD*

*Julien Kern**

Crawford v. Marion County Election Board, *a controversial U.S. Supreme Court decision, recently affirmed the constitutionality of an Indiana statute requiring federal or state-issued photo identification for in-person voting. The Court upheld the Indiana voter identification law as facially valid, but the plurality opinion's evidentiary review left open the possibility of an as-applied challenge by a future plaintiff. The first part of this Article examines the feasibility of an as-applied challenge and identifies potential obstacles to bringing such a challenge in the voter identification context. The second part of this Article analyzes the possibility of using a class action as-applied challenge as a procedural solution to overcoming some of these practical obstacles. The third part of this Article explores alternatives to challenging voter identification laws, such as seeking relief under the state constitution, pursuing political and federal solutions, and expanding grassroots efforts to promote compliance with voter identification laws. Finally, this Article concludes that the obstacles in bringing an as-applied challenge to vindicate the rights of voters burdened by voter identification laws are so substantial that the Supreme Court's allusion to an as-applied challenge in* Crawford *proves to be an empty promise, placating objectors, but in truth, helping no one.*

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I. INTRODUCTION

At the close of the 2006 Indiana general election, Democrat Daniel Brock and incumbent Republican Myron Brankle were locked in a dead heat for the District 2 position on the Grant County Council.[1] The initial count indicated that Brankle had prevailed by one vote.[2] However, after a recount, the votes were tied.[3] The Grant County Council, composed exclusively of Republicans, voted five to zero in favor of Brankle to break the tie.[4] Brock appealed the recount, arguing that a single provisional ballot should have been counted in his favor.[5] A homeless voter who did not have the requisite form of government-issued voter identification on Election Day cast the critical vote.[6] The deciding vote was ultimately counted, and Daniel Brock took his seat on the Grant County Council.[7]

Indiana's Voter Identification Law ("Voter ID Law") could have easily changed the result of this election. Under this law, voters must present federal or state-issued photo identification at their polling place on election day.[8] If the voter does not possess the requisite identification—like the critical voter in the Grant County Council election—he or she may cast a provisional ballot.[9] The provisional ballot will not be counted unless the voter travels at his or her own expense to the county clerk's office within ten days to either present the proper identification or sign an affidavit swearing he or she is indigent or a religious objector.[10] However, the provisional ballot process can be prohibitively difficult for elderly, disabled, and indigent people because there is only one county clerk's office per county, which can be up to several hundred square miles in size.[11] In

1. Posting of Marcia Oddi, to Indiana Law Blog (April 14, 2007, 14:06 EDT), http://indianalawblog.com/archives/2007/04/ind_law_electio_1.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. IND. CODE § 3-11-8-25.1 (2006).

9. IND. CODE §§ 3-11.7-5-1, 3-11.7-5-2.5 (2006).

10. *Id.*

11. IND. CODE § 3-11.7-5-2.5 (2006); Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1629 (2008) (Souter, J., dissenting).

the Grant County Council case, the necessary affidavits had been accidentally sent to the precinct, and the indigent voter signed one on the spot.[12] But for this act of providence, the critical vote may never have been counted.[13]

Indiana has the most stringent voter identification requirements in the nation.[14] It is one of only six states that require voters to show photo identification, and it is the only one of these six that does not provide an alternative to voters who do not have photo identification at the voting precinct.[15] Other states that require photo identification allow noncompliant voters to sign an affidavit confirming their identity under penalty of perjury, or allow poll workers to confirm the voter's identity, neither of which requires a second trip to a more distant location, as Indiana's Voter ID Law does.[16]

Indiana's rigorous Voter ID Law threatens to disenfranchise a significant percentage of voting-age citizenry. Nationally, up to 10 percent of voting-age citizens lack government-issued identification.[17] With respect to the underlying documentation necessary to procure voter identification, as many as 7 percent of U.S. citizens—thirteen million individuals—do not have ready access to citizenship documents.[18] In 2006, a survey found that at least 12 percent of U.S. citizens earning less than $25,000 per year did not have a readily available U.S. passport, naturalization document, or birth certificate.[19] Yet another academic study conducted in 2007 found that approximately 16 percent of voting-age

12. Oddi, *supra* note 1.

13. *Id.*

14. Over half the states do not require in-person identification. *See* Requirements for Voter Identification, http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm (last visited Mar. 13, 2009). Those twenty-six states simply compel voters to recite their name and current residence when voting in person in accordance with the voter rolls. *Id.* Of the remaining states, fourteen ask for some form of identification without a photo, such as a utility bill, bank statement, or credit card. *Id.*

15. *Id.*

16. *Id.*

17. Cassandra O. Putts & Peter Swire, *The ID Divide*, CENTER FOR AM. PROGRESS, May 6, 2008, http://www.americanprogress.org/issues/2008/05id_divide.html.

18. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2 (2006), *available at* http://www.brennancenter.org/content/resource/citizens_without_proof_a_survey_of_americans_possession_of_documentary_proo/ [hereinafter BRENNAN CTR. FOR JUSTICE].

19. *Id.*

Indiana citizens did not possess current government-issued photo identification.[20]

Obtaining an identification card may seem like a mundane task, but complying with the Voter ID Law can be frustrating to the point of impracticability. Although there is no charge for Indiana state-issued photo identification, the voter must present a number of underlying documents, such as a birth certificate or passport, which may cost anywhere from $3 to $100.[21] These modest fees may be prohibitive for an indigent voter.[22] More troubling is the fact that obtaining underlying documentation typically requires some form of photo identification, ultimately creating an administrative catch-22.[23] Moreover, some voters have religious objections to having their photos taken, and will not be able to vote unless they comply with the burdensome provisional ballot procedures.[24]

While Indiana's Voter ID Law particularly burdens certain minority groups, such as indigent, disabled, elderly, and religious-objector voters,[25] it also threatens mainstream voters. For example, out-of-state students who only possess out-of-state driver's licenses (as opposed to passports)[26] and married individuals[27] who have changed their name may not be able to meet the identification requirements set forth by the Indiana law without a substantial investment of time, effort, and money. A national survey by the Brennan Center found that only 48 percent of voting-age women

20. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, FAST FACTS ON THE IMPACT OF PHOTO: ID: THE DATA 2 (2008) http://www.brennancenter.org/page/-/Democracy/_%20ID-related%20stats.pdf.

21. *See* U.S. Department of State, How to Apply in Person for a Passport, http://travel.state.gov/passport/get/first/first_830.html; Department of State, Passport Fees (Feb. 1, 2008), http://travel.state.gov/passport/get/fees/fees_837.html (individuals sixteen and older can expect to pay $100 for a passport book and $45 for a passport card). Indiana, like most states, charges a fee for obtaining a copy of one's birth certificate. This fee varies by county and is currently between $3 and $12. *See* Indiana State Department of Health, Local Health Department Vital Record Fees, http://www.in.gov/isdh/20422.htm (last visited Feb. 21, 2009).

22. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621 (2008).

23. *Id.* at 1629 (Souter, J., dissenting).

24. *Id.* at 1621 (plurality opinion).

25. *Id.*

26. Paul Axel, *Some Students, Low-Income Residents May Be Stripped of Their Rights*, BADGER HERALD, May 1, 2008, *available at* http://badgerherald.com/oped/2008/05/01/some_students_lowinc.php/.

27. *See* BRENNAN CTR. FOR JUSTICE, *supra* note 18; ROBERT GREENSTEIN ET AL., CTR. FOR BUDGET & POLICY PRIORITIES, SURVEY INDICATES HOUSE BILL COULD DENY VOTING RIGHTS TO MILLIONS OF U.S. CITIZENS (Sept. 22, 2006), http://www.cbpp.org/9-22-06id.pdf.

with ready access to their U.S. birth certificate have a birth certificate with their current legal name.[28] The following story is illustrative. "Mary" is an attorney for the Indianapolis Public Transportation Corporation who never learned to drive.[29] She had a friend drive her to a local Bureau of Motor Vehicles ("BMV") office, where she presented her passport, her bar certification card, pay stubs from her government employer, a social security card, a birth certificate, and a W-2 form from a second government employer.[30] However, she was denied an identification card and was told that she could not vote with any of the forms of identification presented, even though she had been an active, registered voter for over thirty years, simply because her married name differed from the name on her social security card and birth certificate.[31] As a result, she spent over $200 to renew her passport in time for election day.[32] If an attorney equipped with higher education, financial capabilities, and an intimate knowledge of government bureaucracy found compliance with Indiana's Voter ID Law to be this expensive and perplexing, the average citizen might also find the process to be frustratingly complex or even prohibitively difficult.

The Supreme Court's recent decision in *Crawford v. Marion County Election Board* allows for other state legislatures to follow Indiana's lead and enact increasingly stringent voter identification legislation.[33] In *Crawford*, a majority of the Supreme Court upheld Indiana's Voter ID Law as facially valid.[34] The Court reasoned that the state's interests in election modernization, preventing voter fraud, and safeguarding voter confidence justified the burden imposed on voters.[35] Justice Stevens found the plaintiffs' lack of evidence and failure to identify any actual voter who was severely burdened to be

28. *S. Spec. Subcomm. on Aging*, 110th Cong. (2008) (testimony of Wendy R. Weiser, Deputy Dir., Democracy Program, Brennan Ctr. for Justice), *available at* http://www.brennancenter.org/content/resource/wendy_r_weiser_before_senate_special_subcommittee_on_aging/.

29. Telephone Interview with Ms. Janice Kreucher, Gen. Counsel of the Ind. Pub. Transp. Corp., (Nov. 21, 2007).

30. *Id.*

31. *Id.*

32. *Id.* Ironically, she could have voted with an expired passport but did not know of that exception to the law. *Id.*

33. David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 486 (2008).

34. Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008).

