

FORGOTTEN VOTERS: THE CONSTITUTIONALITY OF INDIANA'S VOTER ID LAW AND ITS EFFECT ON AMISH VOTERS

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“Thou shalt not make unto thee any *graven image*, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.”² (emphasis added).

INTRODUCTION

In 2008, Indiana's strict Voter Identification law was upheld over a strong dissent in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).³ Indiana's Voter ID law was passed in response to a movement for election reform throughout the country, and features perhaps the most stringent identification requirements out of any state's Voter ID law in the nation.⁴ In an effort to combat voter fraud, Indiana's Voter ID law, like those being passed in many other states throughout the nation, requires voters to present acceptable forms of photo identification at the polls.⁵

Exemptions to the law exist for religious objectors who oppose being photographed due to their beliefs.⁶ However, unlike the laws

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2. *Exodus* 20:4. This Bible verse, in the language of the King James Version, is the most frequently cited basis for the strongly held Amish religious objection to being photographed. The Amish believe that posing for photographs in which their faces are recognizable is a violation of the Biblical commandment contained within this verse. See JOHN A. HOSTETLER, *AMISH SOCIETY* 311 (3d ed. 1980).

3. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

4. Indiana's law requires all voters to present a valid photo ID. Those unable to provide a valid photo ID on Election Day are limited to casting a provisional ballot. See Senate Enrolled Act No. 483; 2005 Ind. Acts 2005.

5. Indiana is one of seventeen states in the nation that currently require voters to present photo identification. Amongst these states, many have made allowances for religious objectors, making Indiana's law arguably one of the strictest. See *Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Jan. 2, 2014).

6. Senate Enrolled Act No. 483, *supra* note 4.

enacted in other states, such as Pennsylvania which allows religious objectors to vote using a government-issued, non-photo ID, Indiana's law limits religious objectors' rights to casting either a provisional or absentee ballot.⁷ To cast a provisional ballot, voters must vote on Election Day and then visit the county election office within ten days to confirm their exemption.⁸ This requirement of Indiana's law places a unique burden on religious objectors, namely Amish and Mennonites, who will be limited to casting provisional ballots and required to travel to their county's election office every time they vote. Unlike polling stations, election offices are limited to one per county, increasing the burdens associated with travel and expenses in order to vote.⁹

Compounding the First Amendment issues posed by Indiana's Voter ID law is the fact that by preferring to settle disputes on their own, the Amish are typically reluctant to pursue legal suits in order to protect their own interests.¹⁰ This note will examine the voter identification debate from the perspective of Indiana's Amish and Mennonite population to determine whether Indiana's Voter ID law unconstitutionally restricts their religious freedoms. In addition, this note will compare Indiana's law to Pennsylvania's recently upheld Voter ID law, which allows religious objectors to vote using non-photo ID's. Examining the form of Voter ID laws passed in other states throughout the nation provides a framework for Voter ID laws that can protect state interests without unduly burdening the indigent and religious objectors.

This Note will culminate by examining the alternatives to Indiana's current Voter ID law and propose a solution, which respects

7. See *Voter ID Laws Passed Since 2011*, BRENNAN CENTER JUST., <http://www.brennancenter.org/analysis/voter-id-laws-passed-2011> (last updated Nov. 12, 2013).

8. *Exemptions*, IND. ELECTION DIVISION, available at <http://www.in.gov/sos/elections/2624.htm> (last visited Jan. 2, 2014).

9. Indiana's largest county is Allen County at 657 square miles. See *Allen County, Indiana*, STATS INDIANA, http://www.stats.indiana.edu/profiles/profiles.asp?scope_choice=a&county_changer=18003&button1=Get+Profile&id=2&page_path=Area+Profiles&path_id=11&panel_number=1 (last visited Jan. 2, 2014). This amounts to a considerable amount of travel for religious objectors within the state of Indiana who are required to visit the county election office following every election. *Exemptions*, *supra* note 8.

10. The Amish that resort to using the United States legal system to fight their battles are often shunned by those within their own religious community. See HOSTETLER, *supra* note 2, at 252. Shunning entails complete social rejection within the Amish community and is a mandated disassociation with the Amish member that has broken with the Amish commandments. *Id.*

religious freedoms while satisfying state interests. Of course, exemptions for religious objectors open up a window for further voter fraud and a proper balance must look at the fraud that stands to be prevented in comparison to the burdens that regulations place on all voters. Possible alternatives to Indiana's current religious exemption from its Voter ID law include: statewide voter registration databases, updating of registration rolls, unique voter identification numbers, signature comparison technologies, biometric technologies, non-photo IDs for religious objectors, and increased prosecution.¹¹

I. REFORM AT THE POLLS AND THE RISE OF VOTER ID LAWS

A. Voter Requirements Historically

Historically, eligible voters throughout the United States have cast their vote without the necessity of providing identification at the polls.¹² In the past, small towns and neighbor familiarity made it unnecessary for voters to prove their identity to administrators at the polls.¹³ However, as some areas became urbanized, populations grew, and relocating became a common and often frequent part of life, making the possibility of voter fraud a much more prevalent issue throughout the nation.¹⁴

Voter registration laws were first proposed in the mid-eighteenth century and were regulated by the states.¹⁵ These laws remained within state control for the majority of the next century,

11. These alternatives will be considered in full later in this note. See *Policy Brief on Alternatives to Voter Identification*, BRENNAN CENTER JUST., (Sept. 12, 2006), http://www.brennancenter.org/content/resource/policy_brief_on_alternatives_to_voter_identification/.

12. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193 (2008). Notably, some states still have no voter ID requirement at all. Among these states are: California, Oregon, Nevada, New Mexico, Wyoming, Nebraska, Iowa, Minnesota, Wisconsin, Illinois, Mississippi, West Virginia, North Carolina, New York, Maine, Vermont, Massachusetts, Maryland, and New Jersey. See *Voter ID: State Requirements*, *supra* note 5.

13. See *Crawford*, 553 U.S. at 193 (2008).

14. Studies on the actual frequency of so-called voter fraud have been conflicting, partly due to the difficulties of measuring the occurrence of voter fraud that goes unnoticed. *Id.* at 194.

15. Another factor in the proposal for voter registration laws was the expansion of voting rights from solely property owners to men of all races. See Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 742 (2008).

and as such considerable variation existed between state registration laws throughout the nation. Methods of maintaining voter registration lists varied from state to state as well. In 1993, Congress passed the National Voter Registration Act (NVRA), which allowed citizens to register to vote upon obtaining a driver's license.¹⁶ The passage of the NVRA marked the end of a century of independent control held by the states over voter registration and maintenance of registration rolls.

The NVRA combated some of the problems occurring in the South for disenfranchised African Americans, and established the first uniform rules for state voter registration laws.¹⁷ However, the NVRA also limited states' abilities to easily remove voters from their registration lists, resulting in inflated lists filled with the names of those who were deceased, had moved, or for some other reason were no longer eligible to vote.¹⁸ With inflated registration lists, states could no longer utilize voter registration rosters to deter voter fraud.¹⁹ Verifying identity at the polls became viewed as one possible solution to combat the increasing opportunity for voter fraud created by the inflated registration lists.²⁰ This is when the idea of photo identification requirements first began to take form.

