

# The Question of ID: Access to the Vote

# The Right to Vote

- “[T]he political franchise of voting . . . Is regarded as a fundamental political right, because [it is] preservative of all rights . . . ” *Yick Wo v. Hopkins* (1886)
- Specific Constitutional Protections – 15<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup> and 26<sup>th</sup> Amendments
- Doctrinally, voting as a fundamental right; restrictions on the right to vote are subject to strict scrutiny
- All adult, resident citizens entitled to vote (exception for persons convicted of a felony)

# The Emergence of Administrative Issues in Voting

- Registration Requirements
  - Timing and Place for Registration
  - Proof of eligibility (new efforts to require proof of citizenship)
- Election Machinery and Election Day Issues
  - “Hanging chads”
  - Provisional Ballots
  - Polling Place Numbers and Locations; Waiting Times
- Absentee, Mail-in and Early in-Person Voting
  - “Souls to the Polls”
- Partisan Election Administrative Bodies

# Voter Identification Requirements

- No requirements before 1950
- 1950-1980 – five states require some form of ID (not photo)
- By 2000 – fourteen states require some form of ID (not photo)
- 2005 – Georgia, Indiana become first states to require strict photo ID (driver's license, passport, or government-issued)
- 2008 – Supreme Court upholds Indiana photo ID law in *Crawford v. Marion County*

# Voter ID today

- 34 states have laws requiring or requesting voters to show ID to vote; 32 are currently in force
- NCSL considers 10 of these to be “strict” including Ohio and Wisconsin
- Another 10 of the “non-strict” require a photo, but provide for some alternatives
- States vary in terms of the photo IDs that count
- Others permit other forms of ID like a rent or utility bill
- 18 states rely on other methods, primarily signature matching

# Crawford v. Marion County Board of Elections (2008)

- Challenge to Indiana's strict photo ID requirement
- Three-way split in the Court
- Lead opinion (Stevens, with Roberts and Kennedy) applies *Anderson-Burdick* sliding scale test; rejects facial challenge, leaves open possibility of as-applied challenges
- Scalia concurrence (with Thomas and Alito), rejects possibility of as-applied challenges
- Souter (with Ginsburg) and Breyer dissent

# Crawford – Stevens Opinion

- Magnitude of the Burden on the Right to Vote
  - Not great – most people have ID; state provides free IDs; state offers provisional ballot option
  - Leaves open the possibility of an as-applied challenge by those for whom the burden is particularly severe; Scalia would reject this
- Justifications
  - Possibility of in-person Voter Fraud – “no evidence of any such fraud actually occurring in Indiana at any time in its history” but it could happen
  - Safeguarding Voter Confidence

# In-Person Voter Fraud

- Washington Post Study (2014) – 31 “credible instances” (not limited to prosecutions – all claims) in 2000-2014 out of 1 billion ballots
- Special US DOJ unit created to track federal election fraud examined 2002 and 2004 ballots and found 0.00000013 % were fraudulent (none involved in-person fraud)
- Fifth Circuit (Texas case)– 2 convictions out of 20 million votes cast in Texas in a decade
- 4<sup>th</sup> Circuit (NC case) – none found
- Kansas Sec of State – reviewed 84 million votes cast in 22 states and found 14 instances of voter fraud prosecution – 0.00000017%
- Judge Posner: “Some of the ‘evidence’ of voter-impersonation fraud is downright goofy, if not paranoid” (Frank v. Walker, 2014)

# More Posner

- “Voter-impersonation fraud . . . Is by all accounts . . . a tiny problem, and a mere fig leaf for efforts to disenfranchise voters likely to vote for the political party that does not control the state government. Those of us who live in Illinois are familiar with a variety of voting frauds, and no one would deny the propriety of the law’s trying to stamp out such frauds. The one form of voter fraud known to be too rare to justify limiting voters’ ability to vote by requiring them to present a photo ID at the polling place is in-person voter impersonation.” Frank v. Walker

# Voter Confidence

- Ansolabehere and Persily Study: perceptions of voter fraud are unrelated to the strictness of a state's voter ID law (Harv. L. Rev. 2008)
- Valentino & Neuner Study: Knowledge of voter ID laws increases anger and concern among Democrats and non-whites (Political Psychology 2016)

# Voter ID Laws and Partisanship

- Crawford (Stevens) – dismisses significance of partisan motivation – “if a nondiscriminatory law is supported by neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motive”
- Virtually all strict laws adopted in states with Republican governor and legislature

# Posner Again

- “The data imply that a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver’s license or feel comfortable dealing with officialdom, to vote because if they do vote they are likely to vote for Democratic candidates.”

# Voter ID (and other Election Administration Issues) in Court

- 15 states have new voting laws that have never been used during a presidential election
- Litigations in AL, AZ, GA, KS, MI, NC, ND, OH, TX, VA, WI (incomplete list)
- Major recent (July-Sep 2016) decisions from 4<sup>th</sup> (NC), 5<sup>th</sup> (TX), 6<sup>th</sup> (OH), 7<sup>th</sup> (WI) circuit courts

# Voter ID in Court

- For voter id, main issues have been
  - per *Crawford*, determining the extent and severity of the burden for voters without ID
  - Whether provision of a “reasonable impediment” exception is an adequate remedy
  - Evidence of disparate racial impact of voter id and other election law changes (particularly early voting rollback)
  - Proof of intentional racial discrimination