

THE RISE AND FALL OF PENNSYLVANIA'S VOTER IDENTIFICATION LAW

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Enacted in the wake of election 2000, the Help America Vote Act of 2002 (HAVA) mandated nationwide standards in the conduct of federal elections. Several states went beyond the statutory requirements of HAVA and passed legislation requiring voters to show photo IDs at the polls. Pennsylvania passed such a law in 2012, triggering a protracted legal battle in state courts that continued well after that year's presidential election. Although the Commonwealth lost this fight because of noncompliance with the statutory guarantee of liberal access to voter ID cards, the law may yet be upheld should the appeal process be taken further.

The Nationwide Push for Strict Voter Identification

The debacle of the 2000 presidential election prompted a national debate over electoral reform. One of the notable policy consequences of that debate was the enactment of the Help America Vote Act of 2002 (HAVA), which required the states to revamp their voter registration systems by implementing a “single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the state level” (Help America Vote Act 2002, 42 USC §15483 (a)(1)(A)). Presumably to curb the potential for voter fraud and maintain a fair electoral system, another key provision of the Act required the states to verify the identity of individuals who registered by mail and had not previously voted in a federal election (Help America Vote Act 2002, 42 USC §15483 (b)(2)(A)(i)(I)-(II)). To enhance electoral integrity beyond the minimum requirements of HAVA, some states began considering legislation to require all voters to show proof of their identity at the polls (Hale and Ramona 2010).

Indiana was a pioneer state in the introduction of strict photo identification laws. Approved in April 2005, Public Law 109-2005 required Indiana residents who cast their ballots in person to provide a current and valid photo identification (Senate Enrolled Act No. 483 2005, IC §3-11-8-25.1). Exempt from the photo ID requirement were people confined to nursing homes (Senate Enrolled Act No. 483 2005, IC §3-11-8-25.1(e)) and registered voters who qualified for absentee voting under state law (Senate Enrolled Act No. 483 2005, IC §3-11-10-1.2). Voters who did not have an officially sanctioned form of ID, or who for religious reasons did not wish to have their picture taken, were allowed to cast provisional ballots and report to their county election office within ten days of the election to execute an affidavit affirming the applicable exemption in order for their ballots to count (Senate Enrolled Act No. 483 2005, IC §3-11.7-5-2.5). Additionally, any voter who could not afford to pay for an official state-issued photo ID would be issued one at no charge (Senate Enrolled Act No. 483 2005, IC §9-24-16-10). These facilitative provisions and exceptions, however, did not insulate the law from the legal challenges that soon followed.

A coalition of civil rights organizations, along with the Indiana Democratic Party, challenged the voter ID law. They contended that because of the paucity of voter fraud cases, the law unjustifiably and arbitrarily burdened the voting rights of many properly registered voters, especially indigent, elderly, and minority voters, in violation of the Equal Protection Clause of the Fourteenth Amendment. The U.S. District Court for the Southern District of Indiana upheld the Act, noting that the plaintiffs, who had the burden of proof, failed to introduce “evidence of a single, individual Indiana resident who will be unable to vote” or who is “unduly burdened” by the requirements of the Act (*Indiana Democratic Party v. Rokita* 2006: 783). A divided panel of the U.S. Court of Appeals for the Seventh Circuit affirmed, with a strong dissent by Judge Evans contending that the Indiana law was “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic” (*Indiana Democratic Party v. Rokita* 2006: 954). This interpretation of the law’s intent was especially valid, he added, given that “no one—in the history of Indiana—had ever been charged with violating” the state’s election law (*Indiana Democratic Party v. Rokita* 2006: 955).

On appeal, the U.S. Supreme Court affirmed the lower courts’ rulings in the test case of *Crawford v. Marion County Election Board* (2008), which garnered the attention of many state legislatures. Upholding the law, a plurality of the Court acknowledged the legitimacy of the state’s interest not only in “detering and detecting voter fraud” but also in “safeguarding voter confidence” and “participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and

inefficient” (*Crawford v. Marion County Election Board* 2008: 191). As to the argument that the law was intended to advantage Republicans at the expense of Democrats, the Court found that the law was “nondiscriminatory” and “supported by valid neutral justifications,” which “should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators” (*Crawford v. Marion County Election Board* 2008: 204).

At the time it was passed, Indiana’s law was considered to be the strictest voter ID measure in the country. In upholding it, the Supreme Court rejected the contention that voter ID laws are subtle discriminatory devices akin to literacy tests, whose real purpose was to disfranchise rather than maintain an informed electorate. The *Crawford* ruling also established that voter photo ID laws are constitutionally sound so long as they are neutral on their face and in their application, even if they are deemed inconvenient by some voters or have the incidental effect of reducing voter turnout. Moreover, a state need not prove that voter fraud has already occurred to justify the burden that the photo ID requirement may place on potential voters (Schaffer and Wang 2009). The preservation of electoral integrity *per se* is a sufficient governmental interest to sustain the statute.

Though divided in its reasoning, the Court was united on the principle that voter ID laws are a valid exercise of a state’s police power to prevent fraud and govern elections. In his dissenting opinion, Justice Souter acknowledged “the legitimacy of interests on both sides” of the case, but he chided the plurality for not applying a balancing test to determine whether the state’s interest in structuring elections outweighed the burden the law imposed on voters’ rights (*Crawford v. Marion County Election Board* 2008: 210). Similarly, Justice Breyer “share[d] the general view of the lead opinion insofar as it holds that the Constitution does not automatically prohibit Indiana from enacting a photo ID requirement,” but he was disappointed by the plurality’s failure to apply a balancing test to the interests at issue (*Crawford v. Marion County Election Board* 2008: 238). The reasoning and language of these dissents show that the Court was split not so much over a state’s authority to require a photo ID to vote, as over the grounds on which it would uphold that requirement.

