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Our Most Precious Right: Evaluating the Court's Voter Identification Review and Its Effect on North Carolina Franchise

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INTRODUCTION

How did you first get your photo ID? If you are like most people, the task was easy. You probably went to the DMV with the proper documentation, waited in line, paid the taxes, and continued on with your day. Or maybe you were planning a trip out of the country, and you had to apply for a passport. There may have been some minor annoyances—the DMV might have been out of the way, maybe you had to search a bit for your birth certificate, or you might have come in late to work one morning—but it was manageable. If your parents took you to the DMV on your sixteenth birthday, it might have even been an exciting milestone.

Getting photo identification is a relatively simple task for most people.[1] Therefore, for the majority of voters, presenting identification at the polls requires no more than opening their wallets and pulling out their driver's licenses,[2] or at most, tracking down which drawer they last put their passport in. Those with easy access to photo identification continue to exercise their constitutionally guaranteed right to vote without much difficulty.

However, not everyone has such easy access to photo identification.[3] For citizens who do not drive, those who are penalized

1. There are more than six million registered voters in the state of North Carolina, and in a 2013 study, the State Board of Elections estimated that approximately ninety percent of voters have state-issued photo identification. STATE BD. OF ELECTIONS, 2013 SBOE-DMV ID ANALYSIS 1 (2013), http://www.wral.com/asset/news/state/nccapitol/2013/01/08/11956025/2013_Analysis.pdf [http://perma.cc/SS5T-WK42].

2. Though North Carolina state documents, including the North Carolina voter identification bill, use "driver license," colloquially, the phrase "driver's license" is much more common and less jarring to the reader. Therefore, this Comment will refer to photo identification issued from the Department of Motor Vehicles as "driver's licenses."

3. The same report found that over 600,000 voters could not be matched with a DMV identification card. STATE BD. OF ELECTIONS, *supra* note 1. Of those, an estimated

for taking time off of work, those who live in counties without a DMV, and those who do not have access to their identifying documents, the process of getting photo identification can be nearly impossible.[4] Because of these hurdles, the right to vote has become less accessible for some citizens than it is for others.

The recent surge of voter identification laws passed by state legislatures around the country raises the issue of whether these laws unconstitutionally infringe on citizens' right to vote.[5] Though voter identification laws vary, the most stringent forms require voters to present state-issued photo identification before registering to vote and also immediately before voting.[6] The issue of photo identification is highly divisive, with some arguing that these laws effectively disenfranchise thousands of voters, and others arguing that adding an extra step to the voting process does not equate to the deprivation of a right.[7] Ultimately, the issue centers around the question of whether photo identification laws actually burden voters, and if so, to what extent.

The Supreme Court evaluated this burden in its 2008 decision, *Crawford v. Marion County Election Board*.[8] Although the *Crawford* Court acknowledged the importance of the right to vote, it held that photo identification laws do not infringe upon this right.[9] Furthermore,

300,000 could have no form of photo identification. *See* Alisa Chang, *In Rural N.C., New Voter ID Law Awakens Some Old Fears*, NPR (Aug. 16, 2013), http://www.npr.org/2013/08/16/212664895/in-rural-n-c-new-voter-id-law-awakens-some-old-fears [http://perma.cc/RVQ6-7ERA] (discussing obstacles preventing some citizens from acquiring state-issued photo identification).

4. *See generally* RICHARD SOBEL, THE HIGH COST OF 'FREE' PHOTO VOTER IDENTIFICATION CARDS (2014) (describing how even when states provide a "free" state-issued form of identification, the costs associated with getting that identification can be prohibitive to the point that photo identification laws functionally bar many individuals from voting).

5. *See infra* Part IV.

6. *See, e.g.*, N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015); TEX. ELEC. CODE ANN. §§ 63.001, 63.0101 (West 2012). Texas's photo identification law went into effect in 2013, and North Carolina's amended photo identification law is set to take effect in January 2016. TEX. ELEC. CODE ANN. § 63.001; N.C. GEN. STAT. § 163-166.13. Though "photo identification" and "voter identification" can sometimes be used interchangeably, for the purposes of this Comment, "photo identification" refers to any form of identification that has a photo of the owner, such as a passport or a driver's license. "Voter identification" is a broader term that includes any form of identification, regardless of whether it includes a photo. Examples of "voter identification" that are not "photo identification" include social security cards and bank statements.

7. *See infra* Part III.

8. 553 U.S. 181 (2008).

9. *See id.* at 202–04 (finding that photo identification requirements do not infringe upon the right to vote).

the Court did not apply strict scrutiny to the laws in question, reasoning that photo identification laws are related to a person's qualifications to vote.[10] Given the state's interest in preventing voter fraud, the *Crawford* Court applied a more relaxed balancing test and upheld the state's photo identification requirements.[11] However, the *Crawford* decision created complicated precedent. Notably, the *Crawford* Court's decision emphasized fraud prevention, rather than the burden that obtaining voter identification places on voters.[12] *Crawford* does not require a finding of voter fraud for a state to enact voter identification laws.[13] Under the *Crawford* Court's holding, fear of fraud alone is enough to justify voter identification laws.[14] The *Crawford* Court also failed to closely consider the impact of voter identification laws; instead the Court assumed that the burden of providing identification was minimal.[15] Furthermore, the *Crawford* Court had little incentive to give a close analysis to any discriminatory effect of the Indiana voter identification law because the Voting Rights Act ("VRA") was still in place to guarantee that states could not enact discriminatory voting laws.[16]

10. *See id.* at 202–03 (finding that strict scrutiny was inapplicable, and thus Indiana's voter identification law was constitutional).

11. *Id.* at 204.

12. *See id.* at 196–97.

13. *See id.* at 218 (Souter, J., dissenting) ("The State, in fact, shows no discomfort with the District Court's finding that an 'estimated 43,000 individuals' . . . lack a qualifying ID."). At least one scholar has criticized the Court for sidestepping the issue of prevalence of voter fraud; the Court accepted the risk of fraud at face value, rather than independently examining the facts to determine whether fraud truly existed. *See, e.g.*, Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1742 (2008) ("Rather than undertake the more difficult task of proving its existence, it is much easier to look at a system's potential for abuse and to point to public opinion that suggests such abuse occurs with great frequency.").

14. *See Crawford*, 553 U.S. at 226–29 (Souter, J., dissenting). Admittedly, fraud seems like a legitimate reason to enact certain safeguards. However, there is a lack of evidence that substantial voter fraud exists at all, much less in *Crawford*. For a more detailed discussion of the actual limited occurrence of voter fraud, see *infra* Section III.B.

15. *See Crawford*, 553 U.S. at 198–200 (majority opinion); *see also id.* at 231–34 (Souter, J., dissenting).

16. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437–46, 52 U.S.C. §§ 10301–10702 (2014) (formerly 42 U.S.C. §§ 1973–1973bb-1 (2012)). Indiana was not subject to preclearance at the time. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last updated Aug. 6, 2015) [http://perma.cc/YQ45-FJBY] [hereinafter *Section 5 Jurisdictions*]. However, the *Crawford* Court still had little incentive to look closely at the law. Prior to the Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the VRA required certain states with a history of discrimination to get approval from the federal government before making changes to their voting laws. ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 17 (1987). When deciding

Today's election law landscape looks much different. In its 2013 decision, *Shelby County v. Holder*,[17] the Court held that that sections 4(b) and 5 of the VRA, which had previously required counties and states with a history of voting discrimination to secure approval by the Department of Justice before changing their voting laws, were unconstitutional and no longer necessary.[18] In concluding that the VRA's preclearance standards were outdated, Chief Justice Roberts stated, "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[19] The *Shelby County* Court held that, while discrimination continues to be an issue, sections 4(b) and 5 of the VRA are the wrong way to remedy the problem.[20]

Post-*Shelby County*, counties all over the country with a history of discrimination are no longer encumbered by federal preclearance rules.[21] The *Shelby County* Court's removal of the preclearance requirement meant that states were free to pass restrictive voter identification laws, such as the one North Carolina passed almost immediately after the decision was handed down.[22] Indeed, many of these states have passed photo identification laws despite little evidence of the voting fraud they purport to prevent.[23]

However, these voter identification laws impact the fundamental right to vote, guaranteed to the citizens of the United States under the

Crawford, the Court did not have to worry about establishing precedent that would allow states with more discriminatory pasts to enact discriminatory voting laws, because the VRA acted as a safety net. *See* TOMAS LOPEZ, "SHELBY COUNTY": ONE YEAR LATER 6–7 (2014) (discussing how the *Shelby County* decision made it more difficult to bring challenges to discriminatory election laws).

17. 133 S. Ct. 2612 (2013).

18. *See id.* at 2617. For more information about federal preclearance, see *infra* notes 51–56 and accompanying text.

19. *Shelby Cty.*, 133 S. Ct. at 2631.

20. *See id.* at 2617.

21. *See Section 5 Jurisdictions*, *supra* note 16.

22. *See* N.C. GEN. STAT. § 163-166.13 (2013). *Compare* H.B. 589, First Edition, Gen. Assemb., Reg. Sess. (N.C. Apr. 8, 2013) (initial version), *with* Act of June 18, 2015, ch. 103, § 8.(d), 2015 N.C. Sess. Laws ___ (codified at N.C. GEN. STAT. § 163-166.15 (2015)) (final version).

23. *See generally* Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER (Oct. 29, 2012), http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth [http://perma.cc/G7TD-KFB6] (describing the lack of evidence of voter fraud across the country); Sarah Childress, *Why Voter ID Laws Aren't Really About Fraud*, UNC-TV (Oct. 20, 2014, 6:14 PM), http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/why-voter-id-laws-arent-really-about-fraud/ [http://perma.cc/4HC5-8UJM] (describing various studies of voter fraud around the country).

Constitution.[24] This right should be protected under *Crawford*; this Comment argues that the *Crawford* Court underestimated the oppressiveness of the burden imposed by photo identification laws. Moreover, the *Crawford* Court undervalued the fact that the state presented no actual evidence of voter fraud to support the need for a photo identification requirement.[25] Nor did the *Crawford* Court consider that hundreds of thousands of voters were potentially disenfranchised by voter identification requirements.[26]

Although the VRA no longer acts as a safeguard against discriminatory voter identification laws, discrimination remains a critical concern.[27] Between the low burden for voter identification challenges established in *Crawford* and the invalidation of the safety net that the VRA provided, citizens whose fundamental right to vote is affected have little recourse. This Comment argues that because of the actual burden on voters, as well as the absence of concrete evidence that voter identification laws prevent fraud, the Court should reevaluate voter identification requirements under a higher standard of scrutiny.

Analysis proceeds in five parts. Part I of this Comment examines the history of voting and voter identification laws, using the progression of voting laws in North Carolina as an example. Part II considers the Court's history of evaluating election laws, focusing on the types of burdens the Court applies, which vary depending on whether the voter identification law is facially discriminatory or merely has a disproportionate effect on a certain population. Part III discusses the Court and states' justifications for applying a lower standard of scrutiny to voter identification laws. Part IV applies different levels of scrutiny to the North Carolina voter identification law, illustrating the significance of the Court's review of voter identification laws and how different levels of scrutiny may affect voters and elections in the state.

24. *See* U.S. CONST. amend. XV (guaranteeing the right to vote to all citizens); *id.* amend. XIX (extending the right to vote to women); *id.* amend. XXIV (prohibiting poll taxes from abridging the right to vote); *id.* amend. XXVI (extending the right to vote to those eighteen and older).

25. Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1591 (2012) (discussing the Court's reliance on reducing the appearance of fraud despite a lack of empirical evidence that fraud exists).

26. *See* STATE BD. OF ELECTIONS, *supra* note 1 (showing that over 600,000 voters could not be matched with a DMV identification, and thus, these voters are theoretically disenfranchised by the law).

27. Though the plurality in *Crawford* did not acknowledge the history of voting discrimination, in *Shelby County*, the dissent recognized the presence of racial discrimination in voting even in the modern era. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2650–51 (2013) (Ginsburg, J., dissenting).

This Part also evaluates the North Carolina General Assembly's remedy to the problems caused by its voter identification law. Finally, Part V argues that the Court should apply a higher level of scrutiny when evaluating voter identification laws in the future. This Comment concludes that given the potential impact on voters and that the protection of the VRA no longer exists, the Court should evaluate photo identification laws under a heightened level of scrutiny.

I. VOTING LAWS AND PHOTO IDENTIFICATION

A. Voters' Access to the Polls: The Federal Government's Involvement in Voting Laws from 1787–2013

In general, states are free to choose the way they run elections, though Congress may impose additional laws.[28] Article I of the Constitution gives relatively free rein to the states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[29] For many years, this guarantee was interpreted broadly, and states were allowed considerable leeway to run their own elections.[30]

Throughout most of the 1800s, states took advantage of Article I's broad freedom and enacted restrictive voting laws with little interference from Congress.[31] Until Congress passed the Fifteenth Amendment, which guaranteed that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude,"[32] many states had laws explicitly preventing black citizens from voting.[33] Even after the amendment was enacted, states still tried to prevent black citizens from voting through facially

28. U.S. CONST. art. I, § 4, cl. 1.

29. *Id.*

30. *See* TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION 16 (2012) (funded by the Century Foundation).

31. *Id.* ("From the mid-nineteenth century until the turn of the twentieth century, Americans in many states witnessed the enactment and implementation of egregiously disenfranchising laws and procedures. Given the amount of power states had (and continue to have) to determine how elections are administered in our voting system, such laws were put into place by state legislatures and governors.").

32. U.S. CONST. amend. XV (establishing that the right to vote is guaranteed to all citizens).

33. Even though these laws were aimed at black voters, they also disenfranchised poorer, white voters. WANG, *supra* note 30, at 16–17.

nondiscriminatory laws that had a discriminatory impact, which restricted voting through both formal and informal means.[34] For example, many states required voters to pass a literacy test before voting, claiming that these tests weeded out unqualified voters.[35] In reality, these laws took advantage of a history of inferior education for black citizens, and states used the tests as tools to deny black citizens suffrage.[36] Moreover, these tests were sometimes discriminatorily administered; literacy tests administered to black voters were often held to a higher standard than those taken by white voters.[37] Similarly, states often implemented poll taxes, which required voters to pay before they could vote.[38] Unsurprisingly, these poll taxes disproportionately impacted black families, who were much less likely to be able to afford the fee due to the lingering effects of slavery and the subsequent system of sharecropping.[39] Finally, many states also used grandfather clauses, which allowed the children and grandchildren of men who had been allowed to vote prior to the passage of the Fifteenth Amendment to bypass poll taxes or literacy tests.[40] In practice, grandfather clauses helped very few black voters and served mostly to protect poor and illiterate white voters.[41]

Until the 1960s, voters were predominantly white and male.[42] Despite several constitutional amendments, the voting population

34. *See id.* at 17–22 (describing the use of poll taxes, literacy tests, and intimidation tactics to deter black voters).

35. *Id.* at 20.

36. *Id.*

37. *See generally* Davis v. Schnell, 81 F. Supp. 872, 875–76 (S.D. Ala. 1949), *aff'd*, Schnell v. Davis, 336 U.S. 933 (1949) (finding that the Alabama Board of Registrars was using arbitrary tests to evaluate voter qualifications and registering white voters with fewer qualifications than black voters).

38. WANG, *supra* note 30, at 18–19.

39. *Id.* at 20.

40. *Id.*

41. *Id.*; *see also* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1786 (1992) (quoting William A. Mabry, *"White Supremacy" and the North Carolina Suffrage Amendment*, 13 N.C. HIST. REV. 2, 2–4 (1936)) ("Copied from an earlier scheme developed in Louisiana, the literacy test included a 'grandfather clause' to protect illiterate white male voters: whether one was literate or not, he was entitled to vote if he or a lineal ancestor—the amendment did not actually specify a 'grandfather' . . . . Although in 1915 the United States Supreme Court ruled grandfather clauses unconstitutional, North Carolina's had by then safely accomplished its mission. As later described by Henry Groves Connor, one of the architects of the suffrage amendment: 'With the qualification imposed by this amendment the political power of the State practically passed to the white voters—certainly for the present generation.' ").