B. Help America Vote Act of 2002

In response to the controversy surrounding the 2000 Presidential Election, Congress joined the movement for voting reform by passing the Help America Vote Act (HAVA) in 2002.²¹ HAVA im-

16. National Voter Registration Act, 42 U.S.C. § 1973 (1993).

17. *See Texas v. Holder*, 888 F. Supp. 2d 113, 122 (D.D.C. 2012).

18. The Act requires states to conform to federal dictated procedures in order to remove a voter from registration rolls who is no longer available. In addition to the problems related to removing non-eligible voters, the Act also allows for mail in registration eliminating the in-person registration that was used by some states to verify voter identity. The Act creates a possibility for double voting by individuals that have moved, as the decision of which precinct to vote in, either that of their old home or their new one, is left to their discretion. *See Langholz, supra* note 15, at 744.

19. Prior to the Act, it was up to the state's discretion how to go about removing individuals that were no longer eligible to vote because they had either moved, passed away, been convicted of a felony, or were improperly registered to vote in the first place. *See Id.*

20. *Id.*

21. The 2000 Presidential Election between Republican candidate George W. Bush and Democratic candidate Al Gore, marked the fourth time in history that a

posed minimum standards on the states to follow in election administration.²² The most controversial part of HAVA surrounded the voter identification requirements.²³ Under the Act, citizens that are registering to vote for the first time are required to provide a form of identification.²⁴ This can take the form of a verifiable driver's license number, social security number, a photo identification card, or a government document displaying the name and address of the individual, such as a government check.²⁵ In response to these new regulations, state legislatures were forced to change laws in order to maintain compliance with the Act. This gave proponents of stricter voter identification requirements the perfect opportunity to push their proposals.²⁶ As a result, state legislatures enacted voter identification requirements that not only met, but also often exceeded the minimum requirements of HAVA.²⁷ The strictest of these laws were those that applied to all voters and limited the type of acceptable identification to government-issued photo identification.²⁸

Voter identification laws presented problems for citizens who did not already possess a valid identification. Burdens associated

candidate won despite losing the popular vote. President George W. Bush won the election by a narrow five electoral points. The election's controversy centered around the awarding of the state of Florida's twenty-five electoral votes. The Help America Vote Act also contains provisions to assist states in updating election technology that created some of the controversy over the accuracy of the ballot counts in the 2000 Presidential Election. *See* Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

22. HAVA contains provisions imposing minimum standards that states must meet regarding poll accessibility, statewide computerized voter registration, voter identification, provisional voting, and voting systems. *Id.*

23. *See* Langholz, *supra* note 15, at 746.

24. Forms of acceptable identification under HAVA include photo identification, or a current utility bill, banking statement, government issued check, paycheck, or another government issued document that contains the name and address of the voter. Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

25. *Id.*

26. *See* Langholz, *supra* note 15, at 747-48.

27. Photo identification is not a strict requirement for voter registration under HAVA, and states that have enacted legislation requiring photo IDs have exceeded the minimum standard imposed under the Act. *See id.* at 748.

28. A list of which states currently require photo identification in order to cast a vote is described in the next section, *infra*, of this note, "The Current State of Voter ID laws." For now, it is enough to recognize that advocates of stricter Voter ID laws saw HAVA as an opportunity to enact their legislation. *See id.* at 748-750.

with obtaining proper identification led many states to provide free forms of government issued identification.²⁹

C. The Current State of Voter ID Laws

Presently, thirty states have implemented laws requiring that all voters show proper identification at the election polls, with an additional three states having passed Voter ID laws that have yet to be implemented.³⁰ Differences exist amongst the laws implemented throughout these thirty states. States with the strictest laws prohibit voters from casting a valid ballot if they fail to provide identification. In those states, voters lacking ID are limited to casting a provisional ballot. States with these strict laws currently in effect include Georgia, Indiana, Kansas, Tennessee, Arizona, Ohio, and Virginia.³¹

Other states have implemented more lenient Voter ID laws in which voters who lack identification on Election Day have other options for casting a regular ballot. States that have implemented these more lenient Voter ID laws include Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and Wisconsin.³²

In addition to the differences in rigidity of the laws, more differences exist between states that require the acceptable ID to be a photo ID and those that accept other forms of ID including non-photo ID and signatures. Currently, nineteen states require that the voter ID include a photo of the voter.³³ Out of all of the Voter ID laws, the most burdensome are those that are both strict in enforcement and require a photo ID. For the 2012 election, only four states met this description: Georgia, Indiana, Kansas, and Tennessee.³⁴ Still, other states are soon to join this small group in coming

29. For example, Pennsylvania currently provides free photo identification upon request to be used solely for the purpose of voting. These photo IDs are valid for a period of ten years. To obtain a free photo ID, the individual must complete an application form and sign an oath stating they are a registered voter with no other form of valid ID acceptable for voting purposes. See *Driver and Vehicle Services: New Department of State Voter ID*, PA. DEP'T TRANSP., available at <http://www.dmv.state.pa.us/voter/voteridlaw.shtml> (last visited Jan. 2, 2014).

30. See *Voter ID: State Requirements*, *supra* note 5.

31. See *id.*

32. *Id.*

33. *Id.*

34. *Id.*

elections, with legislation and constitutional challenges still pending.³⁵ Future states in line to adopt strict photo ID requirements include Arkansas, North Carolina, Mississippi, Pennsylvania, Texas, Virginia, and Wisconsin.³⁶

D. National Challenges to Voter ID Laws

Voter ID laws throughout the country have not been implemented without resistance. Challenges to Voter ID laws have resulted in different outcomes, with judicial decisions focusing closely on the potential burdens facing voters. The Department of Justice (DOJ) has taken a leading role in many of the cases against states' new voter identification laws pursuant to the requirements of Section 5 of the Voting Rights Act.³⁷ Notably, Section 5 of the Voting Rights Act requires states with a history of discrimination to receive permission before changing voting laws.³⁸ As initially enacted in the 1965 Act, Section 5 applied to jurisdictions that "maintained a voting test or device as of November 1, 1964," as well as those with a voter turnout or registration of less than 50% in the presidential election from the previous year.³⁹

35. Currently, there are proposals to strengthen existing Voter ID laws in seven states. *See Voter ID: State Requirements*, *supra* note 5.

36. All of these states have passed similar legislation mandating strict voter ID requirements at the polls, however they were not in effect for the November 2012 Presidential Election. *Id.*

37. Suevon Lee, *Voting Rights Act: The State of Section 5*, PROPUBLICA (Aug. 30, 2013, 7:27 AM), <http://www.propublica.org/article/the-state-of-section-5>.

38. Section 5 of the Voting Rights Act of 1965 states in relevant part:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . .

42 U.S.C. §§ 1973–1973aa-6. For a more general explanation of the Department of Justice's role regarding preclearance of charges to state voting laws *see* Suevon Lee, *Everything You've Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Nov. 5, 2012, 4:50 PM), <http://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

39. 42 U.S.C. § 1973(b)(b) (2011).