Encouraged by *Crawford*, other states began crafting their own photo identification programs. This trend gained significant momentum in the wake of the Republican tidal wave in the election of 2010 that gave the GOP control of more state legislatures. The new laws were generally patterned on Indiana’s. At the beginning of 2011, Indiana and Georgia were the only states requiring a government-issued photo ID card to vote; but within a year or so, the number had increased to sixteen (Hirschhorn 2012). Following the example of more than a dozen states, Pennsylvania passed its own voter

identification law in March 2012, using Indiana's framework as its model (Ariosto 2012). This move precipitated a protracted legal battle that began in the run-up to that year's presidential election.

The Enactment of Pennsylvania's Voter Identification Law

The Pennsylvania Voter Identification Protection Act¹ had its origin in House Bill 934, which was introduced on March 5, 2011, by State Representative Daryl Metcalfe (R-Butler), chairman of the House State Government Committee. Democrats vehemently opposed the bill, but it had enough Republican votes to pass. Tom Corbett, the state's Republican governor, also supported the bill. Passing the House on June 23, 2011, the bill advanced to the Senate, where it cleared the Appropriations Committee on March 5, 2012, and the full chamber two days later by a vote of 26–23. The bill then returned to the House for a final vote on the Senate's amendments. On March 14, 2012, after three straight days of often impassioned debate, the measure passed the House in a nearly party-line vote of 104–88, with only three Republican lawmakers joining the entire Democratic caucus in opposition (Finarelli 2012).

Within hours of the bill's passage, Governor Corbett signed it into law, making Pennsylvania the sixteenth state in the nation to enact a photo identification requirement for voting (Miller and Mayes 2012). Pennsylvania toughened its voting rules considerably with this legislation, which did away with non-photo IDs and extended the proof of identity requirement to all voters in every election. Prior state law required identification only from people voting for the first time in a precinct and it allowed non-photo identification, such as utility bills and state or local government-issued checks (Associated Press 2012). Governor Corbett defended the tougher rules as necessary to ensure fair and accurate elections. As he signed the bill, the governor touted it as a means of protecting the "sacred principle . . . one person, one vote" (Miller and Mayes 2012). He further assured the citizenry that the bill "does not interfere with anyone's legal right to vote," and he pledged that the state would provide a free photo ID for voting to anyone who lacked a valid ID (Gorsegner 2012).

The Pennsylvania voter ID law was similar to the Indiana law upheld in *Crawford*. Acceptable forms of identification included any photo ID issued by the federal government, the Commonwealth of Pennsylvania, a municipality of the Commonwealth, an accredited Pennsylvania public or private institution of higher learning, or a Pennsylvania care facility (Pennsylvania Election Code 2012, 25 P.S. §2602(z.5)(2)). All IDs must have an expiration date that is current. As noted above, a free non-driver photo ID would be provided to voters who did not possess any of the

required IDs. Individuals with a religious objection to being photographed would be allowed to use a state-issued non-photo ID (Pennsylvania Election Code 2012, 25 P.S. §2602(z.5)(1)). A few minor differences set the two laws apart. For instance, Pennsylvania's law allowed voters who did not present an ID card at the polls to verify their identity in person within six rather than ten days of voting (Pennsylvania Election Code 2012, 25 P.S. §3050(a.4)(5)(ii)(D)-(E)). Also at variance with the Indiana law, absentee ballot voters in Pennsylvania were not exempted from identification. They must provide either their driver's license number or the last four digits of their Social Security number if they did not have a driver's license (Pennsylvania Election Code 2012, 25 P.S. §2602(z.5)(3)(ii)).²

It was somewhat surprising that the law did not divide the electorate as deeply as it had divided the state legislature, considering that it had been enacted in a presidential election year when partisan fervor tends to be especially intense. According to a Quinnipiac University poll conducted shortly after the law's passage, Pennsylvania voters backed the idea of requiring an ID to vote by a 2:1 margin (Quinnipiac University Poll 2012). Conducted in June 2012, the poll found that Pennsylvania voters approved of the photo ID requirement, 66% to 32%. Republicans approved by 91% to 7% and independents approved by 64% to 35%, but Democrats were opposed by 53% to 46%. All age and income groups strongly supported the law. It is unclear, however, whether public support was strong because an estimated 99% of the state's eligible voters already had acceptable photo IDs (Barcousky 2012), or because they shared their governor's view that the law "sets a simple and clear standard to protect the integrity of our elections" (Hirschhorn 2012).

Some of the Democrats against the law likened it to "old-fashioned Jim Crow tactics," and accused Republicans of trying to "steal the White House" by manufacturing barriers that limit access to the ballot box, especially in poor and minority precincts (Levy 2012). High-profile political action groups, such as the AARP, the NAACP, the Homeless Advocacy Project, and the League of Women Voters were highly critical of the law. The backlash was hardly surprising given that a coalition of 45 organizations called Protect Our Vote had vociferously opposed House Bill 934 when it came to a vote (Thompson 2012a). The American Civil Liberties Union announced it was preparing a challenge to the law, which was to take effect in the November general election rather than in the April state primary (Jerry 2012).³ Some citizen groups organized protests, while others conducted voter education workshops, but all advised voters to take advantage of the free photo identification cards offered by the Pennsylvania Department of Transportation (PennDOT), pending the legal challenge.

