April 30, 2008, 6:00 a.m.

Voters Are Far from the Biggest Losers

Life after *Crawford*.

By Abigail Thernstrom

For one of the most anticipated big decisions of the current Supreme Court term, the Indiana voter-ID ruling Monday is certainly a bit anti-climactic. No big deal, Justice John Paul Stevens, writing the lead opinion, said, in essence. The Indiana law requires citizens, before voting, to show an approved photo identification — a passport or driver's license, for instance. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters," Stevens concluded. Was that truly a debatable proposition?

Only Chief Justice John Roberts and Justice Anthony Kennedy joined Stevens, although Justice Antonin Scalia, along with Justices Clarence Thomas and Samuel Alito, did concur separately. But the big catch — and surprise — was obviously Stevens, whose defection from the liberal bloc is a problem for critics ready to discredit the chief justice and other judicial conservatives by raising the specter of renewed disfranchisement. Although an Indiana ID card can be obtained free of charge and voters without acceptable identification can cast provisional ballots, later rectifying the problem, Justice David Souter, writing in dissent, found the challenged law "uncomfortably close" to the old poll tax. Stevens, usually a Souter ally, was evidently not impressed by such hyperbole.

The south of the 1960s is always lingering off-stage in the view of the civil-rights community — although the regional distinctiveness of fraudulent literacy tests and the like has somehow been forgotten. Voting-rights cases, especially, seem to trigger liberal hysteria about racist arrangements that bear an "uncomfortably close" resemblance to segregated water fountains. Thus, in the summer of 2006, when Congress renewed (for the fourth time) the emergency provisions of the 1965 Voting Rights Act, the House Judiciary Committee report declared discrimination today to be "more subtle than the visible methods used in 1965 . . . [although] the effects and results are the same."

Disfranchisement cases are usually about voting procedures that deny equal electoral opportunity to blacks and Hispanics, of course. But, remarkably, in *Crawford* v. *Marion County*, the voter-ID decision, there is nary a word about race. The statute targeted "the poor and the weak," Justice Souter wrote. Were those code words for Indiana's blacks — out of this particular picture only because the question of African-American disfranchisement had not been raised by the trial court? The NAACP, in its press release responding to the decision, has already added racial minorities to the class of voters victimized by Indiana's law.

Justice Scalia argued that the impact of a voter-ID statute is irrelevant to determining the burden it imposes. "A generally applicable, nondiscriminatory voting regulation" is constitutional. Moreover, "a case-by-case approach naturally encourages constant litigation." Had his opinion been controlling, that "constant litigation" would have been strongly discouraged. But, arguably, the Stevens opinion leaves

the door open to constitutional challenges to a variety of local and state statutes whose specific, individual burden on a particular class of voters is better documented than it was in the Indiana case. The ACLU has already warned of coming lawsuits.

Election lawyers have been growing like weeds in the fertile ground of voter distrust since the 2000 election. They will be swarming all over the results this coming November if the contest is close. The *Crawford* decision, with its distinction between trivial and nontrivial burdens on voting rights may be used in contexts other than voter ID.

Six months before the presidential election, the issue of ballot integrity is already a partisan battleground. The 2005 Indiana law was backed by Republicans, opposed by Democrats, and the decision is widely described as having given the Republicans an election-year victory. "The GOP for years has been actively pursuing a campaign against what it *calls* 'voter fraud,' and the Court's ruling Monday appears to validate that effort, at least in part," Lyle Denniston on the SCOTUS blog maintained. (Italics mine.) Fraud is seen as a (misguided) Republican concern, while Democrats are credited with concern about equal electoral access — with the two viewed as mutually exclusive.

If the poor and elderly find it too hard to obtain photo IDs, voting is not their only problem. They can't take advantage of a cheap airfare when they want to visit a new grandchild; they have no access to their elected representatives in a building with a security check; they are unlikely to get into a Social Security office.

"Democracy was the big loser in the Supreme Court on Monday" the *New York Times* editorialized. Democratic government requires a certain tolerance for fraud, our "paper of record" implies. Somehow, I don't think so. And neither does Justice Stevens.

— Abigail Thernstrom a senior fellow at the Manhattan Institute and the vice-chair of the U.S. Commission on Civil Rights.