42. *See* WANG, *supra* note 30, at 29 ("After the monumental victory for voting rights that occurred in 1920 with the ratification of the Nineteenth Amendment, the years between the 1920s and the early 1960s were a time of relative stasis in the election process."). The franchise was closed to others based on gender and age as well. *Id.* at 28.

remained homogenous because of discriminatory state laws, such as poll taxes and literacy tests.[43] However, the civil rights movement of the 1960s pushed states to abolish these laws.[44] In response to protests around the country, Congress exercised its right to "make or alter such Regulations"[45] by passing the Voting Rights Act of 1965.[46] The law included a broad prohibition on discriminatory voting laws in section 2,[47] as well as more specific rules, such as the ban on the use of literacy tests as a prerequisite for voting.[48]

Sections 4(b) and 5 of the VRA also established "preclearance," a way for the federal government to regulate state elections in counties with histories of discriminatory voting laws.[49] Section 4(b) described a coverage formula used to determine which counties had to obtain federal preclearance under section 5.[50] The formula asked if (1) on November 1, 1964, the state or political subdivision had a "test or device" used to restrict the ability to vote, and (2) whether less than fifty percent of the eligible voting population was registered on November 1, 1964.[51] "Covered" jurisdictions were counties and states that, because of their history of discriminatory election laws, were prohibited from changing their voting laws without the U.S. Attorney General's approval, also known as federal preclearance.[52] The goal of the section 4(b) formula was to encompass the counties with the most

Until the passage of the Nineteenth Amendment in 1920, women were not allowed to vote. *Id.* Even after the passage of the Amendment, dissenters continued to challenge women's right to vote. *See, e.g.*, Leser v. Garnett, 258 U.S. 130, 137 (1922) (holding that Congress had the power to amend the Constitution to allow women to vote). Even after Congress amended the Constitution to expand the franchise, a group of men from Maryland brought suit, claiming that Congress's power to amend the Constitution did not extend to these types of amendments. *Id.* Similarly, voting was closed to young adults for many years. *See* U.S. CONST. amend. XXVI. In 1971, the Twenty-Sixth Amendment expanded the franchise again by lowering the voting age from twenty-one to eighteen. *Id.*

43. *See supra* notes 31–42 and accompanying text.

44. THERNSTROM, *supra* note 16, at 11 ("[It] was precisely the failure of courts to protect basic Fifteenth Amendment rights that prompted the passage of the Voting Rights Act.").

45. U.S. CONST. art. I, § 8.

46. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437–46 (codified as amended at 52 U.S.C. § 10301 (2014)) (formerly 42 U.S.C. § 1973).

47. *Id.* § 2.

48. *Id.* §§ 4(b), 5.

49. *Id.* § 4(b).

50. *Id.*

51. *Id.* Even in 2013, the Act was measured against the voting population from the 1960s and 1970s; this was part of the plaintiffs' challenge in *Shelby County*. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2620 (2013).

52. Voting Rights Act of 1965 § 4(b).

egregious history of discriminatory voting laws.[53] Accordingly, the Department of Justice carefully examined any changes made to voting laws in those counties with a history of discrimination for discriminatory intent and effect.[54]

The effects of the VRA cannot be overstated. Prior to enactment, Congress had passed the Civil Rights Acts of 1957, 1960, and 1964.[55] Though these Acts gave the Department of Justice the authority to investigate voting rights violations, "enforcement on a case-by-case basis [was] time-consuming and ineffective."[56] Unable to exercise their constitutional rights, oppressed black voters began to protest.[57] These protests were often met with shocking violence.[58] Soon after "Bloody Sunday," a particularly gruesome attack in Selma, Alabama, in March 1965, President Lyndon B. Johnson introduced the Voting Rights Act.[59] In August 1965, the VRA was signed into law.[60] In banning racial discrimination in voting practices, the law not only eliminated voter suppression tactics, such as literacy tests, but also prevented states from crafting new ways to surreptitiously prevent black individuals from voting by requiring preclearance of all new voting laws.[61] The VRA's profound impact is clear: black voter registration increased by nearly

53. *See* THERNSTROM, *supra* note 16, at 15 (footnote omitted) ("Lyndon Johnson, in 1965, called for the 'goddamnedest, toughest, voting rights bill' that his staff could devise. And he got it.").

54. *See* Jim Rutenberg, *A Dream Undone: Inside the 50-Year Campaign to Roll Back the Voting Rights Act*, N.Y. TIMES MAG. (July 29, 2015), http://www.nytimes.com/2015/07/29/magazine/voting-rights-act-dream-undone.html?_r=0 [http://perma.cc/XMM8-RWNY]. *See generally* Brian L. Porto, Annotation, *What Changes in Voting Practices or Procedures Must Be Precleared Under § 5 of the Voting Rights Act of 1965*, 146 A.L.R. Fed. 619 (originally published in 1998) (describing the various types of laws requiring preclearance, including: municipal boundary lines altered by annexation of land; number or boundaries of electoral districts in a jurisdiction; voting precincts and polling places; electoral forms; qualifications or procedures for registering to vote; voting or gaining access to the ballot as a candidate; conduct of elections; election or appointment of government officials; and public electoral functions of a political party in which the party acts pursuant to authority granted by a covered jurisdiction. Court-ordered redistricting, decision-making authority of elected officials, changes in a state's or political subdivision's voting scheme crafted wholly by federal district court, and reinstatement of prior election practice do not require preclearance). Under the preclearance scheme, states or counties had the burden of proof to show that the law did not have a discriminatory purpose—not just that it was constitutional. *Id.* § 2[a].

55. Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 L. LIBR. J. 663, 664 (2006).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id*.

60. *Id.*

61. *Id*. at 665–66.

forty percent in just three years after its passage.[62] President Johnson called it "one of the most monumental laws in the entire history of American freedom."[63]

The VRA had a huge impact on the franchise, and no federal voting law since has had such a profound effect. Though Congress passed various voting laws in the years after the VRA, not one was as effective in opening up the franchise. For example, Congress made it slightly easier to vote in 1993, when it passed the National Voter Registration Act ("NVRA"), also known as the "Motor Voter Act."[64] The law allowed citizens to register to vote while at the DMV or by mail.[65] This increased accessibility to voter registration led to a rise in registered voters.[66] Conversely, in 2002, Congress passed the Help America Vote Act ("HAVA")[67] in response to the complicated 2000 presidential election and *Bush v. Gore*.[68] HAVA ultimately made it more difficult for voters to register by requiring states to request identification before registering voters, even when registering voters by mail.[69] If a voter did not show identification when registering, he would have to show identification before voting.[70] Even so, HAVA created

62. *See* Rutenberg, *supra* note 54 ("Only about one-quarter of eligible black voters in the South were registered [in 1956], according to the limited records available . . . . What changed this state of affairs was the passage, 50 years ago this month, of the Voting Rights Act . . . . By 1968, just three years after the Voting Rights Act became law, black registration had increased substantially across the South, to 62 percent.").

63. *Id.*

64. National Voter Registration Act, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended at 52 U.S.C. §§ 20501–20511 (2014) (formerly 42 U.S.C. §§ 1973gg–1973gg-10)).

65. *See* WANG, *supra* note 30, at 61.

66. *Id.* ("Research studies fairly universally show that NVRA has had a significant impact on registration rates, and government statistics demonstrate a tremendous rise in registration (by nearly 30 percent) as a result of better implementation of the law at the state level.").

67. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. § 20901–21145 (2014)) (formerly 42 U.S.C. §§ 15301–15545).

68. 531 U.S. 98 (2000); *see also* WANG, *supra* note 30, at 75–90 (describing the effects of the 2000 election). The result of the 2000 presidential election was ultimately determined by the results in one state: Florida. *Id.* at 75. The vote was incredibly close, coming down to mere hundreds of ballots and leading to multiple recounts. *Id.* Of the various problems associated with the election, one was the issue of voter registration. *Id.* at 76. Some claimed that registered voters were wrongfully turned away from the polls on election day. *Id.* Others argued that many voters were not actually eligible to cast ballots. *Id.* at 77. Either way, the controversy turned the public's attention to the need for closer monitoring of voter registration. *See id.*

69. *Id.* at 77–78.

70. *Id.* at 77.

two exceptions for voters who do not have identification.[71] First, voters may instead provide the last four digits of their social security number.[72] Second, HAVA also requires states to let voters cast provisional ballots if they do not have proper identification.[73] However, HAVA specifically states that these are *minimum* requirements, and that states are free to enact more stringent laws.[74] Some states have interpreted this provision as an invitation to enact voter photo identification laws.[75]

Even though HAVA made voting slightly more difficult, the VRA remained strong during the following decades. Over the years, the VRA withstood numerous legal challenges. In *South Carolina v. Katzenbach*,[76] the Court rejected the state's argument that the VRA unfairly violated states' rights.[77] The Court upheld the law as a valid exercise of Congress's power under the Fifteenth Amendment, holding, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[78] In 1973, the Supreme Court again upheld the VRA in *Georgia v. United States*,[79] finding that it was within Congress's power under the Fifteenth Amendment to mandate review of Georgia's plan to reapportion districts.[80] The number of challenges slowed as it became more apparent that the Court would require compliance with the VRA, and sections 4(b) and 5 remained good law[81] until the Court's *Shelby County* decision in 2013.[82]

71. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 13 (2014) [hereinafter GAO REPORT], http://www.gao.gov/products/GAO-14-634 [http://perma.cc/6E7P-HMY7].

72. *Id.*

73. *Id.* at 19. A provisional ballot is one that acts as a placeholder until election officials can verify the voter's identity. *See infra* notes 145–150 and accompanying text.

74. Help America Vote Act of 2002, Pub. L. No. 107-252, § 304, 116 Stat. 1666, 1714 (codified as amended at 52 U.S.C. § 21084 (2014)) (formerly 42 U.S.C. § 15484); GAO REPORT, *supra* note 71; WANG, *supra* note 30, at 78.

75. WANG, *supra* note 30, at 79.

76. 383 U.S. 301 (1966).

77. *Id.* at 323–24.

78. *Id.* at 324.

79. 411 U.S. 526 (1973).

80. *Id.* at 535 ("And for the reasons stated at length in *South Carolina v. Katzenbach*, . . . we reaffirm that the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment.") (citations omitted).

81. *See, e.g.*, Riley v. Kennedy, 553 U.S. 406, 424–27 (2008) (rejecting a challenge to the Alabama governor's appointment of a county commissioner because the law was never "in force or effect," and thus did not trigger preclearance, but still recognizing the validity of section 5 of the VRA).

82. *See infra* notes 89–103 and accompanying text.

In 2013, the Supreme Court heard *Shelby County v. Holder*, which challenged the constitutionality of sections 4(b) and 5 of the VRA.[83] After years of having to obtain federal preclearance for every change to its voting ordinances, Shelby County, Alabama sued the U.S. Attorney General, claiming that the formula used in section 4(b) of the VRA was facially unconstitutional.[84] The Court agreed.[85] The majority held that because the formula that determined which states and counties required preclearance relied on data from 1964, 1968, and 1972, it should not apply to counties decades later.[86] In the nearly fifty years since the VRA's passage, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[87] The Court concluded that if the VRA's preclearance requirement were to be applied fairly, the section 4(b) formula must be updated to reflect those changes.[88]

The Court ultimately overturned section 4(b) of the VRA because the coverage formula relied on outdated statistics.[89] The Court did not deny that discrimination still exists.[90] However, the *Shelby County* Court held that the VRA had sufficiently remedied the historic discrimination against minority voters that caused Congress to pass the law in 1965, and thus, continuing to punish these counties with an outdated formula was unconstitutional.[91] As the Court explained, "the [VRA] impose[d] current burdens and must be justified by current needs."[92] The VRA took away states' right to regulate their own elections.[93] If Congress was going to take this right away from some of the states, but not others, it "require[d] a showing that a statute's disparate geographic coverage [was] sufficiently related to the problem that it targets."[94] Though the Fifteenth Amendment gives Congress the

83. *See generally* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (challenging the constitutionality of the Voting Rights Act).

84. *Id.* at 2620–22.

85. *Id.*

86. *See id.* at 2627–28.

87. *Id.* at 2625 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

88. *Id.* at 2628–29.

89. *See id.* at 2626 tbl.1, 2627–28 (showing how the gap in voter registration numbers has changed since the passage of the VRA and 2004, when Congress updated the law).

90. *See id.* at 2619.

91. *See id.* at 2627.

92. *Id.* at 2619 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

93. *Id.* at 2623.

94. *Id.* at 2622 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

power to ensure that the right to vote is not abridged or denied on the basis of race or color, the Amendment was not designed to "punish for the past," but instead to "ensure a better future."[95] Therefore, if Congress wanted to create a law that applied to some states but not others, it "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It [could not] rely simply on the past."[96] However, Congress's failure to update the coverage formula when the VRA was extended in 2006, as well as Congress's continued reliance on outdated statistics from the 1960s, was an unconstitutional way to choose which states the VRA applied to and an unauthorized use of Congress's power to enforce the Fifteenth Amendment.[97] Because the Court simply found the use of the outdated formula unconstitutional, as opposed to invalidating the VRA itself, Congress could theoretically update the formula with current statistics, and constitutionally continue to enforce the VRA. However, there is no evidence so far that Congress intends to do so.[98]

The *Shelby County* decision put the power of passing election laws back into the hands of the states. Before these sections were struck down, states previously covered in part or in whole under section 4(b), like Alabama and North Carolina, had to seek federal preclearance before adopting a voter identification law.[99] Now, affected voters have little recourse if they want to prevent a law before an election. Though section 2 of the VRA, which allows affected voters to challenge state laws, still remains,[100] section 2 is merely a post hoc solution.[101] Under

95. *Id.* at 2629.

96. *Id.*

97. *See id.* at 2628–29. In describing how outdated the law was, Chief Justice Roberts stated,

> [b]ut history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

Id.

98. *Editorial: Congress, Redo Section 4 of the Voting Rights Act Now*, REPORTER-HERALD (Loveland, June 27, 2013, 8:57:14 PM), http://www.reporterherald.com/ci_23556024/editorial-congress-redo-section-4-voting-rights-act [http://perma.cc/TCR6-A4SH] ("Not so clear is whether Congress has the leadership needed to revamp Section 4, but that is what it needs to do -- and quickly.").

99. *Section 5 Jurisdictions*, *supra* note 16.

100. Voting Rights Act, 52 U.S.C. § 10301(b) (2014) (formerly 42 U.S.C. § 1973(b)).

the VRA, harm could be prevented before it occurred.[102] Now, the post-*Shelby County* landscape is reminiscent of the pre-VRA era, in which the Department of Justice could only bring case-by-case challenges that were often ineffective.[103]

B. Voter Identification Laws: A New Phenomenon

While Congress has created some federal laws regulating voting, for the most part, states retain the right to pass laws regarding the regulation of elections.[104] Over time, many states have chosen to pass voter identification laws requiring voters to present some form of identification before accessing the polls.[105] Although the Supreme Court first ruled that these laws were constitutional in 2008 in *Crawford*, it was not until the Court decided *Shelby County* that there was a rapid uptick in the severity of these laws, especially in states that had previously been required to secure federal preclearance before changing their voting laws.[106]

1. Voter Identification Laws from 1950–2000

Although voter identification laws have recently become popular, these laws are not a new phenomenon. In 1950, South Carolina enacted the country's first voter identification law.[107] The law instituted a fairly lenient voter identification requirement relative to current laws; voters were only required to show a document with their name on it—no photograph was required.[108] The law also did not specify what type of document voters needed to use to prove their identity.[109] Two decades later, in the 1970s, Hawaii also enacted a law that required identification.[110] Soon after, the popularity of voter identification laws,

101. Though some voter identification advocates have dismissed this difference as unimportant, voting cases are unique in that there is little remedy a court can provide after an election has already passed. *See infra* Section IV.C.

102. *See supra* notes 49–54 and accompanying text (describing the federal preclearance system under sections 4(b) and 5).

103. *See* Conroy, *supra* note 55, at 664.

104. *See* WANG, *supra* note 30, at 16.

105. *See infra* Section I.B.1.

106. *See infra* Section I.B.3.

107. Ann Blythe, *Critics of NC's Voter ID Law To Present Their Case in Court Friday*, NEWS & OBSERVER (Raleigh Jan. 29, 2015), http://www.newsobserver.com/news/politics-government/article10236998.html [http://perma.cc/5WWT-PCMQ].

108. *Id.*

109. *Id.*

110. *History of Voter ID*, NAT'L CONFERENCE OF ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx#History [http://perma.cc/P2MK-PZMD].

but not photo identification laws, began to pick up among the states.[111] By 2000, fourteen states had voter identification laws of some kind.[112]

2. *Crawford v. Marion County Election Board*: Photo Identification Gains Legitimacy

In the 2000s, photo identification gained popularity among state legislatures.[113] Commentators claim various reasons for the uptick in these laws. Some say it was the rise in "Tea Party" conservatives,[114] or a backlash against loose immigration standards.[115] Others cite exaggerated instances of fraudulent voting.[116] Another possible justification is merely political. Because state legislatures could regulate their own elections, and because majorities wanted to stay in power, state legislative majorities had an incentive to craft voting laws that would help them win elections.[117] Statistically, photo identification laws affect more Democratic than Republican voters.[118] Therefore, Republicans had an incentive to pass more stringent voter identification laws as a way to suppress the Democratic vote and thereby maintain their majority.[119]

The Supreme Court's decision in the 2008 case, *Crawford v. Marion County Election Board*, gave voter identification laws

111. *Id.*

112. *Id.*

113. SOBEL, *supra* note 4, at 6. South Dakota enacted the first photo identification law in 2003. *Id.*

114. *See, e.g.*, Zachary Roth, *Tea Party Pushing Voter ID in California*, MSNBC (Jan. 28, 2014, 3:22 PM), http://www.msnbc.com/msnbc/tea-party-pushing-voter-id-california [http://perma.cc/2HQR-6RGE] (describing conservative Tea Party members' support for strict voter identification laws).