Objections to Pennsylvania's Voter Identification Law

Opponents presented six arguments against the law, one specific to Pennsylvania and the others applicable to all voter identification laws. To start with the state-specific argument, opponents said the legislation was too costly to implement. Cost estimates for implementing the voter ID law ranged from \$4 million to \$11 million (Jerry 2012). The Harrisburg-based nonpartisan Pennsylvania Budget and Policy Center (PBPC) issued a statement in May 2011 estimating “the first-year costs for a voter identification program of approximately \$11 million” (Ward 2011). It was feared that considerable expenditures would have to be devoted to the public awareness campaign, the poll workers’ training, and the free identification cards at a time when the Commonwealth was facing a projected budget deficit of \$300 million that necessitated painful cuts in essential services (Boehm 2012).⁴ The limited availability of funds, critics argued, should have barred the introduction of yet another government program that would further strain the state budget by increasing election spending.

Although the vast majority of Pennsylvanians already had photo IDs, so the second argument went, the law could still prevent large numbers of eligible voters from participating in the democratic process. Senior citizens, first-time and students voters, and low-income and minority groups were among the populations deemed most vulnerable to disfranchisement under the law. For example, the AARP reported that as many as 570,000 of its 2.7 million Pennsylvania members did not have proper voter identification (Brown 2012). Moreover, a study by the Brennan Center for Justice at New York University School of Law found that one in four blacks and one in six Hispanics lacked a recognized photo ID, compared with one in ten of the general population (Pilkington 2012). Young people and student voters also drew concern because while most university-issued IDs have photos, they typically lack an expiration date, not to mention that out-of-state student IDs are unacceptable for voting. Of 114 colleges and universities surveyed by the NAACP, 95 issued student IDs without expiration dates (Brown 2012). The requirement that the names on the proof of residency and the ID match also had the potential of disfranchising the many women who did not change the name or update the address on their ID documents after they got married. In addition, thousands of senior citizens were at risk of losing their right to vote because they had no current driver’s license, passport, or military ID.

The third objection lodged by opponents was that while the non-driver photo ID itself may be free, the documents needed to apply for it are not (Thompson, 2012b).⁵ These documents include birth certificate, marriage license, passport, or citizenship/naturalization certificate, none of which is free of charge. Nor did the law arrange for the commute to and

from PennDOT centers or the other state offices that issue the underlying documents. These trips could be onerous on physically handicapped and wheelchair-bound voters and costly to those living on a fixed income. In addition, the state would not pay to replace people's ID cards that might be stolen or lost through no fault of their own. This is not a farfetched or trivial concern in a country where 1,000 wallets and purses are stolen every two minutes (Ohio Department of Aging 2011). In fact, as will be discussed below, the lead plaintiff in the court challenge to the law, Viviette Applewhite, had lost her Social Security card when she was robbed of her purse. Another plaintiff, Wilola Shinholster Lee, had lost her birth certificate in a house fire, and Georgia (her birth state) was unable to locate her birth record to issue a new birth certificate (Bronner 2012).

Doubts were also raised about the law's rationale and potential efficacy. Opponents contended that because voter fraud was hardly a problem in Pennsylvania and adequate safeguards were already in place, then the law would only serve to disfranchise citizens without furthering its stated purpose (Wojcik 2012). Under prior election law, anyone voting for the first time in a district had to appear in person at the polls on Election Day and provide proof of residency and identity. Also, every voter was required to sign the poll list before receiving a ballot, and the sign-in (or mail-in) signature had to be checked against the one in voter registration records. Opponents of the new law maintained that these requirements were effective in preventing and deterring voter fraud for many years as evidenced by the dearth of such prosecutions, which explains why proponents of voter ID laws typically point to the system's vulnerability to fraud and abuse without proving their existence (Ansolabehere and Persily 2008). Hence, critics insisted that the law presented a "solution in search of a problem" (Gregg 2012).

The fifth argument is essentially an extension of the fourth. Because opponents saw no practical purpose in requiring a voter ID card, they attacked the law as merely a Republican political scheme designed to reduce Democratic turnout and thereby give the GOP an electoral advantage. Furthermore, they charged that Republican legislators had acted in bad faith, knowing that most of the potentially disfranchised voters belonged to the Democratic Party (Douglas 2011). Partisan wrangling aside, some studies conducted by neutral third parties, such as the Brennan Center for Justice, found that voter ID laws disproportionately disadvantage racial minorities, among other groups that tend to vote Democratic. While other studies yielded mixed results about the effect of such laws on voter turnout (see de Alth 2009), the fact remained that hundreds of thousands of voters across Pennsylvania lacked acceptable forms of identification and most of them were traditionally Democratic supporters.

Finally, voter ID laws in general have been criticized as a step backward in voting rights because they may hamper the democratic process and

impair the exercise of a fundamental right. As stated earlier, for lack of proper identification the new rules could result in denying eligible voters the opportunity to vote, or allowing them to cast only provisional ballots until their eligibility is established (Baker 2012). According to data released in July 2012 by the Pennsylvania Department of State, as many as 758,939 voters, or 9.2% of the state's registered voters, could be disqualified from voting for not having a Pennsylvania driver's license, the most common form of photo ID in the state (Madison 2012). It is true that IDs are an essential part of everyday life and are required for many activities, such as flying, driving, drinking, and obtaining gun permits. What makes voting different, an opponent of voter ID laws would argue, is that voting is a sacrosanct right of citizenship in a class by itself, as well as an important civic duty that should be encouraged rather than stifled (Sullivan 2012). It is already difficult enough for many people to vote. The voter ID law could further compound the difficulties facing many voters and prevent or dissuade them from exercising their voting rights.