This meant that as it was initially enacted, Section 5 applied to the following states: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.⁴⁰ These six states also happened to be those with the worst records in terms of racial discrimination in voting practices and disenfranchisement of African Americans.⁴¹ Congress has renewed Section 5 four times since its initial enactment in 1965.⁴² Upon renewal of the provision in 1975, Congress also expanded the provision to include jurisdictions that contained a sizeable population of non-English speakers but provide voting materials in English only.⁴³ Due to this expansion in coverage, states falling under the coverage of Section 5 now include: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.⁴⁴

In jurisdictions that are covered by Section 5, it is the jurisdiction that bears the burden of proof to show by a preponderance of the evidence that the change the state wishes to adopt does not have a discriminatory purpose.⁴⁵ The jurisdiction must also show that the proposed change to the law does not have any retrogressive effect.⁴⁶ Notably, the Supreme Court has recognized that this burden is extremely difficult for jurisdictions to meet.⁴⁷

One of the cases that received the most attention after attempts were made by the DOJ to block changes pursuant to Section 5 was *Texas v. Holder*. On July 25, 2011, the state of Texas filed an application with the Attorney General seeking to receive preclearance to the proposed changes to the state's Voter ID laws.⁴⁸ In *Texas v. Holder*, the state of Texas sought to implement a strict Voter ID law, meaning valid ID was required to cast an actual ballot, and the law also had a photo requirement, making it what would have been one of the strictest laws in the nation.⁴⁹ Pursuant

40. *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

41. *See id.*

42. Section 5 was most recently renewed in 2005 for a twenty-five year period. Previously, it has been renewed in 1970, 1975, and 1982. *Id.*

43. *Id.*

44. *Section 5 Covered Jurisdictions*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 2, 2014).

45. *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

46. *Id.* at 113.

47. *Id.*

48. *Id.* at 117.

49. The Voter ID law proposed by Texas had many similarities to the law that was upheld in Indiana. Both laws required all individuals to present a photo ID in order to vote. The Court in *Texas v. Holder* expressed feelings that the

to its powers under Section 5 of the Voting Rights Act, the Attorney General denied the preclearance request on March 12, 2012, because Texas had not met its burden of proving that the proposed ID law did not have a discriminatory purpose or that it would not have a retrogressive effect.⁵⁰ The Attorney General gave three main reasons for this denial. First, Hispanic voters in Texas were more than twice as likely than non-Hispanic voters to lack an appropriate ID.⁵¹ Second, Texas failed to show that the issuance of “free” ID cards would mitigate this divide.⁵² Third, Texas failed to propose a plan for voters for whom it would be difficult, if not impossible to travel to the offices issuing the “free” identification cards during normal business hours.⁵³

Seeing that the bill would likely be rejected by the DOJ, Texas sought judicial preclearance from the U.S. District Court for the District of Columbia.⁵⁴ Since Texas sought to implement the new law for the 2012 Presidential Election, the court granted the state an expedited litigation process.⁵⁵ In making its decision, the court was guided by the legal framework set forth by the Fourteenth and Fifteenth Amendments.⁵⁶ Texas presented two main arguments to the court in its request for judicial preclearance. First, Texas argued that Section 5 was inapplicable to the proposed law because Voter ID laws cannot encumber an individual’s right to vote.⁵⁷ Instead, Texas argued, individuals that chose not to abide by the state-imposed requirements have “chosen” not to vote.⁵⁸ The court rejected this argument, explaining that the exact purpose of Section 5 was to address *any* changes in voting laws within regulated

Texas law may have proved to be even stricter than Indiana’s law when implemented. One noted difference was the process to obtain a free voter ID. Both Indiana’s Voter ID law and the proposed Texas law offered “free” voter ID cards for citizens lacking any other suitable government issued photo-ID. In both states, to obtain a free ID the voter must present a government issued document. The cost to obtain a government-issued document was much lower in Indiana than in Texas. Thus, the costs of complying with the proposed Texas law were higher. *See Holder*, 888 F. Supp. 2d at 139-40.

50. *Id.* at 117.

51. *Id.* at 117-18.

52. *Id.*

53. *Id.*

54. *Holder*, 888 F. Supp. 2d at 118.

55. *Id.* at 119.

56. *Id.* at 121-22.

57. *Id.* at 123.

58. *Id.*

jurisdictions.⁵⁹ According to the sentiment of the court, voter identification requirements are exactly what Congress intended to include in the Section 5 preclearance requirement of the Voting Rights Act.

In the alternative, Texas argued that the District of Columbia District Court should follow the precedent of the Supreme Court's decision in *Crawford v. Marion County Election Board*, upholding Indiana's very similar Voter ID law.⁶⁰ However, the court rejected the argument that *Crawford* was the controlling precedent in this case.⁶¹ To this point, the court found *Crawford* to be inapplicable to the clearance of the Texas Law.⁶² Unlike Texas, Indiana is not a jurisdiction subject to the preclearance requirement of Section 5 of the Voting Rights Act. As such, Indiana was not under any burden to establish that the proposed law lacked discriminatory purpose and retrogressive effect. Alternatively, Indiana only encountered a facial challenge to the proposed law based on the First and Fourteenth Amendments. In other words, here Texas bore the burden of proof where as in *Crawford* those challenging the Indiana law were the ones who bore the burden of showing the discriminatory effect. Further, since Indiana was only faced with a constitutional challenge to the law, the Court in *Crawford* was considering the law's effect on the Indiana voting population as a whole.

In the Texas case, the court had to consider the law's effect on the more specific subset of the voting population protected by Section 5, particularly, racial and language minority voters.⁶³ Noting the differences between the Indiana and Texas burdens, in August of 2012, the three-judge panel sitting on the U.S. District Court for the District of Columbia blocked Texas' attempts to pass a new Voter ID law.⁶⁴ Unconvinced that the law did not discriminate, the court disallowed the voter ID provision that lawmakers

59. *Holder*, 888 F. Supp. 2d at 124.

60. In reviewing this argument the court in *Texas v. Holder* acknowledged both the similarities and the differences between the Texas and Indiana laws. See *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012). This Note will go into greater detail about the Supreme Court's *Crawford* decision in Part IV: Indiana's Voter ID Law and the State's Amish Population.

61. *Id.* at 125.

62. *Id.*

63. *Id.*

64. *Id.* at 144.

in Texas claimed necessary to create safeguards to the election process.⁶⁵

Subsequent to the decision in Texas, other states, such as Pennsylvania have also faced difficulty in the courts in having new Voter ID laws upheld.⁶⁶ Just months after the decision regarding the Texas law, Judge Simpson, sitting on the Commonwealth Court of Pennsylvania, placed a preliminary injunction on changes to Pennsylvania's Voter ID laws, preventing the changes from taking effect for the 2012 Presidential election.⁶⁷ Pennsylvania is not a jurisdiction that falls under the preclearance requirement of Section 5 of the Voting Rights Act.⁶⁸ Thus, the challenge faced by Pennsylvania's proposed law was a constitutional challenge brought on the behalf of voters rather than a challenge for preclearance by the DOJ, such as the case was in Texas. In March of 2012, those alleging disenfranchisement because they lacked acceptable IDs that would conform to the proposed Pennsylvania law, brought an action against the state in the Commonwealth Court of Pennsylvania.⁶⁹ The petitioners asserted state constitutional violations created by the law.⁷⁰ Pennsylvania's proposed law made changes to the description of valid identification acceptable to vote on Election Day.⁷¹

The law contained an exemption for religious objectors, which would allow them to vote upon presenting a valid non-photo ID.⁷² To obtain a non-photo ID, religious objectors to being photographed were required to complete an eighteen-question application about their personal information and their faith.⁷³ Voters in Pennsylvania sought an injunction on the enforcement of the law

65. *Id.*

66. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

67. *Id.* at *8.