115. *See, e.g.*, William La Jeunesse, *License, ID Card Policies Stir Concerns over Illegal Immigrants Voting*, FOX NEWS POL. (Nov. 1, 2014), http://www.foxnews.com/politics/2014/11/01/driver-licenses-id-cards-for-illegal-immigrants-causing-voting-concerns/ [http://perma.cc/XLG6-KT53] (describing conservative concerns that "there's . . . nothing stopping [noncitizens]" from voting, stemming from the 1993 Motor Voter Act (NVRA), which requires states to provide the right to register to vote when getting a license, theoretically allowing noncitizens who do have a license to register because of lax DMV authentication of actual citizen status).

116. *See infra* Section III.B.

117. *See generally* Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088 (2013) (finding that proposal and passage of restrictive voter identification laws are highly partisan issues and concluding that partisan motivations were behind the laws).

118. *Id.* at 1093.

119. *See, e.g.*, Daniel R. Biggers & Michael J. Hanmer, When Voting Gets Harder: Understanding the Adoption of Voter Identification Laws in the American States 24–25 (2011) (unpublished manuscript) (on file with author) (finding that the "largest increase in likelihood of id [sic] law enactment comes from a switch to a Republican governor").

legitimacy.[120] The case arose from a 2005 Indiana law requiring voters to present photo identification at the polls.[121] Indiana's definition of "photo identification" was broad: the state accepted any form of Indiana- or federal government-issued identification, so long as the identification included a name, photo, and expiration date.[122] A voter who did not bring his identification with him to vote could cast a provisional ballot, which would only be counted if he verified his identity with the state board of elections within ten days, either by presenting his photo identification, or executing an affidavit swearing that he was who he purported to be.[123]

The Supreme Court held that the law was constitutional.[124] Because the law was not facially discriminatory, the Court used a balancing test,[125] ultimately finding that Indiana's interest in preventing voting fraud outweighed the burden on the voters.[126] While some voter identification supporters upheld the decision as a necessary protection of our electoral system,[127] critics of such laws pointed out that the state presented little evidence that the type of in-person fraud Indiana's photo identification sought to prevent had in fact occurred.[128] Moreover, these critics challenged the Court's characterization of the burden imposed on voters.[129] They argued that the law that the Court dismissed as a mere "inconvenience"[130] was really a type of law that, when enacted nationwide, could disenfranchise thousands.[131] As one commentator pointed out, "[i]n reaching this conclusion, the Court's

120. *See generally* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (holding that Indiana's voter identification law was constitutional).

121. *Id.* at 185–86.

122. *Id.* at 198 n.16.

123. *Id.* at 199.

124. *Id.* at 203–04.

125. *Id.* at 190; *see also infra* Section II.C.1.

126. *Crawford*, 553 U.S. at 194–97.

127. *See, e.g.*, *Preserving the Integrity of the Electoral System*, SENATE REPUBLICAN POL'Y COMMITTEE (Sept. 21, 2012), http://www.rpc.senate.gov/policy-papers/preserving-the-integrity-of-the-electoral-process [http://perma.cc/KP2B-UE6E].

128. *See, e.g.*, N.C. DEMOCRACY, THE BIG LIE ABOUT VOTER ID (2011), http://nc-democracy.org/lod-big-lie-voter-id/ [http://perma.cc/78XJ-HVS8]; Childress, *supra* note 23; Rhonda Fanning, *Do Voter ID Laws Actually Prevent Voter Fraud?*, TEX. STANDARD (Apr. 28, 2015), http://www.texasstandard.org/shows/04282015/do-voter-id-laws-actually-prevent-voter-fraud/ [http://perma.cc/JM63-5KMS].

129. *See* Chang, *supra* note 3.

130. *Crawford*, 553 U.S. at 198.

131. *See* Chang, *supra* note 3 ("More than 300,000 registered voters in North Carolina could lack either a driver's license or a state ID . . . .").

opinion revealed a vision of American democracy that tolerated the exclusion of voters as both inevitable and acceptable."[132]

Crawford is seen as the decision that opened the door for photo identification laws around the country.[133] At the time *Crawford* was decided, only Indiana, Florida, and Georgia had photo identification laws.[134] Since *Crawford*, nine additional states have passed laws requiring strict forms of government-issued photo identification, and eight have passed voter identification laws allowing non-photo forms of identification.[135]

3. Voter Identification Laws After *Shelby County* and the State of Voting Laws as of 2015

Even before the passage of the VRA, some states required a form of identification, but overall, photo identification laws were relatively rare.[136] When the *Shelby County* Court overturned section 4(b) of the VRA, counties and states that had previously been required to obtain federal preclearance were suddenly free to change their election laws at will.[137] For example, of the nine states previously covered in their entirety under the VRA, three enacted photo identification after the *Shelby County* decision.[138]

As of 2014, thirty-three states have enacted voter identification laws.[139] Of these thirty-three states, seventeen require photo identification.[140] This means that the form of identification produced must include a photograph of the voter, as well as her name and address.[141] Another thirteen states allow identification without a photograph, so long as the identification includes identifying

132. *The Supreme Court, 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 356 (2008) [hereinafter *Leading Cases*] (referencing the subpart of the law review article entitled *Photo Identification Requirement for In-Person Voting*).

133. *See* SOBEL, *supra* note 4, at 6–7.

134. *Crawford*, 553 U.S. at 239.

135. Ari Berman, *Should the Supreme Court Have Accepted a Challenge to Wisconsin's Voter ID Law?*, THE NATION (Mar. 23, 2015), http://www.thenation.com/article/should-supreme-court-have-accepted-challenge-wisconsins-voter-id-law/ [http://perma.cc/M29Q-VYE4].

136. *See* Biggers & Hanmer, *supra* note 119, at 17–18.

137. *See* GAO REPORT, *supra* note 71, at 2 n.4.

138. *See, e.g.*, LOPEZ, *supra* note 16, at 2–3 (describing how Texas implemented its photo identification law the day of the *Shelby County* decision); *Section 5 Jurisdictions*, *supra* note 16; *Voter Identification Laws by State*, BALLOTOPEDIA (Apr. 2015), http://ballotpedia.org/Voter_identification_laws_by_state#cite_note-19 [http://perma.cc/X2BX-SHFV].

139. GAO REPORT, *supra* note 71, at 15.

140. *Id.* at 28.

141. *Id.*

information about the voter, such as a social security card or bank statement.[142]

Traditionally, registered voters can cast their votes either by (1) showing up at the polls on election day, (2) voting "absentee" by requesting a ballot and mailing it in, or (3) showing up at an early voting day.[143] Though the rules vary from state to state, most states do not require absentee voters to show identification by including a photocopy of their identifying document with their mailed-in ballot.[144]

Protections from the HAVA extend to voter identification at the polls as well; for example, the provisional ballot requirement in HAVA continues to apply to voter identification laws.[145] As a safeguard, if a voter comes to the polls on election day or an early voting day, but is found to be ineligible for lack of the requisite identification, HAVA requires states to allow a voter without identification to cast a provisional ballot.[146] This provisional vote acts as a placeholder while the relevant election entity determines the voter's registration status; if the local or state board of elections determines that the voter is indeed qualified to vote, the vote will then be counted.[147] Generally, in order for a voter's status to be determined, she must physically bring a copy of her identification to the state board of elections office.[148] This system

142. *Id.* at 17.

143. *Id.* at 14. Early voting is technically another form of absentee voting. *Id.* at 14 n.28. Rather than requesting a ballot, though, voters can show up at polling locations. *Id.* The process is much like voting on election day in form, but the ballots are treated like absentee ballots. *Id.* Practically speaking, this notation has little effect. *See id.*

144. *See 2015 Voter ID Laws*, LONG DISTANCE VOTER (May 16, 2015), http://www.longdistancevoter.org/voter-id-laws#.VcQzbZNViko [http://perma.cc/UR9D-RWDR]. As of 2015, only nine states of the thirty-three that require in-person identification also require identification for absentee voting purposes. *Id.*

145. *See generally* DANIEL P. TOKAJI, *The Help America Vote Act*, *in* THE E-BOOK ON ELECTION LAW (2015) (ebook), http://moritzlaw.osu.edu/electionlaw/ebook/part5/hava.html [http://perma.cc/7HET-64GG] (providing background on HAVA and describing its application to voter identification laws).

146. *See* GAO REPORT, *supra* note 71, at 57 n.82.

147. *See id.* at 57.

148. *Id.* at 57–58. For example,

> In Kansas, a voter who casts a provisional ballot must provide a valid form of identification to the county election officer in person or provide a copy by mail or electronic means before between 8:00 a.m. and 10:00 a.m. on the Monday following an election, when the county board of canvassers meets. At this meeting, the county election officer presents copies of identification received from provisional voters and the corresponding provisional ballots, and the board determines the validity of a voter's identification and whether the ballot will be counted. In Tennessee, in order to have a provisional ballot counted, the voter must provide evidence of identification to the administrator of elections at the county election office or other designated location by the close of business on the

presumes that the voter has the identification or has the ability to quickly secure an appropriate form of identification. If a voter does not bring in the applicable identification within the set time, her vote is discarded.[149] A recent Government Accountability Office ("GAO") report found that provisional ballot use has increased in certain states after those states passed voter identification laws.[150] However, the provision has been interpreted differently by the states, with the result that voters in different states receive varying levels of protection. The lack of research on provisional ballot counting and amount of discretion given to poll-workers concerns some critics.[151]

Despite the increase in voter identification laws for in-person voting, most of the states with such laws do not have equally stringent identification requirements for absentee voting.[152] Of the thirty-three states that require any sort of identification at the polls, photo or not, only nine require a copy of any identification be included with the

> second business day after the election. The voter must also sign an affidavit affirming that he or she is the same person who cast the provisional ballot.

Id.

149. *Id.* at 57.

150. *Id.* at 57–62.

151. WENDY R. WEISER, ARE HAVA'S PROVISIONAL BALLOTS WORKING? 5 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39043.pdf [http://perma.cc/9CJ4-3SNK] ("A number of states had no clearly articulated rules for provisional ballots; others announced partial rules only weeks, or days, before the election; and most left at least some aspects of the provisional balloting process to the discretion of county or local officials."); Pam Fessler, *Rules for Provisional Ballots All Over the Map*, NPR (Oct. 9, 2014, 3:05 PM), http://www.npr.org/sections/itsallpolitics/2014/10/09/354534487/rules-for-provisional-ballots-all-over-the-map [http://perma.cc/CP5L-EATH] ("But Hanmer says there's also evidence that whether a provisional ballot counts sometimes depends on an election official's political affiliation. 'That should strike anybody as problematic,' he says. The fact is, no one knows for sure. Though almost 3 million provisional ballots were cast in 2012, widespread provisional voting is fairly new and research is limited — which also means that poll workers and voters are often confused over how they work."); *see also* GAO REPORT, *supra* note 71, at 19–20. HAVA requires states to allow voters without identification to cast a provisional ballot, but this is a floor. *Id.* States are allowed to extend additional rights to those without identification. *Id.* Eighteen of the thirty-three states with an identification requirement only allow a provisional ballot to be cast, and in fifteen of those states, voters must supply election officials with appropriate identification within a certain period of time if they want their ballot counted. *Id.* Other states vary in their strict application of HAVA. *Id.* According to the GAO report, "1 state does not provide an alternative process if a voter does not have acceptable ID; 10 allow the voter to verify his or her identity and cast a regular ballot; and 4 allow for a voter's identity to be verified by elections officials and vote a regular ballot; and, of those 4, 3 additionally allow for the voter to cast a provisional ballot." *Id.* at 19 n.37. In the GAO's analysis of two states with identification requirements (Kansas and Tennessee), it found that provisional ballot use increased when the state enacted voter identification laws. *Id.* at 57–62.

152. GAO REPORT, *supra* note 71, at 14–15.

voter's absentee ballot, and only three of those states require that copy to be a photo ID.[153] In the remaining twenty-four states, a voter must sign an affidavit verifying his identity.[154] Notably, before the enactment of voter identification laws, many states merely required the signature of an affidavit for *both* absentee and in-person voting.[155]

4. Criticism of Current Voter Identification Laws: 2014 GAO Report

In 2014, Congress commissioned a report in response to the Supreme Court's decision in *Shelby County*.[156] The report focused on the anticipated effects of photo voter identification laws.[157] The report found that most provisional ballots cast for lack of identification reasons were not ultimately counted,[158] that there are problems in estimating actual evidence of voter fraud,[159] and that the cost of

153. *See 2015 Voter ID Laws*, *supra* note 144. "The identifying information that voters are required to provide when voting absentee varies—with some states requiring that voters provide documentary identification, such as a driver's license number, Social Security number, or copy of an acceptable document, and other states requiring information that does not involve an underlying document, such as the voter's signature or date of birth." GAO REPORT, *supra* note 71, at 14–15.

154. *2015 Voter ID Laws*, *supra* note 144.

155. *See, e.g.*, *Voting in North Carolina*, N.C. ST. BOARD ELECTIONS, http://www.ncsbe.gov/ncsbe/Voting [http://perma.cc/XU5H-8UWG] (requiring voters to sign only a poll book before voting until the photo identification law goes into effect).

156. Ben Kamisar, *GAO Report: Voter ID Laws Stunted Turnout*, THE HILL (Oct. 8, 2014, 1:18 PM), http://thehill.com/blogs/ballot-box/220147-gao-voter-id-laws-stunted-turnout-in-kansas-and-tennessee [http://perma.cc/85K2-G9Q8] ("Sens. Bernie Sanders (I-Vt.), Patrick Leahy (D-Vt.), Dick Durbin (D-Ill.), Charles Schumer (D-N.Y.) and Bill Nelson (D-Fla.) requested the report in light of last year's decision by the Supreme Court striking down part of the Voting Rights Act."); GAO REPORT, *supra* note 71, at 1 ("GAO was asked to review issues related to voter ID laws.").

157. *See generally* GAO REPORT, *supra* note 71.

> GAO was asked to review issues related to voter ID laws. This report reviews (1) what available literature indicates about voter ownership of and direct costs to obtain select IDs; (2) what available literature and (3) analyses of available data indicate about how, if at all, voter ID laws have affected turnout in select states; (4) to what extent provisional ballots were cast due to ID reasons in select states and (5) what challenges may exist in using available information to estimate the incidence of in-person voter fraud.

Id. at 1.

158. *Id.* at 61 (finding that increased usage of provisional ballots was attributable to the increasingly strict voter identification requirements).

159. *Id.* at 63–74 (commenting on the difficulty of determining how often fraud is committed). The GAO report uses Medicare fraud as a comparison. *Id.* In-person fraud is particularly difficult to detect. *Id.* However, even so, instances of fraud are rare. *See id.* at 69. In a study of the November 2010 election, there were two-hundred questioned votes; all but five were the result of clerical errors. *Id.*

acquiring voter identification can be expensive to the individual.[160] Overall, the report found that in some states, identification requirements have had or will have a negative impact on voter turnout.[161]

C. *North Carolina Voting Laws: A History of Expanding and Contracting*

Because states' practices are so different with respect to voter identification laws, this Comment will provide an example of voting laws and voting law enactment in the states by examining the law in one state in particular: North Carolina. The Comment will explore (1) North Carolina's history of discriminatory voting laws; (2) the state's period of expanding voting rights; and (3) the state's passage of one of the most restrictive voter identification laws in the country.[162] Though North Carolina's law was recently amended to allow voters without identification to use their social security numbers,[163] the progression of the state's approach to voter identification laws serves as a helpful case study of the questionable constitutionality of photo identification laws.

1. A History of Discrimination: North Carolina Voting Laws from 1776–1965

The history of North Carolina's voting laws is far from tidy. Throughout its history, the state has utilized a variety of statutory mechanisms limiting the franchise to white men, including literacy tests,

160. *Id.* at 31–33 (2014) (finding that, across the states, the costs of voter identification vary widely). In North Carolina, an eight-year license costs thirty-two dollars, whereas in Kansas, a license is fourteen dollars, but there is an additional eight-dollar photo fee. *Id.* at 31. Furthermore, the number of documents that a person must provide (which can also be costly) varies. *Id.* Kansas identification applicants need only any proof of identity and residency, whereas in Indiana, a driver has to provide various forms of identification from a specific list of U.S. documents (e.g., a passport or a birth certificate). *Id.*

161. *See id.* at 169–79; *see also* Kamisar, *supra* note 156 ("Congress's research arm blamed the two states' laws requiring that voters show identification on a dip in turnout in 2012 — about 2 percentage points in Kansas and between 2.2 and 3.2 percentage points in Tennessee.").