Pennsylvania's Voter Identification Law Litigated

Opponents of the voter ID law tried to achieve in state courts what they could not in state legislative chambers. On May 1, 2012, the ACLU, along with several other civil rights groups,⁶ filed suit to enjoin the Corbett administration from enforcing the law. The plaintiffs pointed to three alleged flaws that put the law at odds with the state Constitution. They argued first that the law "unduly burdens the fundamental right to vote in violation of Article I, Section 5 of the Pennsylvania Constitution"; second that it "imposes burdens on the right to vote that do not bear upon all voters equally under similar circumstances in violation of the equal protection guarantees of Article I, Sections 1 and 26 of the Pennsylvania Constitution"; and third that it "imposes an additional qualification on the right to vote in violation of Article VII, Section 1 of the Pennsylvania Constitution" (*Applewhite v. Commonwealth* 2012a: 4–5).

The Commonwealth Court Upholds the Voter Identification Law

The action was brought on behalf of ten Pennsylvanians struggling to obtain IDs, among them a 93-year-old Philadelphia resident, Viviette Applewhite, who had voted regularly since 1960 and was now in danger of being disfranchised by the law. With her eventful past and complicated circumstances, Applewhite appeared to be an ideal lead plaintiff for the case. She was a twice-married elderly black woman who had been adopted as a child and who had gone through several name changes (Bronner 2012). In

addition, she had lost her Social Security card when her purse was stolen in a supermarket four years before, and she could not procure a certified copy of her birth certificate because of the “bureaucratic confusion surrounding her identity,” as one commentator tersely put it (Ungar 2012). Shortly after the lawsuit was filed, PennDOT made an exception for Viviette Applewhite and issued her an ID, even though she lacked the documentation required by law and never had a driver’s license in her life. Still, this flexibility on the part of the state did not render the case moot because of the other individual and organizational plaintiffs named in the suit.⁷

On August 15, 2012, Commonwealth Judge Robert Simpson issued his opinion upholding the law as a “reasonable, nondiscriminatory, non-severe burden” that is justified and outweighed by “a relevant and legitimate state interest” (*Applewhite v. Commonwealth* 2012a: 88). After setting out the background of the case, summarizing the key provisions of the statute (Act 18) under consideration, and delineating the standard that should apply for granting or denying the preliminary injunction motion, Judge Simpson went on to reject the facial challenge because the plaintiffs failed to meet the heavy burden of showing that every application of the statute would be unconstitutional, or “no set of circumstances exist under which the statute would be valid” (*Applewhite v. Commonwealth* 2012a: 22). Nor did the judge find merit in the contention that the statute would inevitably disadvantage certain voters, noting that it “applies equally to all qualified electors . . . [and] does not expressly disenfranchise or burden any qualified elector or group of electors” (*Applewhite v. Commonwealth* 2012a: 30). He attached no constitutional significance to House Majority Leader Mike Turzai’s brazen boast in a videotaped Republican State Committee meeting that the enactment of the voter ID law would “allow Governor Romney to win the state of Pennsylvania” (Cernetich 2012). Dismissing the “partisan motivation” argument, Judge Simpson asserted that while Turzai’s “tendentious statements” were “disturbing,” they “did not invalidate the interests supporting Act 18, for factual and legal reasons” (*Applewhite v. Commonwealth* 2012a: 86).

With the failure of the facial challenge, it remained for the plaintiffs to furnish the circumstances under which the statute was applied in an unconstitutional manner, but this would not be possible until after the enforcement date of November 6. Stated differently, because the statute was found facially valid, it could only be subject to an as-applied challenge, which Judge Simpson concluded was unripe because the statute was not in operation at the time. After making this determination, he proceeded to explain at length why the statute was a constitutionally permissible means of regulating elections. The bulk of the 70-page opinion analyzed and drew analogies from several recent precedents, especially the 2008 *Crawford*

decision in which the “Supreme Court upheld a nearly identical Indiana voter ID law despite the absence of any evidence of in-person voter fraud occurring in that state” (*Applewhite v. Commonwealth* 2012a: 86).

The Pennsylvania Supreme Court Remands the Case

In denying the motion for a preliminary injunction, the trial court kept the voter ID law in effect and cleared the way for the case to proceed further. The possibility of obtaining an injunction from a higher court was not out of reach, given that Election Day was still about 11 weeks away. On August 23, 2012, the Supreme Court of Pennsylvania granted the request for expedited review and scheduled the oral arguments for September 13. As the trial date was nearing, some voting rights advocates suggested it did not bode well for the Pennsylvania law when a federal court blocked a Texas voter ID law. Proponents of the law, however, discounted such speculation because Pennsylvania legislators had avoided the constitutional pitfall that doomed the Texas law by providing for free photo IDs.⁸ They were even optimistic since the decision of the lower court could stand if the state supreme court split along predictable ideological lines.⁹

Neither side was correct in its conjectures. On September 18, after a week of testimony and oral arguments, the highest state court issued a surprise 4–2 ruling, ordering the case sent back to the Commonwealth Court for reconsideration. Rather than determine the Act’s constitutionality, the supreme court opted to “return the matter to the Commonwealth Court to make a present assessment of the actual availability of the alternate identification cards on a developed record in light of the experience since the time the cards became available” (*Applewhite v. Commonwealth* 2012b: 5). By not granting a permanent injunction, the court tacitly recognized that the Act could conceivably be constitutionally applied if the state implemented adequate measures to ensure that voting rights would not be curtailed. Still, the decision gave petitioners some hope by allowing their facial constitutional challenge to proceed. Correcting the lower court, the supreme court upheld the validity of making a facial challenge because of the short-term implications of the Act. The court reasoned that “if a statute violates constitutional norms in the short term, a facial challenge may be sustainable even though the statute might validly be enforced at some time in the future” (*Applewhite v. Commonwealth* 2012b: 5).