35. *See id.* at 1623–24.

dispositive.[36] Although Justice Stevens agreed that Indiana's Voter ID Law was facially valid, he recommended that voters who faced a severe burden could find a remedy through an as-applied challenge.[37]

This Article argues that Justice Stevens's suggestion of an as-applied challenge to vindicate the rights of individuals disenfranchised by voter identification laws may prove to be an empty promise placating objectors but in truth helping no one.[38] Although an as-applied challenge is a feasible strategy in theory, the voter identification context poses special difficulties that will discourage viable plaintiffs from using this approach. For example, plaintiffs who lack the resources to obtain acceptable voter identification probably also lack the resources to pursue individual litigation.[39] Moreover, the pro bono attorneys who would traditionally assist such plaintiffs in bringing suit may lack motivation to do so because of the slim possibility of recovering attorney's fees and the limited impact afforded by an individual remedy.[40] Even if willing to pursue litigation, pro bono attorneys have the difficult task of identifying appropriate individual plaintiffs whose claims will not be mooted by the acquisition of identification.[41] Finally, the multiplicity of suits generated by individual as-applied challenges risks creating inconsistent results, which undermines basic notions of fairness, efficiency, and equality.[42]

The use of a class action may be an appropriate procedural vehicle by which some of these problems may be addressed. But certification of a plaintiff class also presents inherent difficulties,

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36. *See id.* at 1622–23.

37. *See id.* at 1623.

38. Although I limit my inquiry to in-person voter identification laws as demonstrated through *Crawford,* my observations may be applicable to voter identification laws in other states. Many of the issues examined here may also find future relevance in the voter registration context with respect to proof of citizenship requirements and immigration.

39. Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405, 476 (2003).

40. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 601 (2001); Interview with Aaron H. Caplan, Associate Professor of Law, Loyola Law Sch. L.A., in L.A., Cal. (Nov. 11, 2008). Professor Caplan served as a staff attorney for the ACLU of Washington from 1998 to 2008.

41. *Id.*; *see* Brian J. Sutherland, *Voting Rights Rollback: The Effect of Buckhannon on the Private Enforcement of Voting Rights*, 30 N.C. CENT. L.J. 267, 277 (2008).

42. 1 NEWBERG ON CLASS ACTIONS § 1:6 (4th ed. 2003).

which may render an as-applied class action similarly unworkable. At the very least, the unpredictability of certification itself may discourage future plaintiffs and their attorneys from pursuing this legal alternative. Therefore, regardless of whether the challenge is brought by an individual or by a class, it is unlikely that Justice Stevens's suggestion of an as-applied challenge will yield tangible relief for individuals constitutionally burdened by voter identification laws.

Part II of this Article describes the Supreme Court's holding in *Crawford* and Justice Stevens's suggestion of an as-applied challenge. Part III explores the feasibility of bringing an individual as-applied challenge and discusses practical obstacles to doing so. Part IV identifies potential benefits of utilizing a class action litigation strategy to overcome the practical obstacles identified in Part III. Part V considers the certification of a hypothetical plaintiff class and illustrates the problems confronted when choosing this procedural alternative. Part VI briefly explores other potential solutions. Finally, Part VII concludes that considering the totality of the circumstances, the as-applied suggestion simply will not bring the promised relief to voters who are adversely affected by the Voter ID Law.

II. *CRAWFORD*: BURDENS ON VOTERS, THE IMPORTANCE OF STATE INTERESTS, THE *ANDERSON/BURDICK* BALANCING TEST, AND THE SUGGESTION OF AN AS-APPLIED CHALLENGE

In *Crawford v. Marion County Election Board*, a majority of the Supreme Court upheld Indiana's Voter ID Law.[43] The two plurality opinions were written by Justice Stevens, who was joined by Chief Justice Roberts and Justice Kennedy,[44] and by Justice Scalia, who was joined by Justices Thomas and Alito.[45] Justices Souter, Ginsburg, and Breyer dissented.[46] The six Justices in the majority agreed that Indiana's Voter ID Law was facially valid under the *Anderson/Burdick* balancing test because legitimate state interests

43. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615, 1627 (2008).

44. *Id.* at 1613.

45. *Id.* at 1624 (Scalia, J., concurring).

46. *Id.* at 1627 (Souter, J., dissenting); *id.* at 1643 (Breyer, J., dissenting). Justice Ginsburg joined Justice Souter's dissent, and Justice Breyer wrote separately.

justified the burden imposed by the law on voters.[47] However, the two plurality opinions employed different methods of applying the test and disagreed about the viability of future as-applied challenges.[48] This section will analyze *Crawford* by describing the burdens created by Indiana's Voter ID Law, the state's interests in requiring identification, and the two divergent approaches to balancing these interests under the *Anderson/Burdick* test.

A. The Burdens of Indiana's Voter ID Law

As discussed above, there are numerous potential burdens associated with the compliance with Indiana's Voter ID Law, and the task of obtaining state or federal government-issued identification is deceptively difficult.[49] Although Indiana's Bureau of Motor Vehicles ("BMV") provides photo identification for free, applicants must present a primary document, such as an original birth certificate;[50] a secondary document, such as a bank statement; and possibly additional proof of Indiana residency.[51]

In Indiana, the cost of a birth certificate is $10, and the fees for residents born elsewhere may be as high as $28, with no provision to avoid this expense.[52] Citizens born out of state, like many college students, must go to the additional trouble of navigating a distant, recalcitrant bureaucracy to obtain proper underlying documentation.[53] Also, states did not uniformly issue birth certificates until the late 1940s, which means that elderly people—through no fault of their own—may never have possessed a birth certificate at all.[54] Additionally, people who were adopted or who

47. *Id.* at 1616; *id.* at 1624 (Scalia, J., concurring); *see also* Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983). *See generally* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping v. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 523–24 (2008).

48. *Id.*

49. IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2006). Voter ID law does not apply to voters desiring to vote by absentee ballot or to those voters living in a state-licensed nursing home.

50. Applicants may instead present a certificate of naturalization if they were born outside the United States.

51. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 790–91 (S.D. Ind. 2006).

52. *Id.* at 791, 798.

53. Axel, *supra* note 26.

54. U.S. Census Bureau, Birth Records and Age Search Service, http://www.census.gov/po/www/foia/birth.htm (last visited Feb. 21, 2009).

had transient childhoods may not know where they were born. Again, obtaining the underlying identification to acquire the government-issued voter identification often requires applicants to show some form of identification, which traps such unfortunate voters by a circuitous logic that is akin to a catch-22.[55]

If the voter is able to surmount the hurdle of obtaining the underlying documentation, he or she may not be physically able to travel to a local BMV.[56] Although the "average person" probably views such a burden as nothing more than an inconvenience, "[p]oor, old, and disabled voters who do not drive a car . . . may find the trip prohibitive . . . ."[57] Offices of the BMV may be few and far between, whereas vast numbers of polling places are usually within walking distance of residences within the voting precinct.[58] For example, Marion County, Indiana, has over nine hundred active voting precincts but only twelve BMV offices distributed throughout the entire county.[59] In smaller counties, there may be only one BMV office.[60] Therefore, in terms of distance, the process to obtain a government-issued identification can be much more burdensome than is readily apparant.

As mentioned earlier, the Voter ID Law does provide a limited recourse or work-around for individuals who do not possess (or did not bring) proper photo identification on election day.[61] A voter without identification may cast a provisional ballot, but the ballot will not be counted unless the voter goes to the county clerk's office within ten days either to prove that he or she possesses qualifying state or federal identification or to sign an affidavit swearing that he or she is indigent or a religious objector.[62]

Although this work-around creates a theoretical alternative for many of the groups burdened by voter identification requirements, it provides very little relief as a practical matter. Voters who do not

55. *See id.*

56. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1629 (2008) (Souter, J., dissenting).

57. *Id.*

58. *See id.*

59. *Id.*

60. *Id.* at 1629–30.

61. IND. CODE §§ 3-11.7-1, 3-11.7-5-2.5 (2006).

62. IND. CODE §§ 3-11.7-5-2.5, 3-11-8-23, 3-11-8-25.1 (2006).

have photo identification are not likely to own cars.[63] Without a car, it may be complicated and costly to travel to the county clerk's office, which in large counties could feasibly be located hundreds of miles away.[64] Moreover, as of August 2007, only twenty-one out of the ninety-two counties in Indiana have any form of public transportation.[65] Among the counties that possess public transportation infrastructure, only eighteen have transportation countywide.[66] The hidden costs of time and energy in procuring underlying documents, arranging multiple trips to government offices, and navigating intractable bureaucracy impose additional burdens upon voters that are not immediately obvious when examining Indiana's Voter ID Law.

B. Justice Stevens's Articulation of Indiana's Interests in Voter Identification Requirements

In his plurality opinion, Justice Stevens pointed to three state interests in requiring photo identification that arguably justified the burdens that this law imposed on voters: (1) modernizing elections, (2) the preventing voter fraud, and (3) safeguarding voter confidence.[67]

First, Justice Stevens found that Indiana's Voter ID Law was a legitimate effort to modernize elections and establish electoral integrity through improved technology.[68] In doing so, he relied on two federal statutes: the National Voter Registration Act of 1993 ("NVRA"), which requires state motor vehicle driver's license applications to serve as voter registration applications,[69] and the Help America Vote Act of 2002 ("HAVA"),[70] which imposes voter identification requirements on first-time voters who register to vote by mail.[71] Although neither of these statutes translated directly into

63. Brief for Current and Former State Secretaries of State as Amici Curiae Supporting Petitioners at 11, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (No. 07-21, 07-25), 2007 WL 4133217.