162. North Carolina is a good example of the issues of voter identification and the potential problems. *See supra* Section I.C; *see infra* Part IV. Until 2013, nearly half of the state's counties were subject to federal preclearance under the VRA. *See Section 5 Jurisdictions*, *supra* note 16. The combination of the quick change in the law and history of discriminatory voting laws makes for an interesting analysis. *See supra* Section I.C; *see infra* Part IV.

163. Act of June 18, 2015, ch. 103, § 8.(d), 2015 N.C. Sess. Laws ___ (codified at N.C. GEN. STAT. § 163-166.15 (2015)).

grandfather clauses, and poll taxes.[164] Surprisingly, North Carolina's 1776 constitution initially opened the franchise to include some black men.[165] However, at the state's constitutional convention in 1835, North Carolina chose to disenfranchise free blacks.[166] During the post-Civil War Reconstruction era, voting rights for black Americans were briefly expanded, only to be restricted again in the 1870s "Redemption" era.[167] During this period, white Southerners attempted to reassert their dominance by imposing strict voting laws, utilizing techniques that were popular nationally, such as poll taxes and literacy tests.[168]

In 1874, the first black man from North Carolina was elected to Congress,[169] and in 1898, a coalition of black and white state representatives took political control of the state legislature.[170] Many white North Carolinians were outraged, vowing revenge.[171] White lawmakers played on fears, prejudices, and racial stereotypes to inspire hatred, calling for mass lynching.[172] Even when white representatives

164. *See* JEFFREY J. CROW, PAUL D. ESCOTT & FLORA J. HATLEY, A HISTORY OF AFRICAN AMERICANS IN NORTH CAROLINA 92 (2002) (describing disenfranchisement of black North Carolinians); JACK D. FLEER, NORTH CAROLINA GUIDE TO POLITICS: AN INTRODUCTION 14–15, 24–26 (1968) (describing literacy tests required for voting in North Carolina and discussing the number of black and white voter registrants during the relevant period). In fact, the North Carolina Constitution still requires that any person who wants to register to vote must be able to read or write any portion of the constitution in English, its complicated language making it a daunting task for even some native speakers. N.C. CONST. art. VI, § 4. Additionally, North Carolina was particularly averse to women's suffrage, and did not allow women to vote until the passage of the Nineteenth Amendment. Meredith Malburne-Wade, *North Carolina and the Struggle for Women's Suffrage*, DOCUMENTING THE AMERICAN SOUTH, http://docsouth.unc.edu/highlights/suffrage.html (last updated Aug. 18, 2015) [http://perma.cc/5WDJ-A4JK].

165. LACY K. FORD, DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH 420–21 (2009).

166. Ronnie K Faulkner, *Constitution of 1835*, N.C. HIST. PROJECT, http://www.northcarolinahistory.org/commentary/32/entry [http://perma.cc/CY9Z-LV4N].

167. *See* Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1305 (2012) (voting rights for blacks were restricted during the 1870s). *See generally* Gabriel J. Chin, *The "Voting Rights Act of 1867": The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1588–89 (2004) (discussing how the South retaliated against mandatory enfranchisement by strengthening criminal disenfranchisement and focusing on crimes more often committed by African Americans).

168. U.S. Dep't of State, *The Struggle for Voting Rights*, LEARN NC, http://www.learnnc.org/lp/editions/nchist-postwar/6031 [http://perma.cc/5SZP-NA6W]; *see also supra* notes 31–41 and accompanying text.

169. *See* Office of the Clerk, U.S. House of Representatives, *John Adams Hyman*, LEARN NC, http://www.learnnc.org/lp/editions/nchist-civilwar/5471 [http://perma.cc/2GHB-QFXC].

170. *See* Timothy B. Tyson, *The Ghost of 1898: Wilmington's Race Riot and the Rise of White Supremacy*, NEWS & OBSERVER (Raleigh), Nov. 17, 2006, at 1A.

171. *Id.*

172. *Id.* at 8.

took back political control of the state legislature, tensions continued to rise, eventually to the point of riots in Wilmington.[173] Wilmington was a predominantly black town at the time,[174] and white citizens took to the streets with guns, intent on decimating the black population.[175] At least twenty-five black men's deaths were accounted for, but historians estimate that many more black citizens were killed and their bodies dumped in the nearby Cape Fear River.[176]

The violence did not end with the Wilmington riots. As if the fear of violent retribution were not enough of a threat to black voters, a 1900 campaign advocating for the return to "white man's government"[177] led the legislature to enact strict voting laws.[178] Under these new laws, voters faced additional requirements: they needed to prove that they were literate, that they could vote before Reconstruction, or that they were the descendants of someone who could vote before Reconstruction.[179] Some of these laws remained in force through the 1960s.[180] Though not facially discriminatory, in practice these laws kept black citizens out of the franchise while still allowing many white citizens to vote.[181] Because black communities in North Carolina lacked access to public education for years, because the state legislature deliberately made the literacy tests difficult, many black citizens were unable to pass.[182] Furthermore, even though the franchise had once been open to black voters,[183] the grandfather clause that created an exception to literacy tests for descendants of those who could vote pre-Reconstruction was meaningless to most black voters, as

173. *Id.* at 10.

174. *Id.* at 4.

175. *Id.*

176. *See id.* at 9, 14.

177. *See* THOMAS DIXON JR., THE LEOPARD'S SPOTS: A ROMANCE OF THE WHITE MAN'S BURDEN—1865–1900: ELECTRONIC EDITION 442 (1998), http://docsouth.unc.edu/southlit/dixonleopard/leopard.html [http://perma.cc/5SBC-34G5] (using the phrase in a work of fiction). Dixon was a North Carolina state legislator and a white supremacist. *See* Jennifer L. Larson & Mary Alice Kirkpatrick, *Summary: The Leopard's Spots*, DOCUMENTING THE AMERICAN SOUTH (Feb. 15, 2015), http://docsouth.unc.edu/southlit/dixonleopard/summary.html [http://perma.cc/FJR7-UGRE] (referring to and analyzing the use of "white man's government" in *The Leopard's Spots*).

178. *See* WANG, *supra* note 30, at 20.

179. *Id.*

180. *E.g.*, Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013, 12:30 PM), http://www.slate.com/blogs/the_vault/2013/06/28/voting_rights_and_the_supreme_court_the_impossible_literacy_test_louisiana.html [http://perma.cc/ULS9-FCHC].

181. *See* WANG, *supra* note 30, at 24–25.

182. *See id.* at 20 (discussing tactics such as literacy tests that were used across the nation to disenfranchise black voters).

183. *See supra* note 169 and accompanying text.

the North Carolina law required the voter's ancestor to have been eligible to vote on January 1, 1867.[184] Because of these limitations, it was nearly impossible for black citizens to vote during this era.

2. An Era of Progress: 1965–2013

After two world wars, a civil rights movement, and the passage of federal legislation,[185] North Carolina began to loosen its voting restrictions.[186] The passage of the federal Voting Rights Act in 1965 forced North Carolina to open the franchise to minorities.[187] Although forty North Carolina counties were subject to the federal preclearance restrictions of sections 4(b) and 5,[188] laws that *expanded* the franchise, as North Carolina's did for many years, could easily get approval.[189] As a result, by the 2000s, North Carolina's voting laws were some of the most progressive in the country.[190] Though North Carolina had historically low voter turnout, civic groups pushed through broad reforms with bipartisan support.[191] The widely held view that voting rights are sacred drove the expansion of the franchise; as one

184. *See* Orth, *supra* note 42, at 1786; *see also* WANG, *supra* note 30, at 20.

185. WANG, *supra* note 30, at 29–34 (describing the post-World War II changes that led to the Voting Rights Act).

186. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts To Make It Harder To Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 59 (2013).

187. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437–46 (codified as amended at 52 U.S.C. § 10301 (2014)) (formerly 42 U.S.C. § 1973).

188. *See Section 5 Jurisdictions*, *supra* note 16.

189. *See generally* Anita S. Earls, Emily Wynes & LeeAnne Quatrucci, *Voting Rights in North Carolina: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008) (describing the laws that have failed preclearance and noting that most attempt to make it harder to vote, rather than easier). North Carolina's laws eventually grew to include extensive early voting, same-day voter registration, and out-of-precinct voting. *See infra* notes 193–199 and accompanying text.

190. *See generally* Chris Kromm & Sue Sturgis, *North Carolina's Tug-of-War*, AM. PROSPECT (June 6, 2013), http://prospect.org/article/north-carolinas-tug-war [http://perma.cc/R5Z6-NWML] (describing North Carolina's history of electing moderate leaders and slowly enacting progressive reforms). Among other things, North Carolina's early-voting period is "one of the nation's most generous," and it was the first state to enact a program that provided public funding of judicial candidates. *Id.* Moreover, because of its various reforms, the state was one of the top fifteen in the country for voter participation in elections. *Id.*

191. *See* Abby Rapoport, *Republicans v. Democracy in North Carolina*, AM. PROSPECT (July 25, 2013), http://prospect.org/article/republicans-vs-democracy-north-carolina [http://perma.cc/YUW5-MNH6] ("A coalition of civic groups, lead by the state NAACP president, the Reverend William Barber, worked for years to get the legislature to address the problem [of dismal voter turnout]."); *see also* Mike McLaughlin et al., *Improving Voter Participation and Accuracy in North Carolina's Elections*, 20 N.C. INSIGHT 2, 6–8 (2003) (describing the changes in the law during the 1990s and early 2000s).

Republican supporter put it, "It's a sacred right that we have to vote."[192]

As of 2007, if a North Carolinian wanted to vote, he had a variety of options.[193] If he could not physically make it to the polls, he could mail in a request for an absentee ballot.[194] Due to a change in the law in 2000,[195] a voter who had to work on election day, or one who found his precinct's location inconvenient, could "early vote" at a variety of satellite sites, beginning seventeen days before an election.[196] This schedule allowed voters nearly three weeks to make it to the polls. While voters could also vote on the traditional election day at their assigned precinct, those who showed up at the wrong precinct on election day could still cast a provisional ballot under a 2005 addition to the law.[197] And in 2007, the general assembly amended the law to allow voters to register and vote on the same day.[198] Furthermore, sixteen-year-olds who would be eligible to vote in the presidential election could vote in presidential primaries.[199]

3. Changing Election Laws from 2012 to the Present

North Carolina's political climate began to shift in 2012.[200] Though North Carolina had a reputation for being a moderate state, in 2012 the state elected a Republican governor and a Republican supermajority in the general assembly.[201] The legislature passed a number of reforms,[202]

192. Rapoport, *supra* note 191.

193. *See generally id.* (describing the various voting options available to North Carolinians in 2013).

194. McLaughlin, *supra* note 191, at 36.

195. Ari Berman, *North Carolina Will Determine the Future of the Voting Rights Act*, THE NATION (July 11, 2014), http://www.thenation.com/article/north-carolina-will-determine-future-voting-rights-act/ [http://perma.cc/24ZE-YKK2].

196. *See* Mark Binker, *Q&A: Changes to NC Election Laws*, WRAL (Raleigh Aug. 12, 2013), http://www.wral.com/election-changes-coming-in-2014-2016/12750290/ [http://perma.cc/7DMQ-SRAU].

197. Berman, *supra* note 195.

198. *See id.*

199. Reid Wilson, *27 Other Things the North Carolina Voting Law Changes*, WASH. POST (Sept. 8, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/08/27-other-things-the-north-carolina-voting-law-changes/ [http://perma.cc/3ZGD-AZZ3] (summarizing the various changes that were enacted through the passage of H.B. 689).

200. Kim Severson, *G.O.P.'s Full Control in Long-Moderate North Carolina May Leave Lasting Stamp*, N.Y. TIMES (Dec. 11, 2012) http://www.nytimes.com/2012/12/12/us/politics/gop-to-take-control-in-long-moderate-north-carolina.html? [http://perma.cc/CY7Y-7C82].

201. *Id.*

202. *See* Tyler Dukes & Kelly Hinchcliffe, *As General Assembly Protests Grow, So Do Frustrations*, WRAL (Raleigh July 23, 2013), http://www.wral.com/as-general-assembly-protests-grow-so-do-list-of-frustrations/12672645/ [http://perma.cc/2EMU-KT68]

but did not immediately change voting laws.[203] Because many counties in the state were still under sections 4(b) and 5 of the VRA,[204] the Department of Justice had to approve any changes North Carolina made to election laws, and approval of a strict voter identification law was therefore difficult to obtain.[205] Instead of enacting such a strict law, the legislature initially filed a relatively modest voter identification bill in April 2013.[206] Though the initial bill still proposed a voter identification requirement, the bill was broadly written so that many types of identification, including those issued by public colleges or employers, would be permitted.[207] The bill passed the House in this form and moved to the Senate, where it sat untouched for months.[208]

During this process, the Supreme Court decided *Shelby County*, which overturned sections 4(b) and 5 of the VRA, on June 25, 2013.[209] By July 23, 2013, the North Carolina General Assembly had drafted a sweeping amendment to the April bill.[210] The originally modest, fourteen-page bill ballooned to fifty-seven pages, including dramatic restrictions on access to polls.[211] The new version of the bill passed the

(describing changes the General Assembly made in the first term after Republicans obtained a majority in the legislature, including ending long-term unemployment benefits, declining the Medicaid extension, ending earned income tax credit, and passing strict abortion bills).

203. *House Bill 589/S.L. 2013-381*, N.C. GEN. ASSEMBLY (2013), http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H589 [http://perma.cc/2LJ5-Z58A] [hereinafter *House Bill 589 Information/History*] (describing how the North Carolina General Assembly wrote a voter identification bill in the Spring of 2013, but did not take any immediate action); *see also* Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506 (codified at N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015)) (describing how the North Carolina General Assembly wrote a voter identification bill in the spring of 2013, but did not take any immediate action).

204. *Section 5 Jurisdictions*, *supra* note 16.

205. *See generally* Earls, Wynes & Quatrucci, *supra* note 189 (describing North Carolina under federal preclearance).

206. *See House Bill 589 Information/History*, *supra* note 203 (describing how the North Carolina General Assembly wrote a voter identification bill in the spring of 2013, but did not take any immediate action). *See generally* H.B. 589, Gen. Assemb., Reg. Sess. (N.C. 2013).

207. H.B. 589, Gen. Assemb., Reg. Sess. (N.C. 2013).

208. *See House Bill 589 Information/History*, *supra* note 203 (indicating that the bill remained untouched for months).

209. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2627–28 (2013).

210. *See House Bill 589 Information/History*, *supra* note 203 (demonstrating how rapidly the North Carolina Senate passed its voter identification bill after the 2013 *Shelby County* decision).

211. *See supra* note 207 and accompanying text; *see also* Fessler, *supra* note 151.

Senate within a day, and flew through the House in two more.[212] The bill eliminated many of the previously available laws that helped North Carolinians vote.[213] Under the new rules, there was no same-day registration or out-of-precinct voting.[214] Voters who did not register nearly a month in advance of the election or who mistakenly went to the wrong precinct could not vote.[215] The early voting period was shortened, making it more difficult for those with inflexible work hours to vote.[216] Pre-registration of sixteen-year-olds was eliminated,[217] hurting efforts to increase youth participation in elections.[218]

Most significantly, beginning in 2016, the legislation required that all registered voters show photo identification at the polls.[219] Previously, voting laws only required voters to confirm their addresses and sign an affidavit.[220] After the July 2013 law, voters in North Carolina are required to show a North Carolina driver's license, a United States passport, a United States military identification card, a veteran identification card, a tribal enrollment card, or a special, non-driver's-license identification card.[221] Many of the forms of identification previously acceptable under the April 2013 bill, including

212. *See House Bill 589 Information/History*, *supra* note 203 (demonstrating how rapidly the North Carolina Senate passed its voter identification bill after the 2013 *Shelby County* decision).

213. *See generally* Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505 (codified in scattered sections of N.C. GEN. STAT. ch. 163 (2013), *amended by* N.C. GEN. STAT. ch. 163 (2015)) (adding a voter identification law).

214. Voter Information Verification Act §§ 16.1–16.1A, 2013 N.C. Sess. Laws at 1535–37 (codified at N.C. GEN. STAT. § 163-82.6A (2013), *amended by* N.C. GEN. STAT. § 163-82.6A (2015)); Voter Information Verification Act, § 49.1, 2013 N.C. Sess. Laws at 1554 (codified at N.C. GEN. STAT. § 163-55 (2013)).