Although the state supreme court did not render a conclusive judgment, its ruling was perceived as a victory for the law’s opponents insofar as it restricted the lower court’s range of review, thereby pressuring it to stay the law from taking effect. In remanding the case, the supreme court specifically instructed the lower court to “consider whether the procedures being used for deployment of the cards comport with the requirement of

liberal access which the General Assembly attached to the issuance of PennDOT identification cards” (*Applewhite v. Commonwealth* 2012b: 5). Moreover, unless the Commonwealth Court is “convinced in its predictive judgment that there will be no voter disenfranchisement . . . for purposes of the upcoming election,” it is “obliged to enter a preliminary injunction” (*Applewhite v. Commonwealth* 2012b: 5). Some legal analysts averred that these instructions would induce the lower court to reverse its prior decision.¹⁰

The two dissenters, however, were frustrated by the court’s reserved decision. They believed that the court should have granted outright an injunction to protect thousands of qualified voters from potential disenfranchisement. Justice McCaffery explained that while he had “no argument with the requirement that all Pennsylvania voters, at some reasonable point in the future, will have to present photo identification before they may cast their ballots,” he saw no reason other than politics for “implementing Act 18 prior to the November 2012 election” (*Applewhite v. Commonwealth* 2012b: 9). Accordingly, he opined that the court should have remanded the case “with the specific directive to the Commonwealth Court to immediately grant the requested preliminary injunction” (*Applewhite v. Commonwealth* 2012b: 9). The other dissenter, Justice Todd, castigated the court for “abdicat[ing] its duty to emphatically decide a legal controversy vitally important to the citizens of this Commonwealth” in the face of the “impending near-certain loss of voting rights” (*Applewhite v. Commonwealth* 2012b: 6).

The state supreme court required the lower court to file its opinion on or before October 2, 2012, that is, within two weeks. As already noted above, the outcome this time around was not necessarily a foregone conclusion. Although Judge Simpson had once held that the law was “neutral and nondiscriminatory” (*Applewhite v. Commonwealth* 2012a: 11), he now had to examine the law afresh under a different and higher standard of review. In the first trial, he saddled the plaintiffs with the burden of proving the risk of disenfranchisement, but on appeal, the supreme court directed him to probe the state’s assertion that no voters would be disenfranchised, thus reversing the onus of proof (see *Applewhite v. Commonwealth* 2012b: 5). To comply with this directive, Judge Simpson would have to shift the focus of analysis from the legitimacy of the law’s purpose to the potential impact of its implementation on the imminent election. So while the dissent took the court to task for not going far enough in its findings, the remand order made it exceedingly difficult for the lower court to let the law go into effect.

Voter Identification Requirements Suspended for the Presidential Election

On October 2, the Commonwealth Court handed down its much-anticipated decision, precluding the enforcement of the key components of

the Act on the grounds that the state was not yet ready to implement it in full. More precisely, it entered a preliminary injunction enjoining the enforcement of only “those parts of Act 18 which directly result in disenfranchisement,” principally the photo ID provision (*Applewhite v. Commonwealth* 2012c: 9). Following the strict guidelines set forth by the state supreme court, Judge Simpson said he was “not still convinced . . . that there will be no voter disenfranchisement arising out of the Commonwealth’s implementation of a voter identification requirement for purposes of the upcoming election” (*Applewhite v. Commonwealth* 2012c: 6). Despite the state’s assurances, he could not but “question whether sufficient time now remains to attain the goal of liberal access” (*Applewhite v. Commonwealth* 2012c: 4), given the relatively small number of IDs that had so far been issued.¹¹ With barely five weeks remaining until Election Day, he had to agree with the petitioners that “the gap between the photo IDs issued and the estimated need will not be closed” (*Applewhite v. Commonwealth* 2012c: 6).

It did not come as a surprise that the Corbett administration decided not to appeal the ruling, given its modest practical impact in the broader scheme of things. The law had already been upheld in August, in the first court challenge, and the October ruling did not change that. The Commonwealth was to continue with its efforts to put more photo IDs in the hands of more citizens to meet the liberal access standard. The preliminary injunction was limited in duration and scope. Though voters would not have to show a photo ID to vote, the terms of the injunction allowed the “soft-run” to go forward to familiarize voters with the new procedures and iron out unforeseen snags in preparation for full future implementation (*Applewhite v. Commonwealth* 2012c: 14).¹²

In rejecting “Petitioners’ request to enjoin all outreach and education efforts” (*Applewhite v. Commonwealth* 2012c: 8) and declining to “restrain election officials from asking for photo ID at the polls” (*Applewhite v. Commonwealth* 2012c: 9), Judge Simpson made it clear that the sole issue the injunction was narrowly drawn to address was the readiness of the state rather than the constitutionality of the Act. As such, the seemingly adverse ruling confirmed that it was only a matter of time before the Act would go into full effect. This is why Governor Corbett’s reaction was quite upbeat. In a press conference, the governor said he saw the ruling as a win for the law in the long term because the court had ultimately approved the voter ID requirement, despite the deferred implementation (Gibson 2012). Echoing the governor’s message, Ron Ruman, a spokesman for the Pennsylvania Department of State, said the agency “is pleased the judgment in effect has upheld the voter ID law for future elections” (Bumsted and Smeltz 2012).