64. *Crawford*, 128 S. Ct. at 1628–30.

65. *Id.* at 1630.

66. *Id.*

67. *Id.* at 1617–20.

68. *Id.* at 1617–18.

69. 42 U.S.C. § 1973gg (2000)

70. 42 U.S.C. § 15483(a) (Supp. II 2002).

71. *Crawford*, 128 S. Ct. at 1617.

Indiana's Voter ID Law, the Court read them broadly as indications that Congress supported the use of photo identification to modernize elections and improve electoral integrity.[72] Justice Stevens stated, "Of course, neither HAVA nor NVRA required Indiana to enact [the Voter ID Law], but they do indicate that Congress believes that requiring photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology."[73]

Second, Justice Stevens considered the state interest in preventing voter fraud.[74] Curiously, there are no recorded instances of in-person voter fraud in Indiana's history.[75] Although one incident of voter fraud occurred during the 2003 Democratic primary in Indiana, it was limited to absentee voting, not in-person voting.[76] Nevertheless, the Court found this interest compelling by citing incidents of voter fraud throughout history in other states, including the famously corrupt New York City Tammany Hall Election.[77] Critics of voter identification laws point out that severe criminal penalties for in-person voter fraud already provide adequate protection against this problem.[78] Also, the few instances of voter fraud that have been reported in recent years primarily occurred through absentee voting, to which the Voter ID Law does not apply.[79] However, the Court maintained that the state interest in stopping voter fraud was wholly legitimate, even though adequate methods of preventing such fraud may already exist.[80]

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72. *Id.* at 1617–18.

73. *Id.* at 1618.

74. *Id.* at 1616–18.

75. David Shultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 504–05 (2008).

76. *Crawford*, 128 S. Ct. at 1619.

77. *Id.* at 1619, n.11.

78. *Id.* at 1619.

79. *Id.* at 1613.

80. *Id.* at 1619. Many scholars have written detailed discussions on voter fraud and the legitimacy of the state interest. *See* Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93 (2007); David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483 (2008); Richard L. Hasen, Op-Ed., *Courts Need to Keep a Skeptical Eye on New Voter Identification Laws*, ELECTIONLAW@MORITZ, Apr. 24, 2007, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=147.

Finally, Justice Stevens found that Indiana's interest in protecting voter confidence in the electoral process was a sufficiently weighty interest to justify its voter identification requirements.[81] Although this interest is closely related to the state interest in preventing voter fraud, it has independent significance because it "encourages citizen participation in the democratic process."[82] The Court relied on a report by former President Jimmy Carter and former Secretary of State James A. Baker III, which was issued shortly after the enactment of Indiana's Voter ID Law and stated that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[83]

However, some scholars note that an overzealous pursuit of these state interests may result in the exclusion of qualified voters from the polls and the dilution of votes for a certain candidate or party, actually undermining the state interest in voter confidence.[84] For example, the occurrence of the type of fraud that photo identification requirements aim to deter—such as in-person voter impersonation fraud—is extraordinarily small, but the number of eligible citizens who would be denied their right to vote as a result of photo identification requirements is exceedingly large.[85] One study noted that in-person voter impersonation fraud is "an occurrence more rare than getting struck by lightning."[86] Furthermore, experts concede that absentee voting, as opposed to in-person fraud, is the one area of election administration that is most vulnerable to fraudulent activity.[87] Even so, Justice Stevens ultimately accepted the state interests in election modernization, preventing voter fraud,

81. *Crawford*, 128 S. Ct. at 1620.

82. *Id.*

83. REPORT OF THE COMM'N ON FED. ELECTION REFORM: BUILDING CONFIDENCE IN U. S. ELECTIONS § 2.5 (Sept. 2005).

84. *See* Steven Ansolabehere, *Access Versus Integrity in Voter Identification Requirements* 63 NYU ANN. SURV. AM. L. 613 (2008).

85. Spencer Overton, Carter Baker Dissenting Statement, http://www.carterbakerdissent.com/dissent.php (last visited Feb. 21, 2009).

86. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 6, (2007), *available at* http://truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf.

87. Shultz, *supra* note 75.

and promoting public confidence, and legitimized these interests after weighing them against the burdens imposed on voters.[88]

C. *The* Anderson/Burdick *Balancing Test*

To evaluate the constitutional validity of Indiana's Voter ID Law, the Court used the *Anderson/Burdick* balancing test to weigh the burdens on potential voters against the proposed state interests.[89] The *Anderson/Burdick* balancing test has been applied inconsistently, which has unsettled election administration law in recent years.[90] In fact, even the two plurality opinions in *Crawford* applied it differently.[91]

Justice Scalia took a formalist view of the test and interpreted it to mean that strict scrutiny should only be applied to laws that "severely" burden political rights and that all other laws should be treated deferentially.[92] In this case, he determined that the law "is a generally applicable, nondiscriminatory voting regulation" and "[t]he burden of acquiring, possessing, and showing a free photo identification is simply not severe" in comparison to the usual burdens associated with voting.[93] In fact, he flatly refused a future "record-based" challenge to the Voter ID Law[94] and completely rejected the as-applied challenge suggested by Justice Stevens.[95] Instead, Justice Scalia opined that the Court must make an overall assessment of the law to determine whether the state requirements go beyond the "merely inconvenient."[96] Ordinary, widespread requirements such as Indiana's Voter ID Law should not be deemed to be severe.[97]

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88. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1617–21 (2008); *see also infra* Part II.C. A detailed discussion about the legitimacy of the state interests is beyond the scope of this Article.

89. *Crawford*, 128 S. Ct. at 1616–17.

90. *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007).

91. *See* Elmendorf & Foley, *supra* note 47, at 535. "Justice Stevens' [*Crawford*] opinion can also be understood as an exercise in pragmatism, though Stevens, Kennedy, and Roberts evidently saw the risks and rewards of their approach somewhat differently than did Scalia." *Id.*

92. *Crawford*, 128 S. Ct. at 1624.

93. *Id.* at 1625, 1627.

94. *Id.* at 1625.

95. *Id.*

96. *Id.*

97. Elmendorf & Foley, *supra* note 47, at 523.

However, six Justices rejected Justice Scalia's formalist, two-tiered system and took a more flexible approach to the *Anderson/Burdick* test.[98] According to Justice Stevens's analysis, "[h]owever slight [a] burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[99] Therefore, the state interests must be proportional to the burden.

In applying this test to Indiana's Voter ID Law, Justice Stevens took issue with the evidence available on the record.[100] He noted that the evidence presented did not establish: (1) the number of registered voters without photo identification; (2) concrete evidence of the burden imposed on voters who currently lack photo identification; and (3) the difficulties faced by indigent voters or voters with religious objections to being photographed.[101] Although Justice Stevens did not specify the kind of evidence he would require in the future, he determined that the evidence in *Crawford* made it impossible to evaluate the magnitude of the burden on a "narrow class of voters."[102]

The plaintiffs in *Crawford* did provide evidence, but it was rejected as insufficient on various grounds. For example, the plaintiffs offered statistical evidence that 43,000 Indiana residents did not have government-issued identification, but the Court rejected the statistic as outdated and "utterly incredible and unreliable."[103] In addition, the plaintiffs also provided testimony from two caseworkers at homeless shelters as evidence of how the voter identification requirements burdened indigent voters.[104] However, the Court dismissed this testimony as irrelevant because they did not express a *personal* inability to vote.[105] Moreover, the plaintiffs offered the testimony of various elderly citizens who had problems obtaining voter identification. The Court also rejected this testimony

98. *Id.*

99. *Crawford* 128 S. Ct. at 1616.

100. *Id.* at 1622.

101. *Id.*

102. *Id.*

103. *Id.* Regarding the statistical evidence, the Court further stated, "Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication." *Id.* at 1623, n.20.

104. *Id.* at 1622.

105. *Id.*

because the elderly individuals ultimately succeeded in obtaining the underlying documentation after the start of litigation or did not adequately explain the personal burdens that prevented them from doing so. [106] The Court acknowledged a homeless woman's affidavit, which stated that she had obtained her birth certificate but was denied a photo identification card because she lacked a mailing address. [107] However, the Court ultimately rejected her affidavit as insufficient because it "[gave] no indication of how common the problem is." [108]

Ultimately, the Court believed the hassles of gathering the underlying documents to obtain the qualifying identification and traveling to the local BMV "impose[d] only a limited burden on voters' rights." [109] Justice Stevens further concluded that the severity of whatever burden might be imposed on certain classes by the Voter ID Law was adequately mitigated through the provisional ballot exception. [110]

D. The Suggestion of an As-Applied Challenge

Justice Stevens's evidentiary review in *Crawford* left open the possibility of an as-applied challenge by a future plaintiff who can prove that Indiana's Voter ID Law imposes severe burdens upon him or her. [111] Although the possibility of a facial challenge has been foreclosed, the *Anderson/Burdick* balancing test may come out in favor of the plaintiff, depending on the evidence presented in an as-applied challenge. [112] After all, the Court did not give any direction as to how the balance should be struck in as-applied cases involving

106. *Id.*

107. *Id.* at 1622–23.

108. *Id.* at 1622.

109. *Id.* (quoting Burdick v. Takushi, 504 U.S. 428, 439 (1992)).

110. *Crawford,* 128 S. Ct. at 1621.

111. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 10–18, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (Nos. 07-21, 07-25), 2007 WL 4351593; Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643; *But see* Rick Hasen, Election Law Blog, http://electionlawblog.org/archives/010701.html (Apr. 28, 2008 8:17 PST) (observing that the decision "encourage[s] further litigation, because it relegates challenges to laws imposing onerous burdens on a small group of voters to 'as applied' challenges, but those challenges will be difficult to win").