215. Voter Information Verification Act § 16.3, 2013 N.C. Sess. Laws at 1535 (codified as amended at N.C. GEN. STAT. § 163-82.6(c) (2013)); Voter Information Verification Act § 49.1, 2013 N.C. Sess. Laws at 1554 (codified as amended at N.C. GEN. STAT. § 163-55 (2013)).

216. Voter Information Verification Act § 25.1, 2013 N.C. Sess. Laws at 1540–41 (codified as amended at N.C. GEN. STAT. § 163-227(b) and (g) (2013)).

217. Voter Information Verification Act § 12.1(c), 2013 N.C. Sess. Laws at 1531–32 (codified as amended at N.C. GEN. STAT. § 163-82.4(d) (2013)).

218. *Youth Preregistration Fact Sheet*, FAIR VOTE: THE CTR. FOR VOTING & DEMOCRACY, http://www.fairvote.org/reforms/universal-voter-registration/voter-preregistration-4/youth-preregistration-fact-sheet/ [http://perma.cc/9EFR-HZQC].

219. Voter Information Verification Act § 2.1, 2013 N.C. Sess. Laws at 1506 (codified at N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015)).

220. *Voting in North Carolina*, *supra* note 155 (providing that until the new photo identification law goes into effect, voters are only required to sign a poll book before they vote).

221. Voter Information Verification Act § 2.1, 2013 N.C. Sess. Laws at 1506 (codified at N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015)).

college student identification cards, were removed in the new bill.[222] The law applies to all registered voters, even if they already showed photo identification when they registered to vote.[223]

The law provides some safeguards for citizens who do not drive or have the appropriate documentation, but have registered to vote. These voters can get a special identification card instead of a license.[224] Usually, the card costs ten dollars.[225] The law includes exceptions for the blind and the elderly, those who have had their licenses revoked, and the homeless.[226] Furthermore, a voter who does not have another form of identification and cannot afford one may sign a declaration to that effect to have the fee waived.[227] Similarly, a voter who cannot

222. Matt Apuzzo, *Students Join Battle To Upend Laws on Voter ID*, N.Y. TIMES (July 5, 2014), http://www.nytimes.com/2014/07/06/us/college-students-claim-voter-id-laws-discriminate-based-on-age.html?_r=0 [http://perma.cc/E33L-LGNV] (stating that college student identification cards were a significant omission from the law). According to some state politicians, college IDs were removed from the law in order to prevent college students from voting via absentee ballot in their home states, and again in North Carolina. *See id.* "Not that they would necessarily [vote in two elections]," Jeff Tarte, a Republican state senator, said, "but why even offer that possibility to occur?" *Id.* Essentially, the law made it harder for college students to vote in North Carolina. *See id.* However, previous case law established that nonresident college students have the right to choose between voting in the state where they are attending school, or in their home state. Lloyd v. Babb, 296 N.C. 416, 449, 251 S.E.2d 843, 864 (1979). Furthermore, *Lloyd* also held that a college student does not have to intend to stay in the college community beyond graduation in order to establish his domicile for voting purposes. *Id.* at 444, 251 S.E.2d at 861. Accordingly, the voter identification law conflicts with *Lloyd*; a nonstudent voter who moves to the state would have to change her license, but under *Lloyd*, college students do not have to make the college community their home beyond graduation (which securing a license would imply). *Id.* By removing college IDs from the law, lawmakers essentially made the choice of where students would vote for them, or at the very least, made the process of voting much more difficult for out-of-state students. By not allowing college students to use their student identification to vote, it follows that students would either need to: (1) register for a North Carolina license, and give up their driver's license in their home state or (2) vote by absentee ballot in their home state.

223. N.C. GEN. STAT. § 163-166.13(a) (2013).

224. *Id.* § 163-166.13(e)(2), *amended by* N.C. GEN. STAT. § 163-166.13(e)(2) (2015).

225. Voter Information Verification Act, ch. 381, § 3.1, 2013 N.C Sess. Laws 1505, 1510 (codified as amended at N.C. GEN. STAT. § 20-37.7(d) (2013)). Comparatively, a driver's license costs $4 per year plus the cost of driver's liability insurance. *All North Carolina DMV Fees*, N.C. DIV. OF MOTOR VEHICLES, http://www.ncdot.gov/dmv/fees/ [http://perma.cc/6JW7-JA28]; *Requirements & Documents to Obtain a Non-Operator ID Card*, N.C. DIVISION OF MOTOR VEHICLES, http://ncdot.gov/dmv/driver/id/ [http://perma.cc/3ABF-HQUH]. Non-owner liability insurance typically costs $1,200 for six months. DURHAM TECH. CMTY. COLL., GETTING A NC DRIVER'S LICENSE (2013) http://www.durhamtech.edu/cgl/DriversLicense.pdf [http://perma.cc/44NJ-UNR2].

226. N.C. GEN. STAT. § 20-37.7(d)(1)–(4).

227. *Id.* § 20-37.7(d)(5).

produce a copy of his birth or marriage certificate (such copies typically cost about ten dollars) can have these fees waived as well.[228]

The law generated substantial controversy, mostly down party lines.[229] The conservative Republicans who passed the bill hailed the law as necessary to restore voter confidence in a failing voting system.[230] Citing the need to prevent fraudulent voting, Governor Pat McCrory likened voter identification to an added precaution, like "lock[ing] your doors at night" even if you have never been robbed.[231] Even though fraud has not occurred, the voter identification law is a preemptive measure to protect the voting process. On the other hand, this law unraveled much of the work of previous North Carolina legislatures in expanding the franchise to minorities and the poor, and some argue that the fees associated with securing photo identification make it an unconstitutional burden on citizens' fundamental right to vote.[232] Additionally, because minorities and the poor are typically more likely to support North Carolina Democrats, the party was more sensitive to the potential impact the law might have.[233]

Even outside of the General Assembly, the law incited strong opinions. Some North Carolinians applauded the state for finally taking action against voting fraud.[234] Other supporters claim that the law effectively boosts voter morale because citizens feel more confident in

228. Voter Information Verification Act, ch. 381, § 3.2, 2013 N.C. Sess. Laws 1511 (codified as amended at N.C. GEN. STAT. § 130A-93 (2013)).

229. *See, e.g.*, Dukes & Hinchcliffe, *supra* note 202 (describing "Moral Monday" protests).

230. Governor Pat McCrory, Letter to the Editor, *Why I Signed the Voter ID Bill*, N.C. SPIN (Raleigh Aug. 12, 2013), http://www.ncspin.com/mccrory-why-i-signed-the-voter-id-bill/ [http://perma.cc/DW4U-JHE2].

231. *Id.*

232. *See* Robert Barnes, *N.C. Case Represents Pivotal Point of Voting Debate*, WASH. POST. (July 30, 2015), http://www.washingtonpost.com/politics/courts_law/outcome-of-trial-on-nc-election-law-changes-will-have-national-effect/2015/07/30/00645094-35f4-11e5-b673-1df005a0fb28_story.html [http://perma.cc/J59Z-AYFY] ("A 14-page bill that would require voters to show specific kinds of identification was replaced with a 57-page omnibus package. It rolled back or repealed a number of voting procedures that civil rights leaders say had made the state a leader in increasing African American voter turnout.").

233. *See* STATE BD. OF ELECTIONS, *supra* note 1, at 3. Of voters who could not be matched with a state-issued identification, about 324,000 were Democrats, compared to 140,000 Republicans without identification. *Id.*

234. Jeremy Hobson, *N.C. Gov. Pat McCrory Defends New Voter ID Law*, HERE & NOW (NPR radio broadcast and transcript Aug. 13, 2013), http://hereandnow.wbur.org/2013/08/13/voter-id-mccrory [http://perma.cc/UNR5-N94F]. McCrory defended the law, stating that the identification required to vote is no greater than what is required for food stamps, or any government service. *Id.*

a democracy with such safeguards.[235] On the other hand, critics condemned the law, likening it to the discriminatory "Jim Crow era" voting laws.[236] The sweeping legislative reforms over the summer of 2013, which included the voter identification law, sparked weekly "Moral Monday" protests outside the General Assembly, where members of the community were peacefully arrested nearly every week.[237] Taking the protest one step further, the League of Women Voters, the American Civil Liberties Union, the Southern Coalition for Social Justice, the North Carolina NAACP, U.S. Attorney General Eric Holder, and the Department of Justice filed suit against the State of North Carolina in July of 2013.[238] Holder alleged that the General Assembly "took extremely aggressive steps to curtail the voting rights of African-Americans."[239] He characterized the legislation as an "intentional step to break a system that was working."[240] Roy Cooper, North Carolina's Attorney General, voiced his opposition to the law, calling it "one of the worst election pieces of legislation in the country."[241]

Though there were many strong opinions about voter identification, those in favor of the law had the benefit of precedent.[242]

235. Howard Koplowitz, *Midterm Election Results 2014: Did Voter ID Laws Help Republicans Win the Senate Majority?*, INT'L BUS. TIMES (Nov. 5, 2014, 3:09 PM), http://www.ibtimes.com/midterm-election-results-2014-did-voter-id-laws-help-republicans-win-senate-majority-1715785 [http://perma.cc/6DPE-TCTF].

236. BRENNAN CTR. FOR JUSTICE, VOTING LAWS ROUNDUP 2013, at 1, http://www.brennancenter.org/sites/default/files/analysis/Voting_Laws_Roundup_2013.pdf [http://perma.cc/6ELS-B7DV] ("And one state, North Carolina, passed a new law to curb rights — one of the most restrictive laws since the Jim Crow era.").

237. Dukes & Hinchcliffe, *supra* note 202 (describing "Moral Monday" protests).

238. NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014); United States v. North Carolina, No. 1L13CV861, 2014 WL 494911 (M.D.N.C. 2014); *see also League of Women Voters of North Carolina, et al. v. North Carolina*, ACLU (July 30, 2015), https://www.aclu.org/cases/league-women-voters-north-carolina-et-al-v-north-carolina (summarizing litigation brought against the voter identification bill); Holly Yeager, *Justice Files Suit Against North Carolina over Voting Law*, WASH. POST (Sept. 30, 2013), http://www.washingtonpost.com/politics/justice-to-sue-north-carolina-over-voting-law/2013/09/30/70799fa4-29eb-11e3-8ade-a1f23cda135e_story.html [http://perma.cc/89EE-AMZA].

239. Hunter Schwarz, *Justice Department Sues North Carolina over Voter ID Law*, WASH. POST (July 7, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/07/justice-department-sues-north-carolina-over-voter-id-law/ [http://perma.cc/MN6C-BURA].

240. *Id.*

241. Joel Brown, *Cooper, McCrory Disagree About Defending Lawsuit over Voter Identification*, ABC NEWS (Oct. 1, 2013), http://abc11.com/archive/9269692/ [http://perma.cc/EX56-U2DN]. Cooper's statements likely led to the state seeking outside counsel to defend the suit. *See id.*

242. *See* Crawford v. Marion Cty., 553 U.S. 181, 204 (2008) (holding that requiring photo identification is constitutional).

Crawford v. Marion County seemingly had already decided the issue of constitutionality. However, dissenters pointed out that *Crawford* was decided in a state with a very different history, *Crawford* dealt with an Indiana law, and Indiana has relatively little history of voting discrimination and was not covered under the VRA.[243] Conversely, North Carolina has a long history of virulent discrimination and was previously covered by the VRA.[244] Moreover, the fact that the general assembly made dramatic changes within a month after the VRA was struck down caused critics to be wary of potential discriminatory effects.[245]

In response to pending lawsuits, just five days before the state court trial was set to be heard and two weeks before the federal trial, the general assembly amended the law.[246] Though voters still must present photo identification at the polls, if a voter shows up to the polls without photo identification, he can instead sign an affidavit swearing that he cannot get the requisite identification.[247] He will also have to provide the last four digits of his social security number.[248]

The North Carolina voter identification law does not go into effect until 2016.[249] However, the November 2014 midterm elections likely served as a preview of what is in store.[250] Before the midterm elections, there was a flurry of judicial activity regarding changes in early voting, same-day registration, and prohibitions on out-of-precinct voting.[251] The district court denied a request to enjoin the changes,[252] and the

243. *See Section 5 Jurisdictions*, *supra* note 16 (noting that neither the state of Indiana nor its counties were previously covered by section 5).

244. *Id.* (showing that forty North Carolina counties were covered under section 5).

245. *See supra* notes 209–218 and accompanying text.

246. *See* Anne Blythe & Colin Campbell, *NC Legislature Votes To Soften Voter ID Requirement*, NEWS & OBSERVER (Raleigh June 18, 2015), http://www.newsobserver.com/news/politics-government/article24877873.html [http://perma.cc/859S-YZLC].

247. *Id.*

248. *Id.*

249. N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015).

250. Before the November midterm elections in 2014, there was a flurry of judicial activity over new, less restrictive voting regulations. *See, e.g.*, Veasey v. Perry, 135 S. Ct. 9 (2014); North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014). For coverage of the legislation, *see* Tripp Gabriel & Manny Fernandez, *Voter ID Laws Scrutinized for Impact on Midterms*, N.Y. TIMES (Nov. 18, 2014), http://www.nytimes.com/2014/11/19/us/voter-id-laws-midterm-elections.html?_r=0 [http://perma.cc/UVN8-7Y7M].

251. *See, e.g.*, *League of Women Voters*, 135 S. Ct. at 6 (describing the new changes to North Carolina voting laws).

252. *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 383–84 (M.D.N.C. 2014), *rev'd*, League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014).

Fourth Circuit reversed.[253] Under the Fourth Circuit's decision, these changes would not have gone into effect, and early voting, same-day registration, and out-of-precinct voting would have remained unchanged.[254] However, the Supreme Court granted a stay of the Fourth's Circuit's opinion.[255] As a result, the law went into effect, and the elections were held with limited early voting and without same-day registration or out-of-precinct voting.[256] In a rare dissent to a stay, Justice Ginsburg, joined by Justice Sotomayor, wrote to express her disagreement.[257] In particular, Justice Ginsburg pointed out that the North Carolina law was enacted almost immediately after the *Shelby County* decision and that the new law likely would not have survived federal preclearance.[258] Justice Ginsburg also criticized the state's argument that these measures were unnecessary because black voter turnout had increased since the VRA's passage, pointing out that the state relied on data from primary elections, but the case at hand involved a general election.[259] Given the disagreements among courts over the handling of these issues, it is likely that the North Carolina voter identification law, or one like it, will eventually reach the Supreme Court.

The initial version of the voter identification law would likely have made voting more difficult for those who do not already have photo identification.[260] Given the state's history of voting discrimination, many critics of the voter identification law saw this abrupt change to the pattern of voting rights expansion as a continuation of that discrimination.[261] Moreover, the fact that the law was changed less than a week before litigation was set to begin seems almost like a concession that the law was wrong. Indeed, there were many issues with the law, the most significant being the law's disproportionate effect on black voters, Latino voters, and young voters.[262] Some estimated that the law

253. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248 (4th Cir. 2014).

254. *Id.*

255. *League of Women Voters*, 135 S. Ct. at 6 (granting a stay of the Fourth Circuit's decision).

256. *See generally id.* (granting the stay and thereby allowing the law to remain in place until a petition for certiorari was granted or denied).

257. *Id.* at 6–7 (Ginsburg, J., dissenting).

258. *Id.*

259. *Id.*

260. Chang, *supra* note 3.

261. *Id.*

262. Childress, *supra* note 23 ("African-Americans and Latinos are more likely to lack one of these qualifying IDs according to several estimates. Even when the state offers a free photo ID, these voters, who are disproportionately low-income, may not be able to

would have disenfranchised more than 300,000 registered voters in North Carolina,[263] and even though a free form of identification was available, other issues, like access to DMVs in rural areas, made obtaining identification impractical.[264]

Though critics and supporters of the law have many opinions, the focus of the debate should center on whether the law is constitutional. Whether the Supreme Court views the law as unconstitutional will depend on which standard of scrutiny it uses to evaluate the law, and what burden, if any, photo identification laws place on voters.

II. TWO TYPES OF SCRUTINY: THE SUPREME COURT AND LAWS BURDENING THE RIGHT TO VOTE

The United States has a tumultuous voting rights history. For the majority of this country's existence, voting rights have been limited to wealthy, white males.[265] These problems are even more relevant in the South.[266] As evidenced by North Carolina's history, not only was the franchise limited, but there were also concerted, violent efforts to keep it that way.[267]

A. The History of Strict Scrutiny

When a voter identification law reaches the Supreme Court, the Court will first determine which standard of scrutiny to use when evaluating the law. In the past, the Court has used a balancing test to evaluate voter identification laws.[268] However, given the importance of the right at stake,[269] the potential to disenfranchise thousands of voters,

procure the underlying documents, such as a birth certificate, to obtain one . . . . And new research from the Government Accountability Office, an independent agency that prepares reports for members of Congress, suggests that voter ID laws are having an impact at the polls. Turnout dropped among both young people and African-Americans in Kansas and Tennessee after new voter ID requirements took effect in 2012, the study found.").