Contrary to initial apprehensions, Election Day in Pennsylvania was largely uneventful. Complications were limited to reports of confused voters and uninformed poll workers in several districts.¹³ As in the April primary,

voters who did not have or want to produce a photo ID were allowed to vote, but this time they were also given information leaflets to educate them about the procedures that ought to be followed in the future. The long lines and heavy turnout reflected the intensity of the campaign. The two candidates battled over Pennsylvania's 20 electoral votes, but the outcome favored President Obama by a margin of 52–47. Despite their electoral victory, the Democrats resumed the legal challenge to the voter ID law that was still on the docket in the hope of defeating it once and for all.¹⁴

After consulting with the lawyers on both sides, Judge Simpson announced in late January that the trial would be held on July 15, 2013. Since the issue remained unresolved, Commonwealth and ACLU lawyers agreed to postpone the enforcement of the law again until the lawsuit had been heard in court. Approving the agreement, Judge Simpson issued an order on February 19, 2013, extending the partial preliminary injunction through the municipal and judicial primaries scheduled for May 21. As in the two prior elections, poll workers would be allowed to ask for a photo ID but voters would not be required to show it in order to cast a ballot.

In a surprise development in June, while final arrangements for the July hearing were underway, Judge Simpson quietly bowed out of the spotlight and turned the case over to Commonwealth Judge Bernard McGinley without formally stating a reason. Neither side made much of his withdrawal, partly because the trial date remained the same, and partly because an appeal to the state supreme court by the losing party seemed almost inevitable. It was now up to the new judge to block the law for November's general elections while the case was still under review.

The Voter Identification Law Back in Commonwealth Court

The Commonwealth Court called the case for trial in mid-July as scheduled, when it heard oral arguments and testimony from expert witnesses, state officials, and longtime voters adversely affected by the voter ID law. The testimony was as intense as the public interest in the trial. One reporter aptly described it as a “statistical duel” (Jackson 2013). Relying on a report by an expert statistician, Bernard Siskin, petitioners contended that the law was both unjustified and unduly restrictive, and unless enjoined it would bar many people from the polls, especially poor, elderly, and minority voters.¹⁵ They further argued that the law was a “political ploy” contrived in an election year to help the Romney candidacy, as candidly admitted by Rep. Turzai in his address to the Republican State Committee (Esack 2013b). Moreover, petitioners attacked the law as not only ill-considered but also ill-executed because the state had failed to provide the statutorily mandated liberal access to the free PennDOT and DOS voter ID cards, leaving hundreds of thousands of registered voters without the

needed identification.¹⁶ The petitioners finally asserted that a permanent injunction was warranted because there was no reason to assume the state could do any better and close this gap (Pearson and Musselman 2013). As one reporter succinctly summed up, the challengers argued that the law was “unconstitutional as written and too hard for too many to comply with” (Baer 2013).

Noting that the law had already passed muster in 2012, the state countered that it was a necessary anti-fraud measure to ensure a fair voting process and that the free voter ID cards were readily available. The state hired its own expert statistician, William Wecker, who questioned the methodology in Siskin’s report and cast doubt on its findings. In particular, Wecker attacked the theory that the relatively small number of voting-only IDs issued by PennDOT meant that numerous voters did not have valid IDs. There was, of course, no way to ascertain how many voters already had or were able to obtain other acceptable forms of identification, nor was it possible to determine how many voters had died, moved out of state, or lost their right to vote due to a criminal conviction (Jackson 2013). As a gesture of goodwill, the state offered to delay the enforcement of the law until 2015 and dedicate more time and resources to its public outreach and voter education campaign (Baer 2013). In so proceeding, it appears that the state’s legal team sought to steer the court away from even inquiring into the constitutionality of the statute and direct its attention to compliance with the statutory requirements instead.¹⁷

The trial lasted more than two weeks. A ruling on the constitutionality of the law was not expected until late fall or early 2014. Meanwhile, the petitioners requested that the enforcement ban be extended to the statewide municipal and judicial elections to be held on November 5.¹⁸ The state was receptive to this request, provided that the injunction was renewed only one election at a time until a final decree was made in the case. A separate request that the state did not support was to block officials from questioning voters for identification (without requiring it) and distributing printed information about the law as part of the voter education and outreach program. A ruling on this interim matter was expected before the end of August.

To be sure, on August 16, the new presiding judge suspended the law for the forthcoming election. He also modified the soft rollout but stopped short of suspending it altogether, allowing poll workers to ask for the unrequired identification yet barring them from advising voters that proper identification would be required in future elections. Using particularly strong language in his memorandum opinion, Judge McGinley described this voter notification practice as “erroneous at best, deceptive at worst” (*Applewhite v. Commonwealth* 2013: 7–8), thus raising doubts about the law’s fate. It was the third time a judge had halted the implementation of the law ahead of an election, the other two times being the 2012 general election

and the 2013 primaries. The petitioners hailed the court order as a victory for Pennsylvania voters and pledged to fight the law until it is permanently enjoined.

The Defeat of the Voter Identification Law

On January 17, 2014, after more than a year and a half of litigation, the Commonwealth Court struck down Section 3 of Act 18, the core provision that applies to in-person voting requirements. In granting a permanent injunction, Judge McGinley found that “not much has changed” since the state supreme court had issued its remand order in September 2012 so as to warrant a different disposition (*Applewhite v. Commonwealth* 2014: 12). Despite some measures taken by the state, including the introduction of the DOS ID in the summer of 2012 as an alternative equivalent to the PennDOT Voting ID, the state still fell short of “comport[ing] with the liberal access compelled by the statute” (*Applewhite v. Commonwealth* 2014: 6). The court quite reasonably attached significant weight to the testimony of state officials. Citing the testimony of Jonathan Marks, Commissioner of the Bureau of Commissions, Elections, and Legislation, Judge McGinley noted that the number of voters who lacked any of the specified forms of photo ID was still “ranging from hundreds of thousands to over a half million” (*Applewhite v. Commonwealth* 2014: 12). Further damaging testimony against the state’s readiness came from Rebecca Oyler, director of policy at Pennsylvania’s Department of State, who also estimated that the “enactment of the Voter ID Law, without an adequate safety net, would preclude 1% of qualified electors from exercising the franchise” (*Applewhite v. Commonwealth* 2014: 12). The solid evidence presented at trial was sufficient to support the finding that the law imposed an unreasonable burden on the right to vote.