112. Erwin Chemerinsky, *When It Matters Most, It's Still the Kennedy Court*, 11 GREEN BAG 2d 427, 428 (2008).

severe burdens.[113] In an as-applied challenge, the Justices who adopt Justice Stevens's flexible approach to the balancing test will have to resolve a dichotomy: whether the Court should consider the widespread burdens on the voting electorate or whether it should consider the magnitude of individual burdens on one or a few affected voters.[114] How this dichotomy will be resolved remains to be seen in future litigation.

Since *Crawford*, Indiana's Voter ID Law has been enforced in several election cycles, and stories of individual voters experiencing significant burdens have emerged. For example, twelve elderly nuns were turned away from the polls because they did not possess the requisite identification.[115] As the nuns were in their eighties and nineties, they possessed such limited physical mobility that traveling to the county clerk's office within ten days would not have been possible even if they had cast provisional ballots.[116] Among other reported cases, a seventy-eight-year-old Korean War veteran could not obtain state voter identification in time for the election after his wallet was stolen, and he was left with only his Medicare card as his sole source of identification;[117] a college student at Purdue University could not obtain a voter identification card in time because the BMV refused to accept his out-of-state driver's license even though it was supposed to be an acceptable form of underlying documentation;[118] and a stay-at-home mother of seven and wife of a janitor could not afford the costs associated with obtaining a voter identification card.[119] Moreover, uneven application of the Voter ID Law produced additional problems because some poll workers

113. Elmendorf & Foley, *supra* note 47, 515.

114. *Id.* at 534.

115. Deborah Hastings, *Indiana Nuns Lacking ID Denied at Poll by Fellow Sister*, ASSOCIATED PRESS, May 6, 2008, http://www.breitbart.com/article.php?id=D90GBCNO0&show_article=1/.

116. *Id.* Although the mere lack of an ID is not enough to demonstrate a burden, the nuns were not provided with an appropriate provisional ballot because they were unable to travel to the county clerk's office in time to sign an affidavit due to their advanced age. *Id.*

117. Posting of Steven Rosenfeld, to AlterNet, http://www.alternet.org/story/68368/ (Nov. 20, 2007).

118. *Id.* However, several of his friends were able to vote because they possessed passports. *Id.*

119. *See* Rosenfeld, *supra* note 117.

demanded more identification than was required by the statute.[120] Although these are merely anecdotal stories illustrating significant burdens, they demonstrate the very real presence of burdened voters and point to the distinct possibility that legally significant burdens may exist for certain classes of citizens. Thus, an as-applied challenge remains a potential solution.

III. THE FEASIBILITY OF BRINGING AN AS-APPLIED CHALLENGE TO INDIANA'S VOTER ID LAW

Plaintiffs can challenge the constitutionality of a statute through either facial or as-applied challenges.[121] Because the Voter ID Law survived a facial challenge in *Crawford*, a future voter would have to challenge the law as applied to a particular set of circumstances.[122] Despite the allure of such as-applied challenges, the scarcity of resources, the lack of a widespread remedy, and the hardship of identifying appropriate plaintiffs may effectively prevent future plaintiffs and their attorneys from bringing suits in the voter identification context.[123] The practical consequence of such obstacles is to leave plaintiffs with no real judicial recourse to challenge the law.

A. Distinguishing a Facial Challenge from an As-Applied Challenge

An as-applied challenge "is a claim that the operation of a statute is unconstitutional in a particular case, while a facial challenge indicates that the statute may rarely or never be constitutionally applied."[124] A facial challenge, like the one staged in *Crawford*, is generally considered more difficult to mount successfully because the challenger must establish that no

120. Eric Marshall, *Indiana Voter ID Law Disenfranchises Voters, from Students to Nuns*, ELECTION PROTECTION, May 7, 2008, http://www.866ourvote.org/newsroom/news?id=0023 (last visited Mar. 14, 2009).

121. 16 C.J.S. *Constitutional Law* § 187 (2008); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Regulations*, 46 STAN. L. REV. 235, 236 ("Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances.").

122. *Crawford*, 128 S. Ct. at 1610.

123. *See infra* Part III.B.

124. 16 C.J.S. *Constitutional Law* § 187.

circumstances exist under which the legislation would be valid.[125] Conversely, an as-applied challenge to the constitutionality of a statute is evaluated according to how the statute operates in practice against the particular litigant and under the facts of the specific case, rather than under hypothetical facts in other situations.[126] In recent years,[127] the Supreme Court Justices have generally disfavored facial challenges because they are highly reluctant to invalidate legislation on the basis of its hypothetical application to situations not before the Court.[128] In contrast, as-applied challenges do not have to rely on speculation, and each court may simply consider the evidence and the facts on the record at hand.[129]

Consequently, even if a statute is facially upheld, as-applied challenges are still available to plaintiffs who believe the law is unconstitutional in its application to them specifically.[130] To illustrate, in *Ayotte v. Planned Parenthood of Northern New England*,[131] the Supreme Court upheld a state abortion law on its face but deemed it unconstitutional in certain limited circumstances.[132] In that case, petitioners alleged that New Hampshire's Parental Notification Prior to Abortion Act[133] was unconstitutional because it failed to provide an emergency health exception for minors faced with significant time-sensitive health risks due to pregnancy.[134] Although the statute was upheld as facially valid, the Court recognized that the statute could be unconstitutional as applied to mothers whose health might be seriously jeopardized by delays inherent in complying with parental notification.[135] The Court stated, "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a

125. United States v. Salerno, 481 U.S. 739, 745 (1987).

126. *Id.* at 745, n.3.

127. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

128. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

129. 16 C.J.S. *Constitutional Law* § 187.

130. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006).

131. 546 U.S. 320 (2006).

132. *Id.* at 331.

133. N.H. REV. STAT. ANN. §§ 132:24–28 (Supp. 2004), *repealed by* 2007 NH H.P. 184 (NS).

134. *Ayotte*, 546 U.S. at 327–28.

135. *Id.* at 331.

statute while leaving other applications in force."[136] Because as-applied challenges are still available where facial challenges fail, voter identification laws may still be held to be unconstitutional when applied in certain cases.

B. Practical Obstacles That Cast Doubt on the Feasibility of an Individual As-Applied Challenge

As-applied challenges are typically made on behalf of an individual.[137] However, in the voter identification context, several practical obstacles exist that make individual as-applied challenges infeasible. A plaintiff without the resources to obtain government-issued photo identification is unlikely to have the time, money, and knowledge to pursue litigation.[138] Although pro bono attorneys normally represent indigent plaintiffs, such attorneys may not want to take on an as-applied challenge because of the financial risks particular to voter identification cases. In addition to possible financial limitations, pro bono attorneys may be dissuaded from pursuing an as-applied challenge because even a successful suit could result in a remedy limited to that individual alone.[139] Moreover, pursuing an individual as-applied challenge to voter identification requirements is risky because of the possibility that the plaintiff's claim will become moot.[140] From an economic efficiency perspective, a pro bono attorney could use his or her resources better by simply giving the voter the money he or she needs to get identification.[141] Therefore, individual plaintiffs burdened by Indiana's voter identification requirements are unlikely to find representation for their as-applied challenges.

136. *Id.* at 328–29.

137. *See* Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 385–87 (2002).

138. *See* Morse, *supra* note 39, at 476.

139. Interview with Aaron H. Caplan, *supra* note 40.

140. *See* Sutherland, *supra* note 40.

141. Telephone Interview with Joanne Evers, President, League of Women Voters of Ind. (Jan. 7, 2009).

1. Lack of Resources for Plaintiffs to Pursue Individual Litigation

The most immediately obvious obstacle to an individual as-applied challenge is that the types of voters who are most likely to be severely burdened by voter identification laws suffer from a lack of resources that makes personal litigation essentially impossible.[142] If voters are too financially burdened to pay for travel costs, to buy a replacement birth certificate, or to navigate the bureaucracy to obtain the supporting documentation required for voter identification, then they are unlikely to have the resources necessary to bring their own litigation.[143] Moreover, most people do not pay attention to their voting rights until shortly before an election, and at that point, it may be too late to obtain a lawyer. Therefore, most voters burdened by identification requirements must rely upon pro bono attorneys to champion their as-applied challenges.

For pro bono attorneys, significant financial gambles are inherent in the pursuit of a voter identification case. Courts have held that the Voting Rights Act itself does not authorize any monetary damages.[144] Also, in 1976, Congress enacted the Civil Rights Attorney's Fees Award Act ("CRAFAA"), which gave courts the authority to award reasonable attorney's fees to "prevailing parties" in suits brought to enforce certain civil rights acts.[145] The Supreme Court clarified the scope of the CRAFAA in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[146] which dictates that a court must award a litigant some relief on the merits for the litigant to recover attorney's fees.[147] Voting rights litigation is particularly susceptible to *Buckhannon* because plaintiffs in voting rights cases do not seek monetary damages but instead seek the equitable remedies of

142. Telephone Interview with William R. Groth, Senior Partner, Fillenwarth, Dennerline, Groth & Towe (Nov. 17, 2008). Groth represented the Indiana Democratic Party in *Rokita v. Indiana Democratic Party*, 128 S. Ct. 830 (2008).

143. *Id.*

144. Olagues v. Russoniello, 770 F.2d 791, 804–05 (9th Cir. 1985) (holding that there exists no cause of action for damages under the Voting Rights Act).

145. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2006)).

146. 532 U.S. 598 (2001).