68. *Section 5 Covered Jurisdictions*, *supra* note 44.

69. *Applewhite*. 2012 WL 4497211, at *1.

70. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15, 2012) *vacated*, 54 A.3d 1 (Pa. 2012).

71. *Id.* at *2.

72. 25 PA. STAT. ANN. § 2602 (West 2012).

73. *See id.* The non-photo, government-issued ID alternative for religious objectors, arguably makes the proposed Pennsylvania law more lenient than Indiana's Voter ID law. The criticisms of the non-photo ID alternative allowed for under the Pennsylvania law will be discussed later in the Note. The use of a non-photo ID for religious objectors in Indiana will also be explored as a less-burdensome alternative to the current law.

from the court.⁷⁴ By presenting a facial challenge of the law to the court, the Plaintiffs had a very high burden to meet to persuade the court that the law was unconstitutional.

Unlike the case in Texas, Pennsylvania's legislation was presumed valid and the burden rested on the voters to show the unconstitutionality of the provisions.⁷⁵ Finding that the Pennsylvania law had a legitimate sweep and imposed only a small burden on voters' rights, the court held that the burden imposed did not outweigh the legitimate sweep of state interests in preventing voter fraud and refused injunctive relief.⁷⁶ The individuals and organizations bringing the suit appealed their case to the Supreme Court of Pennsylvania.⁷⁷

In granting review, the state's supreme court held that the lower court should have evaluated the accessibility of the alternative voter ID cards for those voters who currently lacked a valid photo ID before ruling on the injunction.⁷⁸ The Supreme Court of Pennsylvania vacated the lower court's denial of injunctive relief and remanded the case for findings to be made on the availability of the alternative IDs.⁷⁹

On remand, the court granted the preliminary injunction.⁸⁰ The court found that the goal of liberal access to alternative identification had not been sufficiently met and the number of photo IDs that still needed to be issued compared to those lacking them was too high to ensure that no disenfranchisement would occur.⁸¹ Most interesting to the Pennsylvania Supreme Court's decision is its focus on voter disenfranchisement related to the casting of provisional ballots. Similar to the law in Indiana, Pennsylvania's proposed voter ID law limits those who are unable to show valid photo ID at the time of voting to casting a provisional ballot.⁸² The court focused on the language creating this limitation in the Pennsylvania Act, which explained, "A provisional ballot shall not be

74. *Applewhite*, 2012 WL 3332376, at *1.

75. *Id.*, at *6.

76. *Id.*, at *9.

77. *Applewhite v. Pennsylvania*, 54 A.3d 1, 2 (Pa. 2012).

78. *Id.* at 5.

79. *Id.*

80. *Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2012 WL 4497211, at *3 (Pa. Commw. Ct. Oct. 2, 2012).

81. *Id.* at *2-3.

82. 25 PA. STAT. ANN. § 2626(b) (West 2012).

counted if”⁸³ The court found this practice to expressly cause disenfranchisement during the in-person voting process.⁸⁴

Pennsylvania’s law differs from that of the other strictest states, such as Indiana, in that it allows for a true exemption for religious objectors to photographs.⁸⁵ Under the Pennsylvania Act, voters with a religious objection to obtaining a photo ID are still permitted to vote by presenting a valid non-photo driver’s license or a valid non-photo ID card that can be obtained from the state’s Department of Transportation.⁸⁶ This means that the group of burdened voters considered by the court in the Pennsylvania case was limited to those who do not possess a valid photo ID, but have no religious objection to obtaining one. The court determined that the burden on this group of voters was still substantially high enough to possibly outweigh the state’s interest in preventing voter fraud, so an injunction was necessary to allow further investigation.⁸⁷

E. The Occurrence of Voter Fraud

1. Amish at the Polls

While the Amish have always been opposed to certain involvement in the political process, such as holding public office, Amish views with regard to voting have changed throughout the years. The American Civil War represented the most distinct turning point in Amish voting beliefs.⁸⁸ Throughout the early nineteenth century, prior to the Civil War, the Amish enjoyed the privileges accompanying their place in the new democracy and actively par-

83. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 3332376, at *4 (Pa. Commw. Ct. Aug. 15, 2012)

84. The fact that the Pennsylvania court found the provisional ballot part of the in-person voting process to constitute disenfranchisement is interesting when compared to the Supreme Court’s reasoning in upholding the Indiana Voter ID law. Not only does the Indiana law also have the provisional ballot component of the in-person voting process for those lacking a valid ID on Election Day, but the number of people limited to casting a provisional ballot also includes all religious objectors in Indiana, making the percentage of voters required to cast a provisional ballot higher in Indiana. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205 (2008).

85. H.R. 934, 195th Leg., Reg. Sess. (Pa. 2011), available at <http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0018.HTM>.

86. *Id.*

87. *Applewhite*, 2012 WL 3332376, at *7.

88. DONALD B. KRAYBILL, *THE AMISH AND THE STATE* 32 (1993).

ticipated in the political process by both voting and holding local office.⁸⁹ Following the Civil War, a stark contrast arose to the prior Amish views towards voting. Many Amish felt that the assaults on human life flowing from the Civil War evidenced that their prior political involvement had been fruitless.⁹⁰ As a result, following the Civil War, Amish writers began to discourage the Amish from exercising their voting rights.

By refraining from voting, some Amish feel that they “absolve[] them[selves] of any responsibility for the exercise of force by the state.”⁹¹ In other words, the Amish do not feel responsible for the actions taken by elected officials, since they have played no role in electing them.⁹² National elections pose a particular problem for potential Amish voters who “note that the problem of choosing among candidates is compounded by campaign propaganda and the impossibility of knowing [candidates] personally.”⁹³

However, Amish writers are not representative of the entire Amish population and not all Amish have refrained from voting.⁹⁴ While some government involvement, such as jury duty and office holding is condemned, voting is not outright forbidden in the Amish religion but instead is left to personal choice.⁹⁵ Voting in local elections is more common than national elections, and when issues close to the Amish are up for decision, voter participation is most likely.⁹⁶

Once registered Amish tend to vote on a consistent basis.⁹⁷ Voting rates among Amish communities vary widely, and can be quite high, such as in certain Pennsylvania townships where 40% of the Amish population votes.⁹⁸ The typical Amish voter is registered as Republican and is socially conservative.⁹⁹

89. *Id.* For example, in 1850 Amishman Isaac Kaufman, a resident of Somerset County Pennsylvania became an active member within the Whig party.