Though unequivocal in his conclusion that the law should be permanently enjoined, Judge McGinley had no qualms about the voter ID requirement itself. He was troubled, however, by the absence of a “statutory mechanism for ensuring liberal access” to the free photo IDs (*Applewhite v. Commonwealth* 2014: 18). Moreover, he dismissed the equal protection claim, finding that the “Voter ID law is facially neutral” (*Applewhite v. Commonwealth* 2014: 47), and faulting the petitioners for “not submit[ting] any evidence that all of the individuals lacking compliant ID belong to specially protected classes” (*Applewhite v. Commonwealth* 2014: 48). Like Judge Simpson, he also considered Rep. Turzai’s “unfortunate comments” of no importance in determining whether the Equal Protection Clause was violated, noting that “no case in [the Supreme] Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it” (*Applewhite v. Commonwealth* 2014: n.33).¹⁹

Under this reasoning, it is evident that Judge McGinley invalidated Section 3 not because the statute was defective in its premise, but because it was flawed in its implementation. Since the obstacle is execution rather than principle, the decision left the door open for salvaging the statute, if sufficient effort and resources are invested to save it. Admittedly, the opinion stated that the statute “as written suggests a legislative disconnect from reality” (*Applewhite v. Commonwealth* 2014: 41), but this comment was distinctly confined to the expiration date requirement, which seemed irrational because it implicitly excluded military-retiree IDs and student IDs for not having an expiration date while explicitly recognizing state-employee IDs despite lacking an expiration date. This point, while well taken, would become moot if the state ameliorated its implementation strategies to comply with the liberal access requirement.

The Corbett administration reacted guardedly. Attorney General Kathleen Kane said in a statement that she “respect[ed] Judge McGinley’s very thoughtful decision,” without indicating whether an appeal would be pursued (Frantz 2014). Post-trial motions had to be filed within ten days, but given the immense task that remained to be done to achieve voter readiness, the state’s motions were unlikely to affect the substantive outcome of the case. On January 27, the state filed a motion seeking en banc review by the full Commonwealth Court, which was denied on March 11. The motion to reconsider was also denied, on April 28, letting the ruling stand. The unsuccessful post-trial motions were the last option available before an appeal could be filed in the state supreme court.

On May 8, 2014, the Governor’s Office released a statement announcing that “[t]he Commonwealth will not pursue an appeal to the Pennsylvania Supreme Court to overturn the Commonwealth Court’s decision to enjoin Act 18’s photo identification mandate” (Office of the Governor 2014). Conceding that “changes must be made to address accessibility to photo identifications,” Governor Corbett said he would be working with the legislature in the current legislative term to identify and meet the challenges associated with what he called “a sensible and reasonable measure for the Commonwealth” (Office of the Governor 2014). He also highlighted the necessity of “passing a balanced budget and addressing ongoing legislative priorities” (Office of the Governor 2014), thus signaling his reluctance to rush into what is likely to be another losing battle absent a major shift in the status quo.

Conclusion

As the Commonwealth contemplates a new approach, speculation abounds over the future of the voter ID law. For now, at least, opponents have won a significant victory, despite the Supreme Court’s decision in

Crawford. The Commonwealth Court deemed the *Crawford* precedent of little if any direct relevance to the case at bar, or “inapposite to the facts and legal challenge here,” because there “the statute did not jeopardize the right to vote” (*Applewhite v. Commonwealth* 2014: n.25). The state’s contention that it was well prepared for the full implementation of the law was not credible in the face of the evidentiary record, which clearly demonstrated that the goal of liberal access had not been sufficiently met. Though the state has made some progress toward this goal, it has unsurprisingly fallen short of its own targets.

To illustrate, Pennsylvania has 9,300 polling places, some of which are conveniently located inside senior citizen apartment buildings.²⁰ By contrast, only 71 PennDOT licensing locations are spread unevenly across the state, and they do not operate enough hours to help the state meet its statutorily prescribed obligations. Two years after the law’s enactment hundreds of thousands of people still lack compliant IDs when PennDOT offices in 22 out of the state’s 67 counties are open only one or two days a week and nine counties still have no ID-issuing centers (Lindstrom 2013). Voters could scarcely be blamed for this state of affairs. If the state has changed the law to require voters to present picture ID at the polls, the onus is on the state to help voters overcome the barriers to obtaining one.

State resources need to be used more effectively and new strategies need to be developed to accommodate voters, especially those with income and mobility limitations who do not have the wherewithal to travel to other counties or the stamina to wait in line or sit in a wheelchair for hours to get a voter ID card (Gregg 2013). The state can, for instance, set up mobile units in lower income districts and underserved areas, as proposed by the plaintiffs. Alternatively, the state can arrange for transporting voters to government offices or at least to the nearest PennDot location. It can add new DMV offices or extend the hours of operation of existing ones, as other states have done. As a supplemental measure, perhaps the limited range of state-approved forms of identification can be expanded. Converting traditional voter registration cards into photo voter ID cards is one option to consider. Whatever the strategy, the state must find ways to reach out to voters needing photo IDs, particularly in fringe populations and vulnerable communities, if the law is to be sustained upon appeal.