147. *Id.* at 601–02.

declaratory and injunctive relief.[148] Thus, the only way that attorney's fees can be recovered under *Buckhannon* is for the plaintiff to be awarded some judicial relief in the form of a favorable judgment, a settlement enforced through a consent decree, or some other "court-ordered change [in] the legal relationship between the plaintiff and the defendant."[149]

Thus, even though the possibility of recovering fees exists in theory, the financial risks that face pro bono attorneys litigating voter identification cases is oppressively substantial. Such risks may serve as effective deterrents for pro bono attorneys who hazard conducting litigation at a financial loss.

2. Lack of a Widespread Remedy

Pro bono attorneys take on a case for a variety of reasons aside from financial remuneration, such as the opportunity to produce a widespread restoration of civil rights.[150] Because such attorneys are more likely to champion a case that has the potential to create a far-reaching result, they might be dissuaded from taking on an as-applied case, where the remedy to a voting rights violation may be an injunction only for the individual plaintiff in one particular election. This limitation makes as-applied voter identification cases less attractive to pro bono attorneys who are primarily motivated by effecting significant social change.[151] Moreover, as-applied challenges with limited remedies rely heavily on the process of case-by-case adjudication. Pro bono attorneys inundated by requests for case-by-case adjudication may find their own legal resources limited and even depleted by such numerous requests. This dilution of scarce resources may have a detrimental effect on the overall enforcement of voting rights if pro bono attorneys find themselves outnumbered and unable to focus their energies on the most severely burdened plaintiffs in need of representation.[152]

148. Windy Boy v. Big Horn County, 647 F. Supp. 1002, 1023–24 (D. Mont. 1986) (allowing no damages under the Voting Rights Act because "injunctive relief is the universal remedy . . . in Voting Rights Act cases").

149. *Buckhannon*, 532 U.S. at 604 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989))

150. Interview with Aaron H. Caplan, *supra* note 40.

151. *Id.*

152. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1336 (2005).

Finally, under the as-applied model, courts implement constitutional norms on a slower, more gradual basis than they do through facial challenges.[153] If voter identification laws are challenged through dozens or even hundreds of suits by individual voters, constitutional change will occur, but at a glacial pace.[154]

3. The Challenge of Identifying Appropriate Plaintiffs

Another obstacle inherent in as-applied challenges in the voter identification context is identifying appropriate plaintiffs. Here, potential categories of plaintiffs that may bring voter identification suits are the elderly, the indigent, the disabled, students born out of state with only an out-of-state driver's license, voters who have changed their name, and religious objectors. Pro bono attorneys want to focus their energies on only the most burdened plaintiffs, and the potential categories of plaintiffs make it difficult for pro bono attorneys to choose whom to represent.

Another risk of as-applied challenges is the potential for the plaintiff's claim to become moot if he or she obtains voter identification during the course of extended litigation.[155] This situation actually occurred in an unsuccessful case, *Stewart v. Marion County*,[156] brought by a pro se plaintiff against Indiana's Voter ID Law after *Crawford*. In *Stewart*, the plaintiff claimed that his vote was denied in 2006 and that during the primary held in May 2008, he tried to vote but was denied the opportunity because he lacked valid photo identification.[157] He argued that his case differed from *Crawford* on three grounds: (1) He asserted an as-applied challenge instead of a facial challenge; (2) he had actually been denied the right to vote; and (3) his complaint asserted different claims that were not at issue in *Crawford*.[158] In spite of these

153. *Id.* at 1335.

154. *See id.*

155. In general, a claim becomes moot when the challenged conduct ceases, the issues presented are no longer "live," or parties lack a legally cognizable interest in the outcome. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000); Powell v. McCormack, 395 U.S. 486 (1969).

156. *See* Stewart v. Marion County, No 1:08-CV-586-LJM-TAB, 008 WL 4690984, slip copy at *2 (S.D. Ind. Oct. 21, 2008) (finding that because the plaintiff had obtained the proper form of voter identification after filing the case, he no longer had standing to bring suit).

157. *Id.* at *1.

158. *Id.* at *3.

differences, the court held that because the plaintiff had obtained the proper form of voter identification after filing the case, he no longer had standing to bring the suit.[159] This cautionary tale illustrates that choosing an appropriate plaintiff whose claim will not be mooted is a difficult task for a pro bono attorney or legal aid organization.[160]

Another potential and related mootness problem is that preventing a plaintiff from obtaining identification in order to pursue litigation may also present an ethical problem for pro bono lawyers.[161] Joanne Evers, president of the League of Women Voters of Indiana, explained, "The goal is to get voters a voter ID, not to use them in a lawsuit."[162] To stage a successful as-applied challenge, the burdened voter would have to be continuously deprived of identification. In the meantime, the voter may miss the opportunity to vote in multiple elections.[163] Ms. Evers summarized, "[Keeping a potential voter from obtaining identification just to bring litigation]would be defeating the goals of the organization."[164]

Although it would be premature to conclude that these difficulties are insurmountable, they illustrate discouraging practical obstacles to the suggested individual as-applied challenge.

IV. POTENTIAL BENEFITS OF UTILIZING CLASS ACTION LITIGATION TO OVERCOME PRACTICAL OBSTACLES

A class action as-applied challenge may be the most viable and manageable litigation strategy to vindicate the rights of citizens severely burdened by voter identification laws. Scarce plaintiff resources are preserved by class representation, and pro bono attorneys are able to dedicate themselves to one case, rather than having their energies dispersed by case-by-case litigation. Without a tool like a class action, where a pro bono attorney can aggregate large numbers of individual claims to achieve a widespread remedy through an injunction, it is less likely that a pro bono attorney will take on a voter identification case. Moreover, class actions can avoid mootness problems that could arise in an individual suit.

159. *Id.*
160. Interview with Joanne Evers, *supra* note 141.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

A. Class Action Litigation as a Potential Solution

A class action is a procedural device that allows numerous parties to aggregate similar claims into a single action against a defendant or defendants who have allegedly caused harm.[165] The representative nature of class actions, litigated on behalf of all people who are similarly situated, is particularly appropriate in civil rights cases that seek declaratory and injunctive relief for a numerous and amorphous class of persons.[166] In fact, Federal Rule of Civil Procedure ("FRCP") 23(b)(2), which allows injunctive or declaratory relief appropriate for an entire class, was promulgated in 1966 as a tool for facilitating civil rights actions.[167] Since its enactment, FRCP 23(b)(2) class actions have succeeded in several types of discrimination and civil rights claims, including racial discrimination, gender discrimination, and even voting rights claims.[168] After *Crawford*, this approach may provide the best—and perhaps the only—option to enforce the voting rights of citizens disenfranchised by identification laws.

B. Efficient Use of Resources for Plaintiffs and Pro Bono Attorneys

Class actions generally promote the efficient use of resources for plaintiffs and their counsel, but they have particular relevance when used in a civil rights context. For plaintiffs, a class action may be the only means to obtain relief when their individual claims are too de minimis to support individual litigation, or when plaintiffs are too unaware of their own legal rights to pursue their individual claims.[169] The concept of aggregation is traditionally discussed in class action cases for damages with small individual recoveries,[170] but by analogy, aggregation also works to the benefit of pro bono attorneys seeking broader remedies than individual litigation could provide.[171]

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165. *See* Keele v. Wexler, 149 F.3d 589, 592–93 (7th Cir. 1998).

166. *See* 2 NEWBERG ON CLASS ACTIONS § 4:11 (4th ed. 2003); *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967).

167. FED. R. CIV. P. 23(b)(2).

168. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.43 (3d ed. 2008).

169. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985).

170. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

171. *Id.*

The class action form is also an efficient use of resources for pro bono attorneys because it allows them to pursue litigation without having to identify, locate, and choose among all possible plaintiffs. [172] Because class actions are representative suits on behalf of all people who are similarly situated, absent plaintiffs are also protected, assuming that certification requirements pursuant to FRCP 23 have been met. [173] Thus, the burden on pro bono attorneys to bring an as-applied challenge is greatly alleviated by having to find only one class representative, or representatives of each subclass, rather than trying to represent all burdened plaintiffs. [174]

For example, in *Warren v. City of Tampa*, [175] a lawsuit was filed under the Voting Rights Act challenging the procedure by which all members of the City Council and the County Board of Commissioners were elected. [176] In that case, the plaintiffs sought injunctive relief and moved to have the class certified on behalf of approximately 30,000 registered black electors in the county and approximately 20,000 registered black electors in the city. [177] The class was defined as "all black citizens who are presently registered voters who are potentially eligible voters of the City of Tampa or of Hillsborough County." [178] The class action resulted in a settlement whereby the plaintiffs agreed to dismiss their lawsuit in exchange for the defendants' promise to (a) develop and implement several programs designed to increase black voter participation, and (b) enact an ordinance to allow City Council members to come from any district. [179] In this case, thousands of plaintiffs whose voting rights were affected achieved their desired result while economizing on resources and representation by using a class action. This result illustrates the potential utility and power of a class action within the voting rights context.

172. FED. R. CIV. P. 23(b), advisory committee's notes; *see also* 1 NEWBERG, *supra* note 42, § 2:10.

173. *Phillips Petroleum*, 472 U.S. at 811–12.

174. Interview with Aaron Caplan, *supra* note40.

175. 693 F. Supp. 1051, 1052 (M.D. Fla. 1988).

176. *Id.*

177. *Id.* at 1053.

178. *Id.*

179. *Id.* at 1059.