263. Chang, *supra* note 3; STATE BD. OF ELECTIONS, *supra* note 1, at 1.

264. Chang, *supra* note 3.

265. In order to expand the franchise, Congress had to pass a series of amendments. *See* U.S. CONST. amend. XV (guaranteeing the right to vote to all citizens); *id.* amend. XIX (extending the right to vote to women); *id.* amend. XXVI (extending the right to vote to those older than eighteen).

266. *See generally* WANG, *supra* note 30, at 20 (discussing the history of voting suppression, highlighting Southern means of oppression).

267. *See supra* notes 164–186 and accompanying text.

268. *See, e.g.*, Crawford v. Marion Cty. Bd. of Elections, 553 U.S. 181, 210 (2008) (Souter, J., dissenting) (applying a balancing test when determining whether voter identification laws were constitutional); *see also infra* Section II.C.

269. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under

and North Carolina's discriminatory past,[270] the Court should apply the highest standard of review: strict scrutiny.

The Supreme Court first proposed the concept of a tiered system of scrutiny based on the importance of the right at issue in the now famous "Footnote Four" of *United States v. Carolene Products Co*.[271] Footnote Four is regarded among constitutional scholars as the beginning of a tiered system of scrutiny.[272] Though the *Carolene Products* Court used a more lenient standard than strict scrutiny to decide that case, in Footnote Four, the Court proposed that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution."[273] However, the *Carolene Products* Court declined to state whether this restriction would necessarily apply to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,"[274] or, in other words, voting.[275] The Court cited several cases in which it had applied rational basis review to voting restrictions but ultimately found the voting restrictions unconstitutional.[276] Even though the Court failed to use heightened scrutiny in *Carolene Products*, it would not be long until the Court finally applied strict scrutiny.

In the 1960s, the Warren Court was the first to use strict scrutiny as it is known today.[277] Post-*Lochner*,[278] the Court sought to instill some

certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."); Alexander Hamilton, *First Speech of June 21*, TEACHINGAMERICANHISTORY.ORG (June 21, 1788), http://teachingamericanhistory.org/library/document/alexander-hamilton-speech/ [http://perma.cc/P5TN-U78R] (speaking at the New York ratifying convention) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them.").

270. Though the Court held in *Shelby County* that states cannot be punished for their prior discrimination, Shelby Cty. v. Holder, 133 S. Ct. 2612, 2628–29 (2013), an elevated standard of scrutiny is not a punishment; to argue as such would mean that, under *Shelby County*'s holding, all applications of strict scrutiny are impermissible punishments for prior behavior. Instead, the Court uses strict scrutiny to protect fundamental rights. *See infra* notes 296–304 and accompanying text.

271. 304 U.S. 144 (1938).

272. *See generally, e.g.*, Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004) (discussing "the important role the footnote plays in contemporary constitutional thinking").

273. *Carolene Prods. Co.*, 304 U.S. at 144, 152 n.4.

274. *Id.*

275. *Id.*

276. *Id.* (citing Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932)).

277. Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007).

278. Lochner v. New York, 198 U.S. 45 (1905).

sort of consistency in its decision making.[279] Typically, a court uses strict scrutiny when, "a 'suspect class' such as a racial minority faces discrimination, or if a fundamental right is involved and the law is challenged as an arbitrary classification."[280] If a fundamental right is at stake, or a suspect class is subjected to discrimination, the law will be struck down unless the government can provide a "compelling state interest" to justify the law.[281] The law must also be "narrowly tailored"; it cannot encompass more behavior than necessary to accomplish the government's compelling state interest.[282] Although many law professors have perpetuated the oft-repeated adage that strict scrutiny is " 'strict' in theory and fatal in fact,"[283] in reality, this form of review is much more complex.[284] Some scholars suggest that there are, in fact, several types of "strict" judicial scrutiny that range in their flexibility.[285] First, judges may use a more "stringent" version of review to "avert catastrophic or nearly catastrophic harms."[286] Alternatively, they may use a version that views legislation as "suspect," or a version that functions like a balancing test, balanced in favor of protecting the right.[287]

279. *Lochner* is widely regarded as one of the worst decisions in the Court's history. *See* Robert Bork, *The Judge's Role*, 1 AVE MARIA L. REV. 19, 21 (2003). Holding that "liberty of contract" allowed employees to choose whom to work for, the Court overturned a law that limited the number of hours a baker could work in a day. *Lochner*, 198 U.S. at 45. Ever since, the Court has been careful to avoid appearing as if it is making up laws and ignoring precedent. *See* Bork, *supra*, at 21–22. One such way it accomplished this was to start using more structured standards of review. *Id.*

280. David Bernstein, *Justice Kennedy's Opinion in the Gay Marriage Case May Upend Fifty Plus Years of Settled Equal Protection and Due Process Jurisprudence*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/justice-kennedys-opinion-in-the-gay-marriage-case-may-upend-fifty-plus-years-of-settled-equal-protection-and-due-process-jurisprudence/ [http://perma.cc/P8FT-LMF8]; *see also* Fallon, *supra* note 277, at 1273.

281. *See* Bernstein, *supra* note 280; Fallon, *supra* note 277, at 1273.

282. *See* Fallon, *supra* note 277, at 1326–32.

283. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–95 (2006) (quoting Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court*: *A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)) (arguing that the strict scrutiny standard is actually relatively lenient).

284. Fallon, *supra* note 277, at 1270–71, 1305, 1313; Winkler, *supra* note 283, at 795.

285. Fallon, *supra* note 277, at 1271 ("One stringent version allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms. Another, which views legislation as appropriately suspect when likely to reflect constitutionally forbidden purposes, aims at 'smoking out' illicit governmental motives. A third version of strict scrutiny, partly belying the test's name, is not terribly strict at all and amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right.").

286. *Id.*

287. *Id.*

However, courts can be ambiguous about what the standard means.[288] Although courts consistently use phrases like "narrow tailoring" and "compelling interest," it can be hard to find consistencies in their decisions.[289] It may be easier to identify consistencies by looking at particular courts.[290] For example, the Warren Court often applied strict scrutiny in any case in which the government infringed on constitutional rights.[291] On the other hand, in later decisions, the Court was more cautious.[292] Some post-Warren Courts only applied strict scrutiny to facially nondiscriminatory statutes when "[they could] be shown to have been adopted for a racially discriminatory purpose," even when precedent demanded strict scrutiny.[293]

The Roberts Court's approach to strict scrutiny has been varied.[294] Like other post-Warren Courts, the Roberts Court has been reluctant to apply a higher standard of scrutiny without proof of a racially discriminatory purpose in some cases.[295] However, the justices have shown that they are willing to make large exceptions and apply traditional standards of scrutiny.[296] Recently, the Roberts Court expanded strict scrutiny to campaign finance,[297] and reaffirmed precedential use of strict scrutiny in affirmative action admissions policy cases.[298] On the other hand, the Roberts Court eschewed the standard use of strict scrutiny in 2015's *Obergefell v. Hodges*,[299] which

288. *Id.*
289. *Id.* at 1271–72.
290. *Id.* at 1291–97.
291. *Id.* at 1319.
292. *See id.*
293. *Id.* at 1320.
294. *See generally* Bob Corn-Revere, *Symposium: For Judges Only*, SCOTUSBLOG (May 4, 2015, 4:36 PM), http://www.scotusblog.com/2015/05/symposium-for-judges-only/ [http://perma.cc/TRS2-A582] (describing the Roberts Court's "strange brand of strict scrutiny"). Some of these changes may be attributed to the increased polarization among members of the Court; the Court increasingly issues 5-4 decisions, with the decision hinging on where Justice Kennedy lands. *See* Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html [http://perma.cc/ZG98-CWHU].
295. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008) (refusing to apply a higher standard of scrutiny because the law was not facially discriminatory).
296. Richard L. Hasen, *Die Another Day*, SLATE (Apr. 2, 2014, 1:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html [http://perma.cc/6NMD-ZVXW] (describing the Roberts Court's willingness to depart from rational basis review and apply strict scrutiny in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)).
297. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1437 (2014).
298. *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2415 (2013).
299. 135 S. Ct. 2584 (2015).

required states to issue marriage licenses to same-sex couples.[300] Justice Kennedy, writing for the majority, ignored the traditional use of strict scrutiny. Rather than identifying homosexuals as a protected class, Justice Kennedy identified marriage as "a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment" and held that "couples of the same-sex may not be deprived of that right and that liberty."[301] Rather than undergoing the traditional strict scrutiny and compelling state interest analysis, the majority tied fundamental rights and liberty together to overturn a discriminatory law.[302]

Though previous courts may have applied rigid standards of scrutiny, the tiers of scrutiny have become less formal over time.[303] Despite the variations in the standards it uses, the Roberts Court has demonstrated its willingness to follow precedent and apply a heightened level of scrutiny.[304] Historically, when considering election laws, the Supreme Court has refused to use a blanket application of strict scrutiny to all challenged laws.[305] Instead, the Court has traditionally applied strict scrutiny only to certain types of burdens on the right to vote.[306]

B. Strict Scrutiny and Election Laws: When the Supreme Court Has Been Willing To Use Elevated Scrutiny

The right to vote is essential to democracy, and the Court's decisions reflect the sacred nature of that franchise.[307] The right to participate in elections is guaranteed under the Constitution. The

300. *Id.* at 2607–08.

301. *Id.* at 2604.

302. *See* Bernstein, *supra* note 280.

303. *See supra* notes 268–293 and accompanying text.

304. *See, e.g.*, Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421–22 (2013); McCutcheon v. FEC, 134 S. Ct. 1434, 1445–46 (2014).

305. *See* Fallon, *supra* note 277, at 1297–300 (describing instances where the Warren Court's strict scrutiny has continued through the Burger, Rehnquist, and Roberts Courts, and describing the Court's use of intermediate scrutiny within the context of election laws); *see also id.* at 1320–21 ("Moreover, although the strict scrutiny formula presupposes that triggering rights can be identified, it gives no guidance concerning how the identification should occur.").

306. *See, e.g.*, Crawford v. Marion Cty., 553 U.S. 181, 182 (2008) (refusing to apply strict scrutiny, the Court distinguished between the burdens imposed by different voting laws).

307. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) ("[A]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

Fifteenth Amendment, which Congress passed and the states ratified in 1868, formally guarantees this right, stating "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[308] Later amendments extended the vote to women[309] and lowered the voting age from twenty-one to eighteen.[310]

Beyond the constitutional guarantee, the Court has considered the right to vote fundamental to both the governmental structure and the role of citizens.[311] In *Yick Wo v. Hopkins*,[312] the Court held that while the right to vote was merely a societal privilege subject to certain conditions, "nevertheless it is regarded as a fundamental political right, because [it is] preservative of all rights."[313] The Court further recognized the danger of restrictions on the right to vote in *Reynolds v. Sims*,[314] when it stated, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government."[315]

Despite the recognized importance of the right to vote, the Court has infrequently applied strict scrutiny in cases involving alleged infringement of the right.[316] Two notable cases when the Court did use strict scrutiny are *Harper v. Virginia State Board of Elections*[317] and *Kramer v. Union Free School District*.[318] In *Harper*, the Court evaluated a Virginia law that required voters to pay a $1.50 tax to vote in state elections.[319] The Court noted that the tax was not related to a person's ability to vote.[320] As a result, the Court held that the law was unconstitutional under the Fourteenth Amendment, reasoning that "a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth."[321] The case was also important because it expanded the

308. U.S. CONST. amend. XV (guaranteeing the right to vote to all citizens).
309. *Id.* amend. XIX (extending the right to vote to women).
310. *Id.* amend. XXVI (extending the right to vote to those eighteen and older).
311. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
312. 118 U.S. 356 (1886).
313. *Id.* at 370.
314. 377 U.S. 533 (1964).
315. *Id.* at 555.
316. *See supra* Section II.A.
317. 383 U.S. 663 (1966).
318. 395 U.S. 621 (1969).
319. *Harper*, 383 U.S. at 666–68.
320. *Id.*
321. *Id.* at 666.

Twenty-Fourth Amendment's ban on poll taxes to the states, despite Article I's guarantee that states may run their own elections.[322]

Though the Court did not explicitly state that it was applying strict scrutiny, it did quote its contemporaneous decision in *Reynolds v. Sims*:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[323]

The Court implied that it used a heightened standard of review because of the fundamental nature of the right at stake.[324] This type of review is similar to modern strict scrutiny.[325]

Several years later, the Court again applied strict scrutiny in *Kramer v. Union Free School District*, when it evaluated a New York law that barred citizens who did not own or rent property, were not married to someone who owned or rented property, or were not the parent of a child attending school, from voting in school district elections.[326] As in *Harper*, the Court held that neither the ownership of property nor the parenting of a child was reasonably related to the ability to vote, and thus the law was unconstitutional.[327]

Essentially, in *Harper* and *Kramer*, the Court focused on the relationship between a state's voting requirement law and the ability of a citizen to vote.[328] In these cases, the Court prioritized the preservation of the right to vote, striking down laws that drew weak connections between voter qualifications and the burdens the laws placed on voters.[329] Yet the fact remains, because states may regulate their own

322. *See id.* at 666–67.

323. *Id.* at 667 (citing Reynolds v. Sims, 377 U.S. 533, 561–62 (1964)).

324. *See id.*

325. *See generally* Fallon, *supra* note 277 (discussing how, "[i]n the domain of due process, the U.S. Supreme Court insists that statutes that restrict the exercise of 'fundamental' rights can survive only if necessary to promote compelling governmental interests").

326. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 623 (1969).

327. *Id.* at 633.

328. *Kramer*, 395 U.S. at 626 (discussing how the Court should consider the facts and circumstances behind a law to see if the law violates the equal protection clause); *Harper*, 383 U.S. at 666 ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

329. *See, e.g.*, *Harper*, 383 U.S. at 667–68 (quoting Reynolds v. Sims, 377 U.S. 533, 568 (1904)) (" 'A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal

elections, lower courts sometimes afford substantial deference to states when evaluating election laws that regulate the "Times, Places, and Manner of holding Elections"[330] rather than applying *Harper* and *Kramer*'s heightened scrutiny approach.[331] The line between laws that regulate elections and laws that impose unconstitutional burdens on the fundamental right to vote is sometimes unclear. The former are within the proper province of the state, while the latter should be struck down under heightened scrutiny. Voter identification laws are one example of instances in which this distinction is blurred.

C. The Supreme Court's Approach to Photo Identification: The Use of Scrutiny in Cases Leading up to Crawford

1. *Anderson* and *Burdick*: Ballot Access Cases Before *Crawford*

The Court has been willing to apply strict scrutiny when evaluating restrictions on the right to vote that are unrelated to a voter's qualifications, such as the laws at issue in *Harper* and *Kramer*.[332] However, in *Crawford*, the Court analogized photo identification laws to ballot access cases, rather than to voter-qualification cases.[333] Specifically, *Crawford's* theory of scrutiny is based on *Anderson v. Celebrezze*[334] and *Burdick v. Takushi*[335]—not on *Harper* and *Kramer*.[336]

In evaluating photo identification laws, the Court looked primarily to *Anderson*, a case evaluating ballot access rules for independent candidates.[337] In *Anderson*, supporters of John Anderson, an independent candidate for president, filed a nominating petition on his behalf.[338] Then-Secretary of State Anthony Celebrezze rejected the petition because it was not filed by the deadline.[339] However, the deadline was earlier for independent candidates than it was for candidates in the majority parties, and Anderson would have met the majority party deadline.[340] Although the Court ultimately arrived at the

Protection Clause . . . . ' We say the same whether the citizen, otherwise qualified to vote, has $ 1.50 in his pocket or nothing at all, pays the fee or fails to pay it.").

330. U.S. CONST. art. I, § 4, cl. 1.
331. *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 967–68 (1982) (plurality opinion).
332. *See supra* Section II.B.
333. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189–90 (2008).
334. 460 U.S. 780 (1983).
335. 504 U.S. 428 (1992).
336. *See Crawford*, 553 U.S. at 189–90.
337. *Anderson*, 460 U.S. at 793–95.
338. *Id.* at 782.
339. *Id.* at 782–83.
340. *See id.* at 783, 790–91.

conclusion that the law was unconstitutional, it did not mention levels of scrutiny at all.[341] Instead, the *Anderson* Court found that ballot access cases should "focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' "[342] The Court ultimately held that although the rights of voters to assert their preferences are fundamental, "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."[343] Therefore, the *Anderson* Court proposed a balancing test and enumerated several factors that courts may consider when determining whether a state's election law is constitutional:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.[344]

Later, in *Burdick v. Takushi*, the Court expanded on this reasoning.[345] In that case, the Court applied the balancing standard, this time to a different ballot access issue—whether or not the plaintiff, a resident of Hawaii, had the right to have the state count his write-in vote for Donald Duck.[346] At the time, Hawaii prohibited write-in votes, and the plaintiff sued, claiming the prohibition was a violation of his First and Fourteenth Amendment rights.[347] Although the plaintiff argued that any burden on his right to vote must be evaluated under strict scrutiny, the Court explained that strict scrutiny only applies in

341. *See id.* at 789 (describing, instead, the balancing test that should be used for ballot access cases).