Notwithstanding the many challenges before the state, it should be noted again that the problem at hand is one of preparedness rather than substance. The two Commonwealth judges who blocked the law’s enforcement have agreed in principle that requiring a voter ID *per se* is not an unconstitutional deprivation of the right to vote so long as all eligible voters will be able to vote. The constitutional concern, as stated earlier, is not the voter ID requirement itself, but the lack of supportive mechanisms that facilitate full electoral participation. This has been and continues to be the fundamental

impediment to the law's full implementation. The state must ensure that voters have access to the ballot rather than expect them to contend with various institutional and bureaucratic obstacles in order to gain such access. As the political scientist E. E. Schattschneider famously put it, "Democracy was made for the people, not the people for democracy" (Schattschneider 1960: 135). Unless the required liberal access is demonstrably provided, there is no reason to believe that the Pennsylvania Supreme Court will disturb the findings of the Commonwealth Court, should the state eventually decide to appeal.

Notes

1 Codified at P.L. 195, No. 18 (Pa. 2012).

2 This provision arguably creates a loophole considering that the proven cases of voter fraud in other states, such as Florida, Illinois, Indiana, Texas, and North Carolina, mainly involved absentee ballots rather than polling place impersonation (see Biesecker and Yost 2013; Liptak 2012; Slater 2013).

3 Poll workers were to perform only a test run or soft rollout in the primary election, whereby they would merely ask voters for state-approved identification without requiring it or barring them from voting should they lack such identification.

4 The Independent Fiscal Office projected a deficit of \$300 million by the end of fiscal year 2012. The actual deficit for 2012 turned out to be \$162.8 million due to freezes in state spending (Reuters 2012).

5 Rep. Eddie Day Pashinski (D-121, Luzerne) expressed the same concern in a newsletter to his constituents. Available at: http://www.pahouse.com/pr/121_Voter_ID_NL_0712.pdf.

6 The other four organizational petitioners were the NAACP, the Pennsylvania State Conference, the League of Women Voters of Pennsylvania, and the Homeless Advocacy Project.

7 Although the court did not expressly address the issue of standing, the organizational plaintiffs were deemed to have associational standing because their members, as registered voters, had standing to challenge the law in their own right. This has been the recognized basis on which courts have granted standing to membership organizations in scores of voting rights cases across the country, including *Crawford* (see *Crawford v. Marion County Election Board* 2008: note 7).

8 In the Texas challenge, a three-judge district court panel denied the state's request for a declaratory judgment, finding that the law "imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty" (see *Texas v. Holder* 2012: 144). The unanimous court noted that to meet the law's strict requirements, voters would have to spend a minimum of \$22 to obtain the required documentation.

9 The Supreme Court of Pennsylvania normally has seven members, but Justice Joan Orié Melvin was suspended pending a trial on campaign corruption charges, leaving the court evenly divided between its conservative and liberal wings (see Langley 2012).

10 For instance, John Burkoff, a law professor at the University of Pittsburgh Law School, observed that "this decision means that the voter ID law is dead meat, at least for this election." Similarly, Bruce Ledewitz, a Duquesne University law professor, considered the supreme court's language to be "as strong a hint as an appellate court can give" (see Bumsted and Wereschagin 2012).

11 According to evidence presented at the hearings, “between 9300 and 9500 PennDOT IDs for voting have been issued. Also, between 1300 and 1350 DOS IDs” (*Applewhite v. Commonwealth* 2012c: 5). Launched in August 2012, Department of State (DOS) photo IDs were also free of charge but available only to voters who had exhausted the options for obtaining other state-issued IDs (see Worden and Parks 2012).

12 Under the limited enforcement scheme, a voter without proper identification would still be allowed to cast a regular ballot, instead of being either rejected or obliged to cast a provisional ballot that would not count unless the voter provided a valid photo ID within six days.

13 Lehigh Valley’s *Morning Call*, for instance, reported some delays and complaints by voters who were “subjected to repeated requests for ID” (see Morning Call Staff 2012). *Mother Jones* magazine also received multiple complaints from voters who were told they needed an ID to vote in this election (see Eichelberger and Harkinson 2012).

14 The possibility of averting a trial and resolving the matter by settlement was unlikely, for the legal director of the ACLU, a lead challenger in the case, had vowed, “Until it’s declared unconstitutional we’re not going to give in” (McNulty 2012).

15 According to the “Petitioner’s Disclosure of Expert Reports,” dated July 1, 2013, Bernard Siskin estimated that as many as 511,415 registered voters had neither a PennDOT nor a DOS ID. Available at: <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PetExpSistine.pdf>.

16 In a pre-trial brief dated June 17, 2013, petitioners argued that the Pennsylvania Department of State itself estimated that “about 4%–5% of Pennsylvanians (roughly 328,000 to 410,000)” had no PennDOT identification, and yet only “16,754 free IDs for voting” had been issued as of June 7, 2013. Petitioner’s Pre-Trial Statement is available at: <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PETiApplewhitePreTrialBrief.pdf>.

17 Nils Hagen-Frederiksen, the Press Secretary for the Governor’s Office of General Counsel, commented early in the trial, “Voter ID is constitutional . . . the trial is about the implementation” (see Shawn 2013). By contrast, ACLU attorney Michael Rubin thought “[t] his case is about a law that on its face, and as it is applied, can lead to one result, thousands of voters losing their right to vote” (see Esack 2013a).

18 In a post-hearing brief dated August 5, 2013, petitioners contended that “nothing has changed since last fall, or is likely to change in the future, that would justify lifting the preliminary injunction before the end of this case.” Petitioners’ Post-Hearing Brief is available at: http://www.aclupa.org/download_file/view_inline/1156/624.

19 Quoting *Palmer v. Thompson*, 403 US. 217, 221 (1971) (brackets in original).

20 The plaintiffs presented as evidence a video of Mina Kanter-Pripstein, a 92-year-old resident of Philadelphia, in which she said she could vote inside her apartment building but was unable to get to a licensing center to obtain an ID (see Lindstrom 2013).

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