C. The Economy of Litigation Through the Pursuit of a Widespread Remedy

One of the express purposes of class actions is to avoid multiplicity of suits and prevent inconsistent or varying adjudications.[180] These goals are not only beneficial to plaintiffs and their attorneys but also economical for defendants and for the judicial system at large.[181] The Court in *United States Parole Commission v. Geraghty*[182] summarized:

> The justifications that led to the development of the class action include the protection . . . from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.[183]

The benefits of this procedural vehicle are particularly obvious in challenging the constitutionality of a statute pertaining to voter identification laws.[184] In *Warren*, for example, the remedy created a solution for all adversely affected voters living in a particular county and also called for a change in a local ordinance.[185] Such a result probably would have been far less likely with one black voter pursuing individual litigation. Thus, the widespread vindication of civil rights, which pro bono attorneys often seek, may be manifestly more attainable through a class action.

D. Avoidance of Mootness Problems for Plaintiffs

One of the primary advantages of bringing a class action is to circumvent case dismissal due to mootness, which is a significant obstacle in the individual as-applied challenge.[186] For example, in *Dunn v. Blumstein*,[187] a class was certified challenging a Tennessee

180. FED. R. CIV. P. 23(b).

181. 2 NEWBERG *supra* note 166, § 5:36.

182. 445 U.S. 388 (1980).

183. *Id.* at 402–03.

184. 2 NEWBERG, *supra* note 166, § 5:58.

185. Warren v. City of Tampa, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988).

186. *See* Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 901 (1983).

187. 337 F. Supp. 323 (M.D. Tenn. 1970).

law's three-month residency requirement for voting.[188] Although the class representative satisfied the state residency requirement during the course of litigation, the district court held that the problem to voters posed by the Tennessee residency requirements was "capable of repetition, yet evading review" as to the rest of the class members.[189] Although this doctrine is not limited to the class action context, it would not be applicable in an individual as-applied voter identification context because once a voter obtains identification for one election, the same identification may be used in subsequent elections. It is precisely this situation that mooted the plaintiff's case in *Stewart v. Marion County*.[190]

By contrast, even if the named representative in a class action obtains the proper form of voter identification during litigation, the case may avoid the problem of mootness. In *Sosna v. Iowa*,[191] the Supreme Court recognized that after class certification, the class takes on a separate legal identity apart from the class representative.[192] Thus, the mootness of the class representative's individual claim and the loss of a personal stake in the outcome will not render the class action moot.[193] This holding was affirmed and expanded in *Geraghty*, which involved the right of a class representative whose individual claim had expired to appeal a ruling denying class certification.[194] In *Geraghty*, the Supreme Court held that the mootness of the plaintiff's individual claim did not preclude the plaintiff from vigorously and adequately protecting class interests in appealing the class denial.[195] This exception to the formal standing doctrine recognizes the special nature of class actions in contrast to traditional individual litigation.[196] As such, class actions may prove to be a useful method for overcoming the major obstacle of mootness in an individual as-applied challenge.

188. *Id.* at 324, *aff'd* 405 U.S. 330, 330 (1972) (assumed class certification by language "in his own behalf and on behalf of all others similarly situated").

189. *Id.* at 333 n.2.

190. Stewart v. Marion County, No. 1:08-CV-586-LJM-TAE, slip op. at 2 (S.D. Ind. Oct. 21, 2008).

191. 419 U.S. 393 (1975).

192. *Id.* at 399.

193. *Id.*

194. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 390 (1980).

195. *Id.* at 404.

196. *See id.*

V. CERTIFYING A PLAINTIFF CLASS IN AN AS-APPLIED CHALLENGE TO A VOTER IDENTIFICATION LAW

The benefits of a class action breathe new hope into the possibility of a viable challenge to voter identification laws, but it remains unclear whether a voter identification class could meet certification. Assuming that a "single, individual Indiana resident who will be unable to vote as a result of [the Voter ID Law]"[197] exists, the putative class must satisfy the four explicit prerequisites of FRCP 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.[198] The Seventh Circuit also requires that the class meet an implicit threshold requirement of definiteness.[199] Finally, the action must qualify under at least one of the three subsections of FRCP 23(b).[200] A putative voter identification class would qualify under FRCP 23(b)(2), which requires a finding that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[201] Because district courts have broad discretion to determine whether a proposed class meets these requirements, this Article limits the hypothetical certification of a plaintiff class to the jurisdiction of the Seventh Circuit.[202]

A. The Implied Threshold Requirement in the Seventh Circuit: Definiteness

The Seventh Circuit holds that a class is sufficiently definite if membership can be ascertained by reference to objective criteria.[203] Because the outcome of a class action suit binds all unnamed class members, it is crucial to have a clear definition of which groups or individuals are members of the class.[204] In cases where the class is

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

198. FED. R. CIV. P. 23 (a).

199. Wallace v. Chi. Hous. Auth. 224 F.R.D. 420, 425 (N.D. Ill. 2004).

200. FED. R. CIV. P. 23(b).

201. FED. R. CIV. P. 23(b)(2).

202. Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998).

203. Colbert v. Blagojevich, 2008 WL 4442597, slip copy at *2 (N.D. Ill. Sept. 29, 2008).

204. *See* JAMES WM. MOORE, 3B MOORE FEDERAL PRACTICE ¶ 23.40, at 98 (Supp. 1976–77) ("The definition of the class represented is important, of course, when the defendant loses, since it marks the boundaries of *res judicata*."). *See* Alliance to End Repression v. Rochford, 565 F.2d 975, 978 n.6 (7th Cir. 1977).

defined by an allegedly unconstitutional statute, regulation, policy, or pattern, definiteness is generally met.[205] In other words, regulations provide the objective criteria by which definiteness can be determined.[206] For example, the class of Medicaid-eligible plaintiffs in *Colbert v. Blagojevich*[207] met the definiteness requirement because state regulations served as the objective criteria by which the plaintiffs could determine membership of the class.[208] The class in that case was defined as "all Medicaid-eligible adults with disabilities in Cook County, Illinois, who are being, or may in the future be, unnecessarily confined to nursing facilities and with appropriate supports and services may be able to live in a community setting."[209] Similarly, Indiana's Voter ID Law creates objective criteria for a putative voter identification class, and thus the threshold requirement of definiteness is likely to be satisfied.[210] By contrast, a class is determined to be indefinite where membership is contingent on the state of mind of the prospective class members.[211] For example, a class of Texas state residents who were active in the "peace movement" and who might be chilled from First Amendment expression was held to be too indefinite for certification.[212]

Therefore, using the facts of *Crawford*, the putative class might theoretically be defined as follows: citizens of the State of Indiana, ages eighteen and older, who do not possess federal or Indiana state photo identification required for in-person voting by Indiana's Voter ID Law, and who are unable to obtain such identification because they are (1) indigent, (2) disabled, (3) elderly, (4) out-of-state students, (5) religious objectors, or (6) individuals who have changed their legal name and only possess underlying identification stating their previous name.[213] This class definition should adequately satisfy definiteness because it does not hinge on a state of mind but

205. *Alliance to End Repression*, 565 F.2d at 975.

206. *Blagojevich*, 2008 WL 4442597, slip copy at *3.

207. 2008 WL 4442597, slip copy at *3.

208. *Id.*

209. *Id.* at *2.

210. *Id.*

211. Lau v. Arrow Fin. Servs., LLC, 245 F.R.D. 620, 624 (2007).

212. DeBremaecker v. Short, 433 F.2d 733, 734 (1970).

213. *See* IND. CODE. § 3-5-2-40.5 (2006); *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1629 (2008).

rather defines the class with respect to certain particular characteristics in relation to a governmental regulation.

B. FRCP 23(a)(1): Numerosity

The first prerequisite of certification under FRCP 23(a) is numerosity, which requires that the proposed class be "so numerous that joinder of all members is impracticable."[214] The Seventh Circuit has held that where the membership of the proposed class is at least forty people, joinder is impracticable and the numerosity requirement is sufficiently satisfied.[215]

In a hypothetical plaintiff class, the forty-plaintiff rule is the easiest bright-line method by which plaintiffs may establish numerosity. A recent empirical examination of the first primary election held after the enactment of Indiana's Voter ID law indicates that the forty-plaintiff number is easily met.[216] The study found that an estimated 2,770 provisional ballots were cast at the 2008 primary election in Indiana.[217] Of that number, it is estimated that nearly 400 persons cast provisional ballots because they lacked photo identification.[218] Of the provisional ballots cast, the vast majority (80 percent of those ballots) were not counted.[219] More information about these voters would be useful in precisely defining a putative plaintiff class, but presently such detailed information is not available in the public record.[220] Despite the limited information about the voters, this survey indicates that the number of people required for numerosity is likely to be met, despite the possibility of

214. FED.R.CIV.P. 23(a)(1).

215. *See* Swanson v. Am. Consumer Indus., Inc., 415 F.2d 1326, 1333 & n.9 (7th Cir. 1969).

216. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL., (forthcoming 2009).

217. *Id.* at 4.

218. *Id.* at 4–5.