342. *Id.* at 783 (quoting Clements v. Fashing, 457 U.S. 957, 964 (1982) (plurality opinion)).

343. *Id.* at 788.

344. *Id.* at 789.

345. Burdick v. Takushi, 504 U.S. 428, 438–40 (1992).

346. *Id.*

347. *Id.* at 430.

certain situations.[348] When a citizen's right to vote is subject to " 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' "[349] However, "when the state election law provision imposes only 'reasonable, nondiscriminatory restrictions' " upon these rights, "the State's important regulatory interests are generally sufficient to justify the restriction."[350] In applying this analysis to Hawaii's write-in ban, the Court ruled that although the right to vote is "of the most fundamental significance under our constitutional structure,"[351] the guarantee of a right to vote does not extend so far as to create a "right to vote in any manner."[352] The Court held that the write-in ban did not prevent voters from voting; it merely shaped the manner in which they could assert their preferences.[353] The result in *Burdick* reiterated the principal that the Court will uphold "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls."[354] As a result, the Court applied *Anderson*'s balancing test by weighing the state's interest against the imposed burden and held that the write-in ban was valid.[355]

Anderson and *Burdick* established that because states can regulate elections under Article I of the Constitution,[356] reasonable and nondiscriminatory burdens caused by these regulations are constitutional.[357] In the interest of state sovereignty, the Supreme Court refuses to subject every voting regulation to strict scrutiny and will interfere only when a law has already been shown to infringe on a voter's First and Fourteenth Amendment rights.[358]

2. The *Crawford* Court's Use of Scrutiny

In deciding *Crawford*, the Supreme Court distinguished between two types of election laws.[359] Under *Harper*, "even rational restrictions on the right to vote are invidious if they are unrelated to voter

348. *See id*. at 432 (concluding that "a law that imposes any burden upon the right to vote" is not automatically subject to strict scrutiny).

349. *Id.* at 434 (quoting Norma v. Reed, 502 U.S. 279, 289 (1992)).

350. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

351. *Id.* at 433 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

352. *Id.* (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).

353. *Id.* at 438–39.

354. *Id.* at 438.

355. *Id.* at 438–40.

356. U.S. CONST. art. I, § 4.

357. *Burdick*, 504 U.S. at 433; *see* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

358. *See Burdick*, 504 U.S. at 433–34.

359. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189–90 (2008).

qualifications."[360] On the other hand, *Anderson* clarified that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are acceptable under the rule established in *Harper*.[361] The *Crawford* Court used a balancing test, weighing the state's justification for the law against the imposed burden on voters.[362]

Using this test, the *Crawford* Court compared Indiana's voter identification law with the poll tax in *Harper*.[363] *Crawford* distinguished the photo identification requirement from the poll tax in *Harper* on the grounds that photo identification was related to the citizen's qualifications to vote, while the poll tax was not.[364] This distinction is apparent because being poor does not affect whether a person is qualified to vote. However, according to the Court, Indiana had a legitimate interest in "protecting the integrity and reliability of the electoral process."[365] Photo identification shows that the voter is who she says she is; it provides a way for election workers to make sure that the voter's face matches the photo, and that she is a citizen of the state. Accordingly, the Court found that whether or not a person has photo identification was appropriately related to whether a person was qualified to vote.[366]

The majority in *Crawford* also pointed out that the law was only burdensome on a small group of voters.[367] The state accepted any form of government-issued identification, issued by Indiana or the federal government, as long as it included the voter's photo, address, and name.[368] Additionally, if a voter could not afford photo identification, it would be provided free of charge, as long as she went to the DMV and established her residence and identity with the proper paperwork.[369] Because of these accommodations, the Court found that the "invidious discriminat[ion]" that existed in *Harper* was not present in *Crawford*.[370] After *Crawford*, it seems that the Court is unwilling to apply strict scrutiny unless faced with a law that is facially discriminatory.

360. *Id.* at 189.
361. *Id.* at 189–90 (quoting *Anderson*, 460 U.S. at 788 n.9).
362. *Id.* at 191.
363. *See id.* at 189, 198, 203.
364. *See id.* at 189, 193.
365. *Id.* at 191.
366. *Id.* at 193.
367. *Id.* at 198–200.
368. *Id.* at 198 n.16 (citing IND. CODE ANN. § 3-5-2-40.5 (2006)).
369. *Id.* at 198 (referring to the "BMV," or the "Bureau of Motor Vehicles," Indiana's equivalent to North Carolina's Department of Motor Vehicles).
370. *See id.* at 204 (holding that the state interests are nondiscriminatory and neutral).

Furthermore, the *Crawford* Court was split on the constitutional bounds of voting laws. The majority "assumed that voting laws could constitutionally exclude some eligible voters," while the dissent "saw near universal participation as democracy's defining element."[371] These differing perspectives affected how the justices perceived the standard that should be applied to photo identification laws. The majority dismissed the plaintiffs' claim that strict scrutiny should apply because the law affected so few voters: "Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interest in protecting election integrity."[372] Under the majority's analysis, a law that affects the rights of only a few does not trigger strict scrutiny.[373] Conversely, under the dissent's conception of the law, voting laws should encourage near universal voting participation.[374] The dissent's approach would require voting laws to overcome a higher standard of scrutiny. Rather than accepting the state's allegations of voter fraud at face value, the dissent would require the state to prove that such fraud existed and that photo identification would prevent that fraud.

Although the *Crawford* Court relied heavily on analysis from *Anderson* and *Burdick*, the facts of the case are slightly different.[375] While *Anderson* and *Burdick* both dealt with candidate selection,[376] *Crawford* dealt with the weightier issue of whether citizens could vote at all.[377] As one critic stated, "[*Crawford*] was not aimed at election mechanisms such as procedural voter registration requirements, redistricting, or restrictions on who could appear on the ballot. Instead, it was about the identities of the voters themselves and was aimed squarely at the question of who could cast a ballot on Election Day."[378] In permitting the photo identification law to stand, "the Court broke a tradition dating back to the 1960s of overturning laws that imposed requirements on individual voters that could prevent them from voting. [The Court] thus entrenched its vision of democracy in a unique—and uniquely harmful—way."[379]

371. *Leading Cases*, *supra* note 132, at 359.
372. *Crawford*, 553 U.S. at 200.
373. *See Leading Cases*, *supra* note 132, at 359.
374. *See id.*
375. *See id.* at 365.
376. Burdick v. Takushi, 504 U.S. 428, 430 (1992); Anderson v. Celebrezze, 460 U.S. 780, 786 (1983).
377. *Crawford*, 553 U.S. at 185.
378. *Leading Cases*, *supra* note 132, at 365.
379. *Id.*

Because the *Crawford* Court applied a lower level of scrutiny, the Court did not give much consideration to the plaintiffs' argument that the law would burden Indiana's voters.[380] The majority dismissed the burden of acquiring photo identification as a mere "inconvenience,"[381] and seemed to assume that voting processes will always pose some burdens to potential voters.[382] On the other hand, the dissent pointed out that the law was likely to disproportionately affect the poor; that nondrivers would have trouble getting to a DMV to get the identification; and that the costs associated with getting identification, such as paying for copies of identifying documents, may be "unduly burdensome . . . . By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50."[383]

3. *Crawford*'s Implications for Future Challenges

Crawford poses potential problems for future plaintiffs who hope to challenge photo identification laws. *Crawford* establishes several principles for analyzing photo identification cases. First, the Court will only apply strict scrutiny when a law is facially discriminatory.[384] In all other instances, the Court will use the *Anderson* balancing test.[385] Second, this analysis is not swayed by the severity of a future burden.[386] Even if it seems certain that a law will unduly burden voters and prohibit them from voting, this precedent requires evidence of the harm caused to voters.[387] So, it is unlikely that a suit will prevail under this standard until an entire election cycle has passed, at which point a plaintiff may be able to collect sufficient data to convince the Court.

Although the *Crawford* decision seems like a dead end for pre-election voter identification law challenges, the Court may be willing to reevaluate its stance. The Roberts Court's willingness to stretch the application of strict scrutiny in other cases shows that it may be willing to make an exception—especially when that exception is made to comport with precedent.[388] Moreover, when *Crawford* was decided in

380. *Crawford*, 553 U.S. at 233 ("The State's asserted interests in modernizing elections and combating fraud are decidedly modest; at best, they fail to offset the clear inference that thousands of Indiana citizens will be discouraged from voting.").

381. *Id.* at 198.

382. *See id.* at 212 (Souter, J., dissenting) ("The need to travel to a [DMV] branch will affect voters according to their circumstances, with the average person probably viewing it as nothing more than an inconvenience.").

383. *Id*. at 238–39 (Breyer, J., dissenting).

384. *See supra* notes 359–372 and accompanying text.

385. *See supra* notes 359–372 and accompanying text.

386. *See supra* notes 381–383 and accompanying text.

387. *See supra* notes 381–383 and accompanying text.

388. *See supra* notes 304–306 and accompanying text.

2008, only two states had photo identification laws, and little was known about the laws' impact.[389] Now, several election cycles later, studies have shown the negative impact that these laws have on voter turnout, and the Court's perception of the burden these laws impose on voters should change accordingly.[390]

III. EVALUATING THE ARGUMENTS FOR A LOWER STANDARD OF SCRUTINY

The Court was willing to apply strict scrutiny in *Harper* but averse to applying elevated review in *Anderson* and *Crawford*. The distinction between these cases lies in the way the Court characterizes the burden of the law at hand. If a law imposes an additional qualification on the voter that is unrelated to election legislation, the Court sees this as an unconstitutional burden that triggers strict scrutiny.[391] On the other hand, laws that affect only a small portion of the population and serve to regulate elections receive a lower standard of review.[392] Therefore, if photo identification laws are to receive strict scrutiny, there must be evidence of a substantial and discriminatory burden on a citizen's ability to vote, and that burden must be unrelated to a person's qualifications.

Before discussing whether these laws are burdensome, it is important to discuss the Court's arguments that voter identification requirements are closely related to a voter's qualifications. This argument is used to justify photo identification laws as a means of preventing fraud. In *Crawford*, these arguments were used to sidestep the issue of burden.[393] The Court quickly dismissed comparisons to cases using strict scrutiny, like *Harper* and *Kramer*.[394] Without much evidence,[395] the Court found that the states' ability to regulate elections and eliminate voter fraud was sufficiently connected to photo identification requirements.[396]

389. *See* Berman, *supra* note 135.

390. *See infra* Part III (describing the burden voter identification laws place on voters).

391. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

392. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992).

393. Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 38 (2007) (citing Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting)) ("The *Crawford* Court noted the paucity of empirical evidence on both sides of the voter identification debate. The state could not point to a single prosecution ever in Indiana of impersonation fraud that a voter identification law could deter or detect.").

394. *See* Crawford v. Marion Cty. Election Bd., 533 U.S. 181, 189–91 (2008).

395. *See* Hasen, *supra* note 393, at 38 (the Court "could not point to a single prosecution" of voter fraud in the state of Indiana).

396. *See Crawford*, 533 U.S. at 193–94.

The *Crawford* Court's explanation is unsatisfactory. The plurality never explains *why* the right to vote is so connected with possession of photo identification.[397] Nor does it address the similarities between the way in which poll taxes in *Harper* kept registered voters from the polls and the comparable photo identification burdens.[398] Instead, it relies heavily upon the state's interest and the comparison with ballot access cases.[399] Therefore, this Comment will discuss the legitimacy of the two main arguments that the burdens voter identification laws impose on voters are necessary for the regulation of fair elections.

A. *Voter Identification and the Connection Between Photo Identification and the Ability To Vote*

When the Court has applied a balancing test, rather than strict scrutiny, it has found that the burden placed on voters is not connected to the right to vote. This was the case in *Crawford*. The Court found that because voters had access to free identification cards, "[f]or most voters who need them, the inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[400] Under an "elite-centered" theory of democracy, which imagines a democracy where only the most educated and most qualified vote, this burden is acceptable.[401] In this instance, a voter identification requirement serves as a way to filter out those who are less qualified to vote. However, when viewed through a theory of voting that emphasizes universal participation, as the *Crawford* dissent does, a law with requirements that are convenient for *most* is not necessarily constitutional.[402]

397. *See* Hasen, *supra* note 393, at 40 (quoting Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, Crawford v. Marion Cty. Election Bd., 533 U.S. 181 (2008)) ("Having found that some (unquantifiable, in Judge Posner's view, but likely small, number of) voters would in fact be deterred by the requirement, the *Crawford* court nonetheless found no constitutional violation. It held that the law was not all that burdensome, and following *Purcell*'s (empirically unsupported) statement that in cases of voter identification 'the right to vote is on both sides of the ledger,' the court concluded it had to judge the Indiana law under a low level of scrutiny.").

398. *See id.*

399. *See Crawford*, 533 U.S. at 191–200.

400. *Id.* at 198.

401. *See Leading Cases*, *supra* note 132, at 361.

402. *See id.* at 363.

Some proponents of photo identification laws suggest that the laws have little to no impact on elections.[403] Because the impact on the overall election is minimal, these advocates argue that the inconvenience is worth the cost.[404] However, certain studies have shown that even minor voter identification requirements affect turnout. In a 2007 study that examined the effects of the Help America Vote Act, as well as photo identification laws, scholars found that stricter voter identification requirements depressed voter turnout and disproportionately affected poorer voters.[405]

Moreover, photo identification laws strike at a very different type of voter qualification than other laws that have been analyzed under the *Anderson* balancing test. Legal scholars have pointed out that most cases analyzed under *Anderson* deal with "election mechanisms such as procedural voter registration requirements, redistricting, or restrictions on who could appear on the ballot."[406] Rather than regulating state actions, and how a state may run its elections, photo identification laws regulate voter behavior and determine who may show up to the polls on election day. This sort of regulation seems much closer to the poll tax in *Harper*.[407]

Furthermore, although the effects of photo identification laws were relatively unknown when *Crawford* was decided, there is now evidence that these laws have a discriminatory effect.[408] Voter

403. *See, e.g.*, Nate Cohn, *Why Voter ID Laws Don't Swing Many Elections*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/upshot/why-voter-id-laws-dont-swing-many-elections.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=1&abt=0002&abg=0 [http://perma.cc/J4KJ-MUWB].

404. *See* Gene Berardelli, *Hard Evidence Supports the Need for Voter ID Laws*, IVN (Jan. 16, 2014), http://ivn.us/2014/01/16/hard-evidence-supports-need-voter-id-laws/ [http://perma.cc/8H3D-RT9N].

405. R. Michael Alvarez, Delia Bailey & Jonathan Katz, *The Effect of Voter Identification Laws on Turnout* 3 (Caltech/MIT Voting Tech. Project, Working Paper No. 57, 2007), http://dspace.mit.edu/bitstream/handle/1721.1/96594/vtp_wp57.pdf?sequence=1 [http://perma.cc/G8YX-CZRQ].

406. *Leading Cases*, *supra* note 132, at 365.

407. *See generally* Brendan F. Friedman, *The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment*, 42 HOFSTRA L. REV. 343 (2013) (arguing that the costs associated with acquiring photo identification make it essentially a poll tax).