90. *Id.* at 32-33. (Referring to an article written by Amishman S.D. Mast, entitled *Herold der Wahrheit*, discouraging Amish voting in which he “observed that for the last one hundred years his forebears and other nonresistant people in the United States ‘have participated in worldly elections,’ yet all this voting did not prevent a bloody Civil War.”).

91. *Id.* at 33.

92. *Id.*

93. KRAYBILL, *supra* note 88, at 34.

94. *Id.* at 35.

95. *See* HOSTETLER, *supra* note 2, at 253.

96. *See* KRAYBILL, *supra* note 88, at 35.

97. *See* HOSTETLER, *supra* note 2, at 253.

98. *Id.*

99. *Id.*

Amish influence in national elections, while not common, may be possible in especially close elections. Republicans took notice of this fact in the 2004 campaign for the reelection of President George W. Bush.¹⁰⁰ Within the states of Ohio and Pennsylvania, home to half of the nation's Amish population, the Republican campaign sought to capture the Amish vote, with President George W. Bush even privately meeting with a group of fifty Amish during a campaign stop.¹⁰¹ Republican efforts paid off with huge increases in registered Amish and Mennonite voters.¹⁰² Notably, Lancaster County saw record increases in registered voters with a 169.4% increase in registered Amish voters and a 24.5% increase in registered Mennonite voters.¹⁰³ Likewise, a record number of registered Amish and Mennonites voted in the 2004 Presidential election, with 62.9% of registered Amish and 61.6% of registered Mennonites placing votes respectively.¹⁰⁴

As demonstrated by the turnout in the 2004 Presidential election, Amish and Mennonite interest and participation in elections is no longer limited to the local election process. The Amish population in the United States currently exceeds 250,000 and is growing rapidly.¹⁰⁵ Therefore, the voting power of this quickly spreading religious group is nothing to be ignored, especially in local and close elections. Furthermore, there is a sizeable amount of willing Amish who stand to be excluded from the voting process by Voter ID laws contrary to their strongly held religious beliefs.

2. Amish Religious Objections to Photographs

Perhaps one of the most well-known religious beliefs of the Amish is that they do not pose for photographs under any circumstances.¹⁰⁶ This belief is derived from a variety of biblical sources, and is most often accredited to the Second Commandment's ban on "graven images" found in Exodus 20:4-5:

100. Donald B. Kraybill & Kyle C. Kopko, *Bush Fever: Amish and Old Order Mennonites in the 2004 Presidential Election*, 81 Mennonite Q. Rev. 165 (2007), available at http://www2.etown.edu/amishstudies/PDF/Kraybill/Bush_Fever.pdf.

101. *Id.* at 172.

102. *Id.* at 189.

103. *Id.*

104. *Id.* at 191-92.

105. Megan Gannon, *Amish Population Booms in US*, LIVESCIENCE (July 27, 2012, 2:33 PM), <http://www.livescience.com/21916-amish-population-booms-in-us.html>.

106. See HOSTETLER, *supra* note 2, at 311.

4 Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

5 Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me¹⁰⁷

The Amish believe that willingly posing for photographs represents a form of pride and personal vanity that is frowned upon in the Amish religion.¹⁰⁸ Doing so is specifically forbidden within the Amish religion, and calls for repentance.¹⁰⁹ Outside of the Amish religion, there are also groups of Mennonites and other Christians throughout the country who abide by the Bible's prohibition against "graven" images and thus refuse to pose for photographs.¹¹⁰

Amish opposition to photographs conflicts with numerous laws imposed upon American citizens. Photographs are necessary to comply with laws and procedures in a variety of circumstances. They are essential to travel, where photographs on passports are required when crossing over borders of the United States. Additionally, photographs are a requirement for driver's licenses. Furthermore, photographs are made publicly available when mug shots are taken of individuals who have been placed under arrest. Photograph requirements conflicting with Amish religious beliefs have caused Amish to refrain from participating in activities such as a travel and have forced Amish to make difficult decisions between posing for photographs and abiding by their beliefs.¹¹¹

In some areas the government has compromised, carving out religious exemptions from laws making photographs mandatory.¹¹² However in some cases, such as the Voter ID laws being implemented in many states throughout the country, photograph re-

107. *Exodus* 20:4.

108. See HOSTETLER, *supra* note 2, at 311.

109. *Id.*

110. Brief for the League of Women Voters of Indiana, Inc. as Amicus Curiae Supporting Petitioners, at 17, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

111. Ryan Robinson, *Amish Facing Passport Dilemma: Medical Trips to Mexico, Canada in Jeopardy*, LANCASTERONLINE, http://lancasteronline.com/article/local/200424_Amish-facing-passport-dilemma.html (last updated Feb. 7, 2007).

112. Ind. Senate Enrolled Act No. 483 § 2.5 (2005).

quirements are replaced with other barriers that the Amish and other Christian groups must overcome.¹¹³

II. INDIANA'S VOTER ID LAW AND THE STATE'S AMISH POPULATION

A. *Indiana's Amish Population*

In 1841, the first Amish families migrated from Pennsylvania to northern Indiana.¹¹⁴ The state of Indiana is home to the third largest population of Amish in the United States, following Pennsylvania and Ohio.¹¹⁵ The number of Amish in Indiana exceeds 37,000 with the largest settlement located in the northern part of the state.¹¹⁶ The Amish community of Lagrange-Elkhart is the third largest in the nation and the Amish in this community engage in a variety of jobs from small businesses to factory work.¹¹⁷ Indiana's Amish population continues to grow at a pace exceeding that of Pennsylvania and Ohio.¹¹⁸ The Amish population in Northern Indiana doubles approximately every twenty years.¹¹⁹ This is attributable in part to the large size of many Amish families, which often consist of ten or more children.¹²⁰

B. *Indiana Enacts a Voter ID Law*

In 2005, Indiana enacted the election law SEA 483. This law requires Indiana residents to provide a government-issued photo ID on Election Day in order to place a vote. The photo ID is subject to four requirements. It must display the voter's photo, name, an expiration date, and must have been issued by the state or U.S.

113. *Id.*

114. *Area History*, AMISHCOUNTRY.ORG, <http://www.amishcountry.org/explore-the-area/area-history> (last visited Jan. 2, 2014).

115. Erik Wesner, *Indiana Amish*, AMISHAMERICA.COM, <http://amishamerica.com/indiana-amish/#lagrange%20elkhart>. (last visited Jan. 2, 2014).

116. *The Twelve Largest Amish Settlements (2010)*, AMISH STUDIES, http://www2.etoyn.edu/amishstudies/Largest_Settlements_2010.asp. (last visited Jan. 2, 2014).

117. Wesner, *supra* note 115.

118. *Id.*

119. *The Amish Way of Life*, AMISHCOUNTRY.COM, <http://www.amishcountry.org/explore-the-area/area-history/amish-culture> (last visited Jan. 2, 2014).