219. *Id.*

220. Information about the voters, their provisional ballots, and the reasoning behind why they were or were not counted has been difficult to find pursuant to an announcement from the Indiana Public Access Counselor, who determined that all such information should be confidential and unavailable as a public record. "From a practical standpoint, it is my opinion [that] this means any information collected from the provisional ballot materials and used in the free access system must be maintained as confidential." Letter from Heather Willis Neal, Public Access Counselor, to J. Bradley King, Co-Dir., Ind. Election Div., 4 (Aug. 22, 2008), *available at* http://www.ai.org/pac/index.htm (follow "Informal Inquiry 08-INF-28 Regarding provisional ballot materials" hyperlink).

considerable statistical error and deviation.[221] As long as the putative plaintiff class presents some evidence in the form of a declaration or affidavit establishing an approximate number of class members reaching forty, numerosity should be satisfied.[222]

C. FRCP 23(a)(2): Commonality

The commonality requirement mandates that "questions of law or fact common to the class" must exist.[223] Commonality serves two purposes: (1) to promote the fair and adequate representation of the interests of absentee class members, and (2) to ensure practical and efficient case management.[224] In the Seventh Circuit, a common nucleus of operative fact is sufficient to satisfy the commonality requirements of FRCP 23(a)(2),[225] and such a common nucleus is considered to be inherent in actions challenging government practices.[226]

However, the putative voter identification class may not meet the commonality requirement if the court ultimately has to make separate inquiries into the facts surrounding the claims of each class member.[227] The court failed to find commonality in *Metcalf v. Edelman*,[228] where welfare recipients alleged that they could not obtain housing compatible with their health and well-being under the existing shelter system provided by the defendant state's welfare officials.[229] The proposed class definition would have required the court to make separate inquiries into the facts surrounding the claims of the individual class members and determine whether or not each potential class member was being deprived of a livelihood compatible with each member's perception of his or her own health and well-being.[230]

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221. *See* Pitts, *supra* note 216.

222. *See* FED.R.CIV.P. 23(c)(1).

223. FED.R.CIV.P. 23(a)(2)

224. MOORE, *supra* note 168, ¶ 23.23.

225. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).

226. *See* United States v. Davis, 756 F. Supp. 1162, 1168–69 (E.D. Wis. 1991), *rev'd on other grounds*, 961 F.2d 603 (7th Cir. 1992).

227. Klein v. Du Page County, 119 F.R.D 29, 31 (N.D. Ill. 1988).

228. 64 F.R.D. 407 (N.D. Ill. 1974).

229. *Id.* at 408.

230. *Id.* at 409.

In the voter identification context, a court may also be required to make separate inquiries into each class member's circumstances to determine whether he or she was unable to vote because of the severe burdens imposed by the Voter ID Law.[231] As in *Metcalf*,[232] the alleged harm to the putative plaintiff class in the voter identification cases flows from an injury originated by a state regulation. But, the precise problem in the voter identification context focuses on what exactly constitutes a "burden" to the plaintiff.[233] The burden imposed by the Voter ID Law takes various forms, such as indigency and disability.[234] Even bus fare for a ride to the county clerk's office to sign an affidavit may be burdensome for a homeless individual who relies on welfare and charity for subsistence.[235]

On the other hand, class certification on grounds of commonality may be saved by the creation of subclasses. Under FRCP 23(c)(5), a class may be divided into subclasses that are each treated as a distinct class when appropriate.[236] The plaintiff generally bears the burden of identifying and constructing such subclasses.[237] Thus, the putative class definition of a voter identification class may be divided into subclasses of the indigent, the elderly, the disabled, and other subcategories. Commonality may be found within subclasses, and thus, certification may be saved.

However, there still remains some doubt as to whether subclasses will achieve certification. The Supreme Court itself appears ambivalent as to whether the burden upon voters is defined by the type of burden or by the severity of the burden.[238] The uncertainty of the results of this inquiry points to the possibility that the court may not certify a plaintiff class on the basis of commonality if a case-by-case inquiry proves to be more appropriate in determining a plaintiff's burden.

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231. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1625–26 (2008).

232. *See* Elemendorf & Foley, *supra* note 47, at 513.

233. Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 769 (2008).

234. *See Crawford*, 128 S. Ct. at 1632.

235. *See* Oddi, *supra* note 1.

236. FED. R. CIV. P. 23(c)(5).

237. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980).

238. *See supra* Part II.D.

D. FRCP 23(a)(3): Typicality

To meet the typicality requirement, the named plaintiff's claims or defenses must be typical of the class but need not be identical.[239] A plaintiff's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory."[240] As long as a named representative with standing at the time of certification meets the class definition, certification is not likely to fail on this prong.[241] Factual distinctions between the named plaintiff's claims and those of other class members do not necessarily undermine typicality,[242] and because "commonality and typicality are closely related, a finding of one often results in a finding of the other."[243] Thus, a class representative who is severely burdened by the Voter ID Law will be typical of a class of voters who are also severely burdened by the same law. However, the creation of subclasses may complicate a finding of typicality.[244] The ethical issue presented by depriving one burdened individual of a voter identification still remains for the pro bono attorney, but that conflict may be resolved if the representative plaintiff chooses not to obtain voter identification in order to embrace the goals of class action litigation.

E. FRCP 23(a)(4): Adequacy of Representation

Rule 23(a)(4) is composed of two parts: (1) the adequacy of the named plaintiff's counsel, and (2) the adequacy of the class representative to protect the different, separate, and distinct interests of the class members.[245] Provided that qualified and experienced pro bono attorneys represent the proposed class, plaintiff's counsel will most likely be found competent for the purposes of certification.[246] The purpose of probing the adequacy of the class representative is to

239. FED. R. CIV. P. 23(a)(3); Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998).

240. *Keele*, 149 F.3d at 595 (quoting De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983) (internal quotation marks and citations omitted)).

241. *See* 1 NEWBERG, *supra* note 42, § 2:28; *see also* Sosna v. Iowa, 419 U.S. 393 (1975).

242. *De La Fuente*, 713 F.2d at 232.

243. McKenzie v. City of Chi., 175 F.R.D. 280, 286 (N.D. Ill. 1997).

244. *See* 1 NEWBERG, *supra* note 42, § 3:15. A detailed discussion on how typicality is established with respect to subclasses is beyond the scope of this Article.

245. *See id.* § 3:1.

246. *Id.* § 3:21.

avoid antagonism or conflicts of interest.[247] One case states succinctly, "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims."[248] Again, there is no reason to believe that the class representative would pose a conflict of interest, unless the class representative was somehow aligned with the state government or sympathetic to its interests. Thus, adequacy of representation can be easily guarded by ensuring the competency of class counsel and vigilance against conflicts of interest by the class representative.[249]

F. Injunctive or Declaratory Relief Under FRCP 23(b)(2)

FRCP 23(b)(2) provides that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole . . . ."[250] This rule is generally invoked in cases where "injunctive or declaratory relief is the primary or exclusive relief sought."[251] In cases challenging statutes or government regulations, FRCP 23(b)(2) will probably be considered the most appropriate option. Because a class action against the Voter ID Law will most likely request injunctive relief, FRCP 23(b)(2) probably applies.[252]

Even though a class action as a procedural vehicle for an as-applied challenge is a possibility for a putative Voter ID Law plaintiff class, upon closer examination it is not certain that such a class will be certified. Even if the plaintiff class defines itself to the court's satisfaction, certification may fail on commonality if the court finds that a case-by-case adjudication of the burdens imposed by the Voter ID Law is necessary. This conclusion returns to the hypothesis that an as-applied solution, even when utilizing a creative procedural tool, is simply not a realistic option for voters severely burdened by the Voter ID Law.

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247. *Id.* § 3:22.

248. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).

249. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n. 13 (1982).

250. FED. R. CIV. P. 23(b)(2).

251. Buycks-Robertson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 335 (N.D. Ill. 1995).

252. Telephone Interview with William R. Groth, *supra* note 142.

VI. ALTERNATIVE SOLUTIONS TO CHALLENGING A VOTER IDENTIFICATION LAW

Aside from facial and as-applied challenges under the U.S. Constitution, several alternative solutions to challenging a voter identification law may be available. Challenges under state constitutions, political solutions through local or congressional amendments, and creative administrative relief and grassroots activism by nonprofit organizations may also provide some alterative solutions to plaintiffs burdened by a voter identification law.

A. Potential Relief Under a State Constitution

Bringing a facial challenge under a state constitution instead of the U.S. Constitution is a legal alternative that may be pursued in future challenges to voter identification laws. One such successful challenge, *Weinschenk v. Missouri*,[253] was brought under Missouri's equal protection clause[254] and under the guarantee of the right to vote under Missouri's constitution.[255] At issue in *Weinschenk* was a Missouri statute mandating that in-person voters show identification.[256] Like Indiana's Voter ID Law, the only permissible forms of identification were a Missouri-issued license or federal identification such as a U.S. passport.[257] In evaluating the burden upon the plaintiffs, the Missouri Supreme Court found that the combination of the statistical evidence, the demonstrated expense associated with obtaining identification, and the anecdotal evidence from the elderly, the disabled, the indigent, and citizens who were born out of state, was sufficient to establish that the plaintiffs were actually and severely burdened by the law.[258] Moreover, the state court considered nonmonetary obstacles, such as the time and ability to navigate bureaucracies to obtain the necessary identification to vote, to be especially difficult for the elderly and handicapped.[259] Further, the court found the state interest in preventing voter fraud compelling but struck down the statute on its face because it was not

253. 203 S.W.3d 201, 205 (Mo. 2006).

254. MO. CONST. art. I, §§ 2, 25; art. VIII, § 2.

255. Weinschenk v. Missouri, 203 S.W. 3d 201, 205 (Mo. 2006).

256. *Id.* at 204.

257. *Id.* at 206.

258. *See id.* at 201.

259. *Id.* at 208–09.

narrowly tailored to serve that interest.[260] *Weinschenk*'s success in invalidating a statute that was strikingly similar to the one upheld in *Crawford* indicates that there is potential for future plaintiffs to obtain relief in state courts, if not in federal court.[261]

B. Political and Federal Solutions to Voter Identification Laws

As always, political solutions to restrictive voter identification laws are available through traditional state or congressional legislation. One of the reasons rancor and controversy have surrounded Indiana's Voter ID Law is that the Republicans in Indiana's General Assembly voted in favor of passing the Voter ID Law and the Democrats opposed it.[262] In fact, the dissenting judge on the Court of Appeals in *Crawford* expressed concern that Indiana's Voter ID Law might have been fashioned to discourage Democratic election-day turnout.[263] Thus, a political shift in Indiana's General Assembly to a Democratic majority could give rise to the revocation or amendment of the Voter ID Law. To wit, Indiana politicians are already introducing legislation that would change the requirements of Indiana's Voter ID Law.[264] In early 2009, Senator Susan Errington introduced a bill at the first regular session of the 116th General Assembly expanding the types of identification accepted at the polls on election day and making affidavits to confirm identity available at the polls.[265] Although there is no certainty that this bill or others like it will be adopted, its introduction proves that politicians may continue to champion changes to Indiana's Voter ID Law in future sessions.

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260. *Id.* at 204–05.

261. Following *Weinschenk*'s lead, the League of Women Voters subsequently challenged the Indiana Voter ID Law under provisions of the Indiana State Constitution in 2008. *See* LWVIN and Indiana Voter Law Litigation, http://www.lwvin.org/voterinfo/voterIDlawsuit.html (last visited Feb. 21, 2009). In July 2008, the defendant, Secretary of State Rokita, filed a motion to dismiss the lawsuit on the grounds that the defendant named was not the appropriate defendant. *Id.* On December 17, Judge Reid granted the defendant's motion to dismiss. *Id.* This dismissal of the lawsuit was expected. *Id.* The League of Women Voters of Indianapolis will now file a motion to appeal this ruling. *Id.*

262. Crawford v. Marion County Election Bd. 128 S. Ct. 1610, 1623 n.21 (2008).

263. *See* Crawford v. Marion County Election Bd., 472 F. 3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

264. S. 0005, 116th Gen. Assem., 2nd Reg. Sess. (Ind. 2008), *available at* http://www.in.gov/legislative/senate_democrats/homepages/s26/index.htm (follow "My Legislation" hyperlink; then "SB 0005" hyperlink).

265. *Id.*

A federal solution may also be possible through future amendments or clarifications to existing statutes. For example, HAVA[266] and NVRA,[267] which already incorporate election administration guidelines, could be amended to create uniform identification requirements instead of merely creating a baseline for compliance. Another plausible option is for Congress to approve less problematic and cost-intensive forms of identification for voting purposes. Present examples from other states include a utility bill, a bank statement, a government check, military identification, or a Medicare or Medicaid card.[268] Allowing additional forms of identification gives voters a range of reasonable alternatives that might be less burdensome to obtain. For example, accepting a Medicare or Medicaid card as a form of in-person voter identification may better accommodate elderly and indigent voters. Although not a perfect solution, recognizing a diversity of identification may be one way to accommodate a diversity of personal circumstances.

Lastly, opportunity for congressional action to reform voter identification laws may be much more likely in the next few years than ever before. Then-Senator Barack Obama and nineteen other senators proposed a Senate resolution in 2005 against photo identification laws, describing the state interest in preventing voter fraud as one that was unsubstantiated and based on "exaggerated fears."[269] Also, Senator Dianne Feinstein, Chair of the Senate Rules and Administration Committee, which exercises jurisdiction over proposed legislation for federal elections, filed an amicus brief in favor of the plaintiffs in *Crawford*.[270] The predominance of vociferous and powerful objectors to voter identification laws in both the Senate and the White House indicates that electoral reform through legislation may occur during an opportune political environment.

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266. 42 U.S.C. § 15483(a) (Supp. II 2002).

267. 42 U.S.C. § 1973gg (2000).

268. National Conference of State Legislatures, Requirements for Voter Identification, http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm#table1 (last updated Oct. 23, 2008).

269. S. Con. Res. 53, 109th Cong. (2005) *available at* http://www.brennancenter.org/content/resource/senator_barack_obamas_senate_resolution_against_photo_id_requirements_for_v/.

270. Brief of United States Senator Dianne Feinstein et al. as Amici Curiae Supporting Petitioners, Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) (Nos. 07-21, 07-25).

C. Creative Administrative Suggestions

In lieu of actual changes to federal or state law, creative solutions involving changes to state administration may also lessen the burden imposed on voters. For example, making affidavit forms more widely available may lessen travel costs for some voters with limited mobility. Similarly, eliminating the costs of obtaining the necessary underlying documentation may reduce the financial burden on some voters, which would enable greater compliance with Indiana's Voter ID Law.

1. Providing Provisional Ballots at Multiple Locations

One creative administrative solution to lessen the burdens imposed by the Voter ID Law is to make affidavits accompanying provisional ballots more widely available. Affidavits could be made available at the polls. This would eliminate an extra trip to a more distant location for voters who are probably the least likely to be able to make the trip. The fact that the homeless voter's affidavit in the Grant County Council election was sent to the polls, signed on the spot, and subsequently counted indicates that sending affidavits directly to the polls is an administratively feasible alternative.[271] If the state maintains that affidavits must be signed after election day, other types of local government offices dispersed more evenly throughout counties could be authorized to make affidavits available in proportion to the number and dispersion of polling places. For example, affidavits could be signed and turned in at a city clerk's office or even at a local library branch. This would still preserve the state interest while lessening the burden upon voters to travel in order to obtain the affidavits.

2. Waiver of Fees for Underlying Documentation

Another creative administrative solution that may lessen the burden of the Voter ID Law is to waive fees for birth certificates or other underlying documentation. Even though this solution would only assist those voters born in Indiana, it would eliminate a serious financial burden for many resident voters who were born in the state.

271. Oddi, *supra* note 1.

Affidavit forms to confirm indigency similar to the ones required in the provisional ballot work-around could be signed in lieu of fees, thus enabling some indigent voters to obtain proper voter identification in advance of election day. This solution will have the additional salutary effect of eliminating the need to make indigent voters travel to the county clerk's office during every election cycle. Eliminating or even minimizing the fees for obtaining underlying documentation will doubtless lessen many of the economic burdens associated with voter identification laws. This is an incomplete solution because some legitimate voters do not know where they were born, but alleviating the burden on some voters may allow others to define their burdens with more precision in future litigation.

D. Practical, Grassroots Efforts to Promote Compliance with the Voter ID Law

Until political or administrative reform materializes, burdened voters may take advantage of practical, grassroots efforts to assist them in complying with the Voter ID Law. For example, Indiana has initiated "BMV2You," a program to create a mobile license branch that travels to communities and events across Indiana so that BMV customers may conveniently access select BMV services.[272] Although BMV2You uses only one single vehicle that operates three days a week and only travels to neighborhood-based locations such as town squares and community events, it may be viewed as a practical way to reduce the burden of traveling to a BMV.[273]

However, the very existence of such a program may be evidence of the state's tacit admission of the burdens imposed on voters who cannot travel to a given BMV location. Considering that the annual cost of maintaining the BMV2You program is likely tens of thousands of dollars, these funds may be better utilized through a more tailored solution for voters legitimately burdened by travel and expense.

Additionally, educational programs by nonprofit groups like the League of Women Voters ("LWV") continue to provide some relief to voters who simply require guidance and direction to help them

272. *See* BMV2You Mobile License Branch, http://www.in.gov/bmv/3037.htm (last visited February 12, 2009).

273. *See id.*

comply with Indiana's Voter ID Law.[274] Although Justice Stevens's opinion in *Crawford* suggested that transportation to the BMV to obtain voter identification could be arranged "by a civic or political group such as the League of Women Voters or a political party,"[275] currently no such transportation programs exist.[276] Nonprofits may opt to take up Justice Stevens's suggestion in the future, but as a practical matter, such efforts are unlikely to be forthcoming due to the scarcity of resources.[277] Nonprofit organizations rely upon volunteers for labor and donations for their financial support. Moreover, there is a need to distribute their resources across multiple programs that serve the public generally.[278] Voters cognizant of their legal rights who affirmatively approach nonprofits may procure case-by-case assistance with fees or transportation, but an extensive transportation assistance program of the type suggested by Justice Stevens is cost-prohibitive and beyond the purview of current nonprofit programs.[279] In the meantime, nonprofit organizations, like the League of Women Voters, continue admirable efforts to promote education and awareness of Indiana's voter identification requirements.

VII. CONCLUSION

Although state constitutional challenges, political changes, administrative alternatives, and traditional nonprofit assistance may eventually alleviate the burden imposed by voter identification laws like the one upheld in *Crawford*, the obstacles to bringing suit in federal court are considerable. After *Crawford*, even the most stringent voter identification laws must be challenged using the blunt tool of an as-applied challenge. Practical limitations on resources and remedies in an individual as-applied challenge are strong deterrents to effective representation. Furthermore, it is unclear whether a plaintiff class would be able to be certified in an as-applied class action against a voter identification law. Some precedent

274. *See* League of Women Voters of Indiana, http://www.lwvin.org/voterinfo/index.htm (last visited Mar. 13, 2009).

275. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623 n.20 (2008).

276. Interview with Joanne Evers, *supra* note 141.

277. *Id.*

278. *Id.*

279. *Id.*

indicates that a putative voter identification class may fail on commonality grounds due to the necessity of a case-by-case examination of the burdens imposed by the voter identification law.

Thus, the reference in *Crawford* to a future as-applied solution is illusory. The invocation of an as-applied challenge as an adequate safeguard to protecting the right to vote in unconstitutional applications is an attractive idea on its face. But upon closer examination, it is a hollow promise, a legal chimera. Under current Supreme Court jurisprudence, the best option to vindicate the rights of voters disenfranchised by voter identification laws may be to pursue an alternative political or administrative solution and acquiesce to the existence of voter identification laws. For now, the limited resources of advocates may be best utilized by simply helping burdened voters to comply with voter identification laws. Nevertheless, alternative solutions keep the hope alive that in the long run, challengers to the law may still win the war even if they decline to wage a futile battle.