120. *Id.*

government.¹²¹ If a voter is unable to provide photo identification prior to casting a vote on Election Day, they will be permitted to cast a provisional ballot.¹²² Provisional ballots must be validated within ten days after the election by visiting the county election board and providing a valid photo ID.¹²³ A valid ID can be obtained for free from Indiana's Bureau of Motor Vehicles.¹²⁴

Exemptions from the photo requirement are available for religious objectors.¹²⁵ Individuals who cannot have their picture taken for religious reasons may vote by casting a provisional ballot on Election Day.¹²⁶ Individuals who choose to vote under this exemption must visit the county election office within ten days following the election to confirm that the exemption applies to them.¹²⁷ The only other option for religious objectors or those lacking a valid ID is to vote by absentee ballot.¹²⁸

Requiring religious objectors to vote by provisional ballots creates numerous consequences that may not be apparent when first reading the law. Limiting an individual to casting a provisional ballot means that their vote may not be counted for ten days following an election. In addition, religious objectors who choose to vote in person on Election Day will be required to vote by provisional ballot every time.¹²⁹ This means that they will have to travel to the county election office after every time they vote. The burden of doing so may be even higher for the Amish who have the added difficulty of traveling to the office by horse and buggy.

C. Constitutional Challenges to Indiana's Voter ID Law

Challenges to Indiana's Voter ID law rose to the level of the U.S. Supreme Court in *Crawford v. Marion County Election Board*.¹³⁰ The law was challenged on constitutional grounds and upheld in a 6-3 decision with an opinion written by Justice Ste-

121. *Photo ID Law*, IND. ELECTION DIVISION, <http://www.in.gov/sos/elections/2401.htm> (last visited Jan. 2, 2014).

122. *Id.*

123. *Id.*

124. *Obtaining a Photo ID*, IND. ELECTION DIVISION, <http://www.in.gov/sos/elections/2625.htm> (last visited Jan. 2, 2014).

125. *Exemptions*, *supra* note 8.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

vens.¹³¹ The Court applied the law pronounced in *Norman v. Reed*, which held that when a state law is burdensome on either a class or individual voter it can only be justified when a state interest exists that is “sufficiently weighty to justify the limitation.”¹³²

Indiana provided the Court with three main asserted interests for its Voter ID law.¹³³ First, Indiana asserted an interest in following the rest of the nation in “election modernization” in response to the National Voter Registration Act.¹³⁴ Indiana argued that its Voter ID law was the result of efforts to follow actions across the nation to update and reform the election process.¹³⁵ The Court noted that Voter ID laws reflect necessary change to accommodate the changing landscape of the United States.¹³⁶ In the days of small towns, neighbors knew one another and as such identification at the polls was unnecessary. Today, however, populations have increased greatly, and millions of people move each year within the United States. In some places “people do not even know the people living in their own apartment building let alone their precinct,” creating a need for some type of identification.¹³⁷

Next, Indiana asserted an interest in preventing voter fraud.¹³⁸ Voter fraud posed a particular problem for the state of Indiana due to inflated lists of registered voters. Voter registration rolls in Indiana had become inflated largely with the names of persons who were deceased or no longer resided within the state.¹³⁹ Inflation of Indiana’s registration rolls was estimated at 41.4% in 2004.¹⁴⁰ However, the state’s Voter ID law only addressed in-person voter impersonation, and no evidence was provided to the Court that any of this type of fraud had actually occurred within the state.¹⁴¹ Absentee ballots are not subject to the photo ID requirements of the law.

Finally, Indiana asserted a state interest in safeguarding voter confidence in the election process.¹⁴² Ensuring an efficient and

131. *Id.*

132. *Id.*

133. *Id.* at 191.

134. *Id.*

135. *Crawford*, 553 U.S. at 193.

136. *Id.* at 193-94.

137. *Id.*

138. *Id.* at 181.

139. *Id.* at 196.

140. *Crawford*, 553 U.S. at 192.

141. *Id.* at 194.

142. *Id.* at 197.

fraud-free election process encourages individuals to take part in the democratic process.¹⁴³ Controversy regarding election administration following the 2000 Presidential election stirred public distrust in the election process. Voter ID laws aim to rectify this problem by restoring honesty to the election process, thereby restoring voters' faith in the accuracy of election results.

The majority of the Court held that these three asserted interests outweighed the burden imposed on any one class of voters or individual voter.¹⁴⁴ Justice Stevens noted, "The record sa[id] virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed."¹⁴⁵

The dissent led by Justice Souter noted that Indiana's law imposed such a burden on "tens of thousands of the State's citizens," such that many would likely be deterred from voting under the new requirements.¹⁴⁶ Finding that the balancing test landed in favor of the challengers, the dissent would have found the law to be unconstitutional.¹⁴⁷ In weighing the burdens placed on would-be voters, the dissent especially noted the onerous cost and travel involved in obtaining a valid identification card as well as the added difficulties that accompany casting a provisional ballot.

The dissent in *Crawford* picked up on some of the difficulties accompanying Indiana's Voter ID law. The recognition that a provisional ballot is not a substitute to casting an actual vote on Election Day is an important one. The burden of Voter ID laws extends beyond the trouble of simply obtaining an ID for religious objectors such as the Amish. Other burdens such as travel, inconvenience, and weighing religious beliefs are also to be taken into account. In addition to these burdens, studies show the problems of validating provisional ballots and establishing how many of the provisional ballots actually end up being counted.

One study completed during Indiana's 2008 primary election showed that of the 2771 provisional ballots that were cast, only 752 ended up being counted.¹⁴⁸ This study shows that more than just a few voters were unable to comply with the Voter ID law.

143. *Id.*

144. *Id.* at 202.

145. *Crawford*, 553 U.S. at 201.

146. *Id.* at 209.

147. *Id.*

148. Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 497 (2008).

However, those on the other side of the Voter ID debate will note that these ballots still consist of only a small number of the total ballots cast, and that the percentage of provisional ballots cast due to photo ID-related issues are even smaller. Unfortunately, studies measuring the number of provisional ballots actually counted failed to consider voters who are deterred from voting all together. Potential Amish voters who are already stepping outside the traditional beliefs of their religion by voting may decide that new photo identification requirements make the barrier to casting a vote too high and decide to refrain from the democratic process altogether.

Crawford was the first challenge to a state Voter ID law in the United States. In *Crawford*, the Indiana Democratic Party challenged the Indiana Voter ID law as a violation of the 14th Amendment.¹⁴⁹ The outcome of this challenge, as decided by the Supreme Court of the United States, was that voting was not a fundamental right. Since voting was not viewed as a fundamental right, the Court applied rational basis review in finding that the federal Constitution did not prohibit Indiana's law.¹⁵⁰

Crawford is considered a landmark case for several reasons. First, the claimants never presented any type of evidence tending to show hardship to voters. Since the Indiana Democratic Party failed to show any injury, expectations for a successful challenge were dismal from the start. Next, the Supreme Court only reached a holding on whether the claimants succeeded in making their case, which they did not. The Court did not go on to reach a decision as to whether Indiana's proposed Voter ID law was constitutional or not. In addition, no decision was made about whether Indiana's Voter ID law violated Indiana state law. By giving no guidance on the issue of whether the law was in violation of Indiana's state constitution, the Supreme Court left the question open for the other forty-nine states to decide whether Voter ID laws violate state constitutions.

III. THE PENNSYLVANIA FRAMEWORK FOR DETERMINING STATE CONSTITUTIONALITY OF VOTER ID LAWS

In *Commonwealth v. Edmunds* the Pennsylvania Supreme Court pronounced a framework for determining when a law that was not a violation of the federal Constitution was nonetheless a

149. See *Crawford*, 553 U.S 181 (2008).

150. *Id.*

violation of the state constitution.¹⁵¹ The court's test consisted of four prongs. First, the court examined the text of Pennsylvania's state constitution, next the court considered Pennsylvania's history, then the court looked at cases from other jurisdictions, and finally, the court considered public policy.¹⁵²

In Pennsylvania, if a law is in violation of the state's constitution, it is considered to be per se invalid. However, when a law's constitutionality is not clear, it must then be analyzed under the three latter prongs of the test: history, surrounding jurisdictional law, and public policy. This test provided by the court makes it possible for a law to be aligned with the federal Constitution, but nonetheless be in violation of the Pennsylvania state constitution.

Applewhite v. Commonwealth, the recent Pennsylvania Voter ID case that became highly covered by the media in the fall of 2012, was the first application of the *Edmunds* constitutionality test to Pennsylvania's Voter ID law.¹⁵³ The court in *Applewhite* found that Pennsylvania's Voter ID law did not satisfy the first element of the *Edmunds* test.¹⁵⁴ The reasoning was that Pennsylvania's constitution contains language expressly prohibiting the state from interfering with suffrage.¹⁵⁵

As for the second prong of the *Edmunds* test, Pennsylvania's law was not in line with its historically liberal construction of the right to vote. In regard to the third prong, the court looked at other jurisdictions and found that state supreme courts in Missouri and Wisconsin had disapproved nearly identical Voter ID laws. As a result the court placed an injunction on the implementation of the Voter ID law for the 2012 election season.¹⁵⁶

IV. A NEW PROPOSAL FOR VOTER IDENTIFICATION LAWS IN INDIANA

A. *Less Burdensome Methods of Preventing Fraud*

Critics of Voter ID laws stress that less burdensome and possibly more effective methods of preventing voter fraud exist. These alternatives include voter registration databases maintained at

151. *Pennsylvania v. Edmunds*, 586 A.2d 887 (Pa. 1991).

152. *Id.* at 895.

153. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

154. *Id.* at *8.

155. PA. CONST. art. 1, § 5.

156. *Applewhite*, 2012 WL 4497211 at *8.

the state level, cleansing of registration rolls, the use of unique identifying numbers, in person affirmation, signature comparison, and increased publicized prosecution.

The problem of inflation of registration rolls has been complained of by many states that are now passing stricter Voter ID laws. Historically, registration databases were maintained at the city or county level.¹⁵⁷ With each county in charge of maintaining its own list, major issues of inflation arose as voters moved to other counties within the same state.¹⁵⁸ After moving, voters would still appear on the registration roll of the county that they used to live in.¹⁵⁹ With regard to registration rolls containing the names of individuals who have since moved, the opportunity for voter fraud rose.¹⁶⁰

Currently, HAVA has implemented requirements for statewide voter registration databases.¹⁶¹ These new databases maintained at the state level have eliminated many of the discrepancies and problems that arose in maintaining registration databases at the state level and decreased the opportunity for voter fraud.¹⁶² Much of the fear surrounding voter fraud may be eliminated by these statewide registration databases.

An accurate cleansing of registration rolls will also diminish states concerns with inflation. The means are already in place for the cleansing of registration rolls to make sure that only eligible voters are included on rolls. Both HAVA and NVRA include provisions that allow for the removal of ineligible voters.¹⁶³ Comparing the registration rolls to death records and felony records are one way these laws allow for the removal of inaccurate listings in rolls.

The laws permit states to remove individuals from rolls after two federal election cycles of inactivity once they have not answered non-forwardable postcards.¹⁶⁴ While this cleansing may take some time to implement, the means for their enforcement are already in place and thus eliminate one of many stated purported

157. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 229-30 (2008).

158. *Id.* at 195.

159. *Id.* at 196.

160. *Id.*

161. Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

162. *Policy Brief on Alternatives to Voter Identification*, *supra* note 11.

163. Help America Vote Act, Pub. L. No. 107-252, § 163-82.27 116 Stat. 1666 (2002). *See also* National Voter Registration Act, 42 U.S.C. § 1973 (1993).

164. Help America Vote Act, Pub. L. No. 107-252, § 163-82.27 116 Stat. 1666 (2002). *See also* National Voter Registration Act, 42 U.S.C. § 1973 (1993).

interests in implementing Voter ID laws. The proper use of cleaning of registration rolls means that the reason for many states concerns over voter inflation no longer exists and begins to make the weighing of states interests against voters' burdens fall on the side of the voters.

Verification of unique identifying numbers is another alternative that courts may consider for less burdensome methods of preventing voter fraud. HAVA already has measures in place for all voters who have registered since 2003, verifying their identity when registering by the use of unique identifying numbers.¹⁶⁵ When registering to vote, a citizen is required to provide either their driver's license number or the last four digits of their social security number.¹⁶⁶ These numbers are then crosschecked with Motor Vehicle and Social Security Administration databases to verify the voter's identity.¹⁶⁷ This method of verification could easily be implemented to verify the identity of all voters. Since neither driver's license numbers nor social security numbers are publicly available, states could ensure that voter fraud is safely prevented. The implementation of such a verification system would be free of cost to citizens and would not impose a high burden since most individuals possess either a driver's license or a social security number.

Another viable method of deterring voter fraud is the use of signature comparisons. Most jurisdictions already employ some form of signature comparison at the polls.¹⁶⁸ When registering to vote, an individual provides his signature, which is then copied into the poll books and signed by the individual at the time that he places his vote.¹⁶⁹ This same method is used for absentee ballots sent by mail in order to confirm the identity of the voter.¹⁷⁰ Yet Voter ID laws across the nation do not address the possibility of voter fraud via absentee ballots. Instead, they rely heavily on the same method of comparing signatures that is done at the polls. If this method is effective for absentee ballots, then there is no reason to deem it ineffective for voters who elect to cast their votes in

165. *Id.*

166. Help America Vote Act, Pub. L. No. 107-252, § 163-82.27 116 Stat. 1666 (2002).

167. *Id.*

168. *Policy Brief on Alternatives to Voter Identification*, *supra* note 11.

169. Help America Vote Act, Pub. L. No. 107-252, § 163-82.27 116 Stat. 1666 (2002).

170. *Id.*

person. In fact, the chances for fraud would seem to decrease when voters cast their vote in person, since a veil of anonymity is provided by casting the absentee ballot instead.

Other less practicable methods of preventing voter fraud include highly technical measures involving biometrics. However, these methods would be costly, and as such it is unlikely that many states will adopt them.

Finally, states can enforce laws against voter fraud. It is a federal crime to fraudulently vote under another citizen's name. The punishment for engaging in this illegal activity can result in up to five years in prison and fines totaling \$10,000.¹⁷¹ Such harsh punishments serve to deter the illegal activity of voter fraud. A few highly publicized convictions for voter fraud would serve as effective notice to citizens who would otherwise engage in the illegal activity and presumably result in deterrence. To date, there have been prosecutions and convictions for voter fraud in forty-six states.¹⁷² Indiana has recently followed this approach of increasing highly publicized prosecution of voter fraud as a method of deterrence. Just recently in 2012, Indiana indicted a mayoral primary candidate on voter fraud charges.¹⁷³ The indictment claimed that the mayoral candidate forged the ballots of two women in the 2011 elections.¹⁷⁴ At the same time another individual in Indiana was indicted for falsifying two absentee ballots.¹⁷⁵

B. A True Exception for Religious Objectors

Another possible change to Indiana's Voter ID law that would uphold state interests in preventing fraud while still reducing the current burden on Amish voters would be to allow religious voters to execute an affidavit regarding photo-exempt identification at the polling place on Election Day. Currently, Amish voters who choose to vote at the polls on Election Day are limited by Indi-

171. 42 U.S.C.A. § 1973gg-10.

172. *Did You Know There are Voter Fraud Convictions and Prosecutions in 46 States?*, TRUETHEVOTE.ORG, <http://www.truethetvote.org/news/did-you-know-there-are-voter-fraud-convictions-and-prosecutions-in-46-states> (last visited Jan. 2, 2014).

173. *New Albany Mayoral Primary Candidate Indicted on Voter Fraud Charges*, WLKY.com, (Sept. 14, 2012, 6:57 AM), <http://www.wlky.com/news/politics/New-Albany-mayoral-primary-candidate-indicted-on-voter-fraud-charges/-/9365900/16593866/-/34kwm5/-/index.html#ixzz26UG9OUoe>.

174. *Id.*

175. *Id.*

ana's law requiring them to vote by provisional ballot.¹⁷⁶ They then must travel to the county election board within ten days to complete an affidavit confirming that a religious exemption applies to them.¹⁷⁷ This process has to be completed each time a religious objector seeks to vote at the polls.¹⁷⁸ The provisional ballot process of in-person voting was recognized by the court in *Applewhite* to present significant concerns of disenfranchisement.¹⁷⁹ Instead of having religious objectors travel to the county election board, a true exception for religious objectors would allow them to execute the affidavit at the polling place on election day to eliminate the need for the additional travel and to allow their vote to be counted right away. This would be a true exception to Indiana's Voter ID law for religious objectors, because it would allow them to vote by actual ballot. Completion of the affidavit would still ensure that the exemption remains limited to voters with a true religious objection.

Yet another way to accommodate religious objectors would be to take an approach similar to the Pennsylvania legislature and allow for religious objectors to vote upon presenting a non-photo valid ID.¹⁸⁰ This alternative would greatly decrease the unfair burden placed on Amish voters in states with the strictest Voter ID laws. Similar to the proposed Pennsylvania law, Indiana could allow for religious objectors to complete an application in order to obtain a free non-photo government ID that would be presented upon voting. This ID would eliminate any concerns associated with disenfranchisement associated with provisional ballots. Not only would religious objectors be able to cast an actual ballot, which would eliminate the concern over whether they would actually be counted, it would also eliminate the burden created by requiring the objector to travel to the county office to confirm their religious exception after each election.

Decreasing the burdens associated with travel and being required to cast a provisional ballot would lessen the burden on Indiana's religious objectors. However, precautionary measures would have to be implemented in order to limit the exemption to true objectors and to make sure that those who should not receive

176. Senate Enrolled Act No. 483; 2005 Ind. Acts 2005.

177. *Id.*

178. *Id.*

179. *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

180. *Id.*

the same protection are not using the exception unfairly. Pennsylvania's proposed law sets forth an exemplary precautionary measure. Pennsylvania would issue a non-photo voter ID, which would be renewable every four years.¹⁸¹

The state of Pennsylvania also requires those seeking an ID under this exemption to complete an eighteen-question application in order to evaluate the legitimacy of the religious objection claim.¹⁸² These questions are used to ensure that the exemption is not misused and is limited to legitimate cases of religious objection.¹⁸³

However, some opponents to the law argue that the application is a cumbersome process that still could deter eligible voters from obtaining ID. There is the chance that religious objectors may view the questions as too intrusive and choose to forego the voting process.¹⁸⁴ For this reason, great care must be taken in drafting the application questions to make sure that each question serves a purpose and is helpful in determining eligibility for the exception, while minimizing unnecessary intrusiveness.

CONCLUSION

When considering the constitutionality of Indiana's Voter ID law, the Court in *Crawford* focused on whether the burden the law imposes on voters is outweighed by significant state interests. In considering exactly what the burden was, the possible difficulties faced by religious objectors, specifically Indiana's Amish population, were largely overlooked. Justice Stevens himself remarked,

181. Jan Murphy, *Religious Questions for Pennsylvania Voter ID Law Draw Fire*, PENNLIVE.COM (Apr. 8, 2012, 12:00 AM), http://www.pennlive.com/midstate/index.ssf/2012/04/religious_questions_for_pennsy.html.

182. *Id.* The application asks a variety of questions such as:
 Describe your religion;
 How many members are there of your religion?;
 How many congregations?;
 What's the process by which you came to the religion?;
 What religious practices do you observe?;
 Do other family members hold the same religious beliefs?;
 Does it have sacred texts or commandments? If so, please describe or provide them;
 Does it have ceremonies or meetings?;
 Describe three significant requirements or prohibitions of your religion;
 Describe the ways in which your religion affects your daily life.

183. *Id.*

184. *Id.*

“The record sa[id] virtually nothing about the difficulties faced by either indigent voters or voters with religious objective to being photographed.”¹⁸⁵

However as this note has demonstrated, the Amish presence at the polls is something to be recognized and the burdens imposed on this particular group are greater than may have been originally recognized. Creating additional hurdles for a group that was already hesitant in exercising their voting rights, makes almost certain that additional burdens will dissuade the Amish from continuing to vote. Requiring religious objectors to cast a provisional ballot does not provide a true exception to the Voter ID law and comes with additional burdens for voters with religious objections to photographs.

The burdens associated with casting a provisional ballot have previously been recognized in other cases related to voter IDs, such as the Pennsylvania case of *Applewhite v. Commonwealth of Pennsylvania*.¹⁸⁶ Requiring Amish voters to incur a burden to cast their vote will likely dissuade Amish voters.

Easy alternatives to the photo ID law exist and can be implemented for the Amish, specifically the execution of an affidavit in connection with the providing of photo-exempt identification at the polling place on Election Day. By following the lead of other states that also have tried or have successfully implemented constitutional Voter ID laws, Indiana can continue to protect state interests while continuing to afford Amish voters an unburdened right to vote.

Pennsylvania’s religious exemption for religious objectors, which allows them to complete an application to receive a free non-photo ID is another example of an alternative that could prove effective in Indiana. This note has shown the concerns that Voter ID laws raise for the Amish population, particularly in Indiana. Accommodating the state interests of preventing voter fraud can still be accomplished while continuing to afford Amish in Indiana with protection of their First Amendment rights.

185. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 201 (2008).

186. See *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).