408. *See* STATE BD. OF ELECTIONS, *supra* note 1, at 1–3 (providing a breakdown of demographics of those affected by the law). Others argue that the laws are not aimed at discouraging minorities from voting, but instead are aimed at discouraging Democrats from voting, and that it is a mere coincidence that most of the laws disproportionately affect minorities. *See generally* Bentele & O'Brien, *supra* note 117 (finding that proposal and passage of restrictive voter identification laws are highly partisan issues; though dealing with race, the study concluded that partisan motivations drove the laws). Courts have typically approved this type of politically motivated action, as evidenced by

identification laws mostly affect black, Hispanic, and poor citizens.[409] Logically, the people most likely to not have photo identification are those who do not have cars—symbols of wealth and means. Even Judge Posner, a conservative judge on the United States Court of Appeals for the Seventh Circuit and author of the appellate-level majority opinion for *Crawford*, criticized the laws for "appear[ing] to be aimed at limiting voting by minorities, particularly blacks."[410] Moreover, the laws often fail to address voter fraud concerns in relation to absentee voters, who are typically older and more likely to be white than in-person voters.[411]

These laws also disproportionately affect poor populations. Studies show that getting photo identification could cost upwards of four hundred dollars when the costs of getting the documents, associated taxes, taking time off of work, and traveling to the DMV to get the identification are aggregated.[412] A nondriver who does not plan on leaving the country has little use for an expensive driver's license or passport, the two most common types of photo identification. Furthermore, not everyone has equal access to DMVs—in Bertie County, North Carolina, for example, one of the poorest counties in the state and with one of the highest black populations,[413] a mobile

gerrymandering. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 258 (2001) (holding that redistricting for political reasons, and not racial ones, is not a violation of the Constitution and federal civil rights law). And, like gerrymandering, this explanation is fraught with issues because of the incentive to pass "self-entrenching legislation" that creates "cross-temporal majorities." *Leading Cases*, *supra* note 132, at 364 (quoting Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997)). For more information about the problems associated with entrenched majorities, and why even if partisan politics is the reason for voter identification, it is a weak justification, see generally Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

409. Childress, *supra* note 23 (describing various studies of voter fraud around the country).

410. *Id.*

411. *Id.*

412. SOBEL, *supra* note 4, at 2 ("This report finds that the expenses for documentation, travel, and waiting time are significant—especially for minority group and low-income voters—typically ranging from about $75 to $175. When legal fees are added to these numbers, the costs range as high as $1,500. Even when adjusted for inflation, these figures represent substantially greater costs than the $1.50 poll tax outlawed by the 24th amendment in 1964.").

413. Rebecca Tippett, *2013 County Population Estimates: Race & Ethnicity*, CAROLINA DEMOGRAPHY (June 30, 2014), http://demography.cpc.unc.edu/2014/06/30/2013-county-population-estimates-race-ethnicity/ [http://perma.cc/788M-FJSJ] ("Bertie has the highest percentage of blacks or African-Americans in the state (61.2 percent)."); *see Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2013*, U.S. CENSUS BUREAU

DMV comes three times a year, and is open for a mere six hours.[414] In such situations, going to the DMV to get identification is even more costly.

Some photo identification advocates argue that photo identification laws act as a filter that will prevent uninformed voters from showing up at the polls and "throwing off" elections.[415] This argument highlights the ideological split that divided the *Crawford* Court: should all citizens have equal access to vote, or should that right be reserved for those who are able to jump through hoops to exercise that right?[416] If the goal of photo identification laws is to have better quality elections with a more educated electorate,[417] ownership of a state-issued identification is a poor litmus test. Having photo identification does not make one more cognizant of politics or more able to understand political issues.[418] Instead, because the barriers to accessing photo identification are mostly financial, having photo identification is more likely to demonstrate a voter's financial status, which says nothing of his desire or right to participate in the electoral

(June 2014), http://www.census.gov/popest/data/counties/asrh/2013/PEPSR6H.html [http://perma.cc/SNY8-C8PC] (click "North Carolina" under states listed).

414. *See Search Results: Bertie County*, N.C. DIVISION OF MOTOR VEHICLES, http://www.ncdot.gov/dmv/locations.html?term=Bertie+County&type=license%2Cplate&lat=&lon=&field=county [http://perma.cc/5EDB-85PW] (search "Bertie County" on the N.C. DMV website; the results will show only one location that only provides license plate registration. Filter by "driver license & school bus" to see that there are no driver license locations, like the kind that would be necessary to get a photo identification, in the county); *NCDOT Mobile*, NCDOT, http://www.ncdot.gov/m/dmv/offices.html [http://perma.cc/QJM3-VNQM] (click "Driver License" hyperlink; then click "Bertie" hyperlink for listing schedule of mobile DMV in Bertie County). According to the NCDOT website, the mobile DMV will visit Bertie County on January 7, February 4, and March 4. *Id.*

415. *See Leading Cases*, *supra* note 132, at 361 ("Justice Stevens's default assumption was that there will be burdens associated with voting, and a voter should be expected to deal with those burdens in order to exercise her right to vote.").

416. *See id.* at 361–63.

417. It is possible that this is the goal of the North Carolina act. For example, the full title of the Act is "An Act to Restore Confidence in Government By Establishing the Voter Information Verification Act to *Promote the Electoral Process Through Education* and Increased Registration of Voters and By Requiring Voters to Provide Photo Identification Before Voting to Protect the Right of Each Registered Voter to Cast a Secure Vote with Reasonable Security Measures that Confirm Voter Identity As Accurately As Possible Without Restriction, and to Further Reform the Election Process." Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505, 1506 (codified in scattered sections of N.C. GEN. STAT. ch. 163 (2013), *amended by* N.C. GEN. STAT. ch. 163 (2015)) (emphasis added).

418. Those who do not care to understand political issues most likely do not vote anyway, and some political scientists posit that apathetic votes cancel each other out. *See generally* Graeme Orr, *Ballot Order: Donkey Voting in Australia*, 1 ELECTION L.J. 573 (2002) (finding that apathetic voters' votes cancel each other out).

system. Consequently, the means of photo identification laws do not justify the ends.

Regardless of the motivation, the argument that voter identification is closely entwined with voter qualifications fails on multiple fronts. Much like the voting tax in *Harper* or the property ownership qualification in *Kramer*, photo identification requirements point more to the wealth and affluence of potential voters than to the voters' ability to understand voting rights and election issues. Though photo identification may also serve as proof of citizenship and residence, these can be established through other means, such as asking voters to verify their addresses before voting.[419] Because voter identification is not sufficiently related to the ability to vote, the burden of photo identification laws should be evaluated using heightened scrutiny.

B. The Prevalence of Voter Fraud as a Justification for Photo Identification

Even if voter identification laws are examined under strict scrutiny, the Court will also consider the state's interest in maintaining the law under the "compelling state interest" test. In *Crawford*, the Court afforded substantial deference to the state's interest in preventing voter fraud.[420] Under the Constitution, states may pass laws to regulate the time, place, and manner of elections.[421] Voter identification advocates argue that voter identification laws fall under this constitutionally granted right to regulate elections and that the laws are necessary to deter voter fraud and to enable states to run fair

419. *See infra* note 463 and accompanying text. Photo identification advocates may argue that asking for addresses is an ineffective way to counter fraud. Before many photo identification laws went into effect, voters were only required to recite their addresses and sign a poll book. *See, e.g.*, *Voting in North Carolina*, *supra* note 155. Though this is technically a type of "identification," it is much less restrictive and less likely to disenfranchise voters; many states allow homeless voters to use any address where they regularly return, such as a shelter, a friend's house, a church, or an employer. NAT'L COAL. FOR THE HOMELESS, YOU DON'T NEED A HOME TO VOTE 41 (2012) http://nationalhomeless.org/wp-content/uploads/2013/12/Manual_2012.pdf [http://perma.cc/C8Y8-BVH9]. Voters do not need to own a home to vote. *See id.* Legislators who found this system inadequate passed restrictive photo identification laws. *Id.* However, as discussed in Section III.B, there was little evidence that the address verification system was ineffective at preventing fraud. *See infra* notes 430–469 and accompanying text.

420. *See* Crawford v. Marion Cty. Bd. of Elections, 533 U.S. 181, 223 (2008).

421. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

elections.[422] Though this theory seems plausible on its face, in reality, there is little evidence to support claims of voter fraud of the kind photo identification could prevent.

The most enthusiastic photo identification advocates claim that voting fraud has corrupted the electoral system to the point that it can no longer be called a democracy.[423] Voter fraud occurs when "individuals cast ballots despite knowing that they are ineligible to vote, in an attempt to defraud the election system."[424] Voter identification advocates often cite *Bush v. Gore*,[425] in which the Court found that for every 11,100 votes cast in Florida, George W. Bush received one more vote than Al Gore, evidencing that every vote counts.[426] The media contributes to this theory by circulating plenty of voter-fraud lore, especially around elections.[427] Stories of political groups filling out absentee ballots for seniors, or even dead people, or of noncitizens sneaking into the polls permeate the news cycle every election season.[428] These concerns ultimately fueled both HAVA's passage in 2002,[429] and, of course, the advent of voter identification laws.[430]

422. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644–50 (2007) (describing the anecdotes about voter fraud that voter identification advocates rely upon).

423. *Id.* at 638 ("An alternative movement characterized fraud as the most significant threat to democracy."). The article goes on to describe the fear that motivated lawmakers to pass more restrictive laws. *Id.* at 638–39.

424. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, THE TRUTH ABOUT VOTER FRAUD 4 (2007)

425. 531 U.S. 98 (2000).

426. *See Bush*, 531 U.S. at 100–01; Overton, *supra* note 422, at 638–39. Ironically, photo identification enthusiasts rarely cite this case when arguing that it is appropriate to prevent a small number of people from voting in exchange for more convenient elections.

427. Some scholars argue that stories circulated about voter fraud are misleading and that most of the fear of voter fraud stems from stories of voter registration or absentee ballot fraud, which photo identification laws cannot protect. *See* Overton, *supra* note 422, at 644. Because the media draws attention to single instances of voter fraud, which alarms voters, *see, e.g.*, Joy Y. Wang, *Michele Bachmann: Immigration Reform To Create Illiterate Voters*, MSNBC (Nov. 19, 2014, 8:47 AM), http://www.msnbc.com/msnbc/bachmann-immigration-reform-create-illiterate-voters [http://perma.cc/T3RF-HHPF] (explaining that Michele Bachmann (R-Minn.) recently warned that President Barack Obama's executive action on immigration could lead to thousands of illiterate Democratic voters, thus creating fear of voter fraud for which she has no evidence), but does not report on the tens of thousands of nonfraudulent votes cast, voters' perceptions of the prevalence and impact of fraud are overblown. *See* Overton, *supra* note 422, at 654 (finding that out of 9,078,728 votes, 9,078,724 votes were not fraudulent). This is in part because it can be difficult to figure out how many votes are fraudulently cast. *Id.* at 653. Thus, it is easier for the media and politicians to perpetuate rumors than to actually investigate what happened. *Id.*

428. Overton, *supra* note 422, at 638.

429. *Id.* at 680.

430. *Id.* at 633–34.

Three types of voter fraud are relevant to a discussion of photo identification laws. First, people can fraudulently register to vote.[431] This category includes voters who register multiple times on behalf of other people, real or fictional.[432] Though still rare, voter registration fraud received national attention during the 2008 election, when ACORN, an organization that led voter registration drives, was accused of improperly registering voters and duplicating voter registration cards.[433] Second, there is fraud through voter impersonation on absentee ballots.[434] This type of fraud occurs when a person fills out an absentee ballot on behalf of another person without her permission or unduly influences her to vote for someone else.[435] Finally, there is "in-person fraud," or voter impersonation at the polls.[436] This type of fraud occurs when a person goes to the polls and pretends to be another person.[437]

Crucially, of these three types of voter fraud, photo identification laws only prevent the third type: in-person fraud, when a voter goes to the polls and pretends to be another person without that person's permission.[438] This type of fraud is the least common of the three.[439] Though, by its nature, fraud can be difficult to detect,[440] there is little evidence from the available data that voting fraud is a legitimate or realistic concern. For example, attempts to monitor voter fraud have found little evidence of voter impersonation fraud.[441] In 2002, the

431. *See* LEVITT, *supra* note 424, at 9.

432. *Id.* at 20.

433. *Id.* at 20 & n.148.

434. *Id.* at 12.

435. *Id.* at 34 n.16 ("Most proposals to require photo identification of voters do not address the absentee voting process, where fraud through forgery or undue influence, often directly implicating candidates or their close associates, is far more of a threat.").

436. *See id.* at 20 (referring to "in-person" fraud as "registration fraud").

437. *See id.* ("But it is extraordinarily difficult to find reported cases in which individuals have submitted registration forms in someone else's name in order to impersonate them at the polls.").

438. *Id.* at 6 ("Such photo ID laws are effective *only* in preventing individuals from impersonating other voters at the polls — an occurrence more rare than getting struck by lightning.").

439. *See Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence that Photo ID Is Needed*, NEWS21 (Aug. 12, 2012, 10:39 AM), http://votingrights.news21.com /article/election-fraud/ [http://perma.cc/TZ5A-XDQS] ("The database shows no [Republican National Lawyers Association] cases of voter-impersonation fraud."); *see also Election Fraud in America*, NEWS21 (Aug. 12, 2012, 2:10 PM), http://votingrights.news21.com /interactive/election-fraud-database/index.html [http://perma.cc/MAU7-RSG5] (providing a database of 2,027 cases of voter fraud since 2000 with graph showing that voter impersonation fraud accounts for 0.5% of all voting fraud cases).

440. Overton, *supra* note 422, at 653.

441. *See, e.g.*, Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), http://www.nytimes.com/2007/04/12/washington

Justice Department undertook an initiative to crack down on voter fraud.[442] It did not find much.[443] During the five-year effort, only one hundred and twenty people were charged, and only eighty-six actually convicted.[444] Prosecutors in Wisconsin "lost almost twice as many [voter fraud] cases as they won . . . ."[445] In Milwaukee, only fourteen of the hundreds of suspected voter fraud cases faced charges, and of those, the state won only five cases.[446] Most of these cases involved immigrants who mistakenly thought they could vote—a far cry from the hyperbolic accusation that political activists prey on weakened dementia patients' absentee ballots.[447] Journalists reflecting upon the initiative concluded that the cries of corruption and pervasiveness were "debatable"[448] and that most voting issues involved individuals mistakenly believing they had the right to vote.[449]

In 2005, Texas launched a similar investigation into instances of voter fraud.[450] Then-Texas Attorney General Gregg Abbott declared war on the " 'epidemic' of voter fraud."[451] However, much like the Justice Department, Texas investigators found little evidence of fraud.[452] The state only prosecuted twenty-six cases, most of which involved people who had helped others with absentee ballots, but who had failed to sign the ballot envelope, as required by state law.[453]

/12fraud.html?pagewanted=all&_r=0 [http://perma.cc/RX7R-46QU] (describing the Justice Department's initiative to discover evidence of organized efforts to commit voter fraud).

442. *Id.*

443. *Id.* ("Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.").

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. Associated Press, *Voter ID Laws Target Rarely Occurring Voter Fraud*, FOX NEWS POL. (Sept. 11, 2011), http://www.foxnews.com/politics/2011/09/24/voter-id-laws-target-rarely-occurring-voter-fraud/ [http://perma.cc/3GDY-W7FV]; *see also* Wayne Slater, *Few Texas Voter-Fraud Cases Would Have Been Prevented by Photo ID Law, Review Shows*, DALL. MORNING NEWS (Sept. 8, 2013), http://www.dallasnews.com/news/politics/headlines/20130908-few-texas-voter-fraud-cases-would-have-been-prevented-by-photo-id-law-review-shows.ece [http://perma.cc/P8JK-VR6Q] ("Attorney General Greg Abbott champions a requirement for voters to show photo identification to prevent ballot fraud. But such a rule would have deterred just a few of the cases his office has prosecuted in the last eight years.").

451. Associated Press, *supra* note 450.

452. *See id.*

453. *Id.*

Still others have fruitlessly searched for cases of voter fraud. According to one researcher, between 2000 and 2005 there was one instance of voter impersonation in New Hampshire—a man pretended to be his father, which was made easier by the fact that they shared the same name.[454] Another study found 2,068 cases of election fraud in the United States between 2000 and 2012,[455] out of which twenty-eight individuals were convicted.[456] According to the study, of those twenty-eight, approximately one was a voter impersonation case of the type that photo identification laws would prevent.[457]

Moreover, there is very little proof that voter identification effectively prevents in-person fraud.[458] An analysis of the 250 cases of fraud cited by the defendants in *Crawford* found that few could have been prevented by voter identification.[459] Instead, most instances of fraud involved "vote buying, ballot-box stuffing, problems with absentee ballots, or ex-convicts voting even though laws bar them from doing so."[460] In fact, a recent study found that the most common types of fraud are double voting and voting by disenfranchised felons.[461] Voter identification laws would not prevent these types of fraud.[462]

Furthermore, it is possible that more narrowly tailored laws could effectively prevent in-person fraud. Currently some states require that voters recite their addresses to make sure they match the registry.[463] Anyone perpetuating voting fraud would have to find and memorize several addresses that were not going to be used that day. That voter's fraud would then be discovered if that person did, in fact, vote again later in the day. Other states have proposed checking voter registration against death rolls to make sure that people are not voting under the

454. LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 67 (2010).

455. *Election Fraud in America*, NEWS21 (Aug. 12, 2012, 2:10 PM), http://votingrights.news21.com/interactive/election-fraud-database/index.html [http://perma.cc/DGG7-MXJT].

456. Childress, *supra* note 23 ("An analysis by News21, a journalism project at Arizona State University, found 28 cases of voter fraud convictions since 2000.").

457. *Id.* ("Of [the 28 voter fraud convictions], 14 percent involved absentee ballot fraud. Voter impersonation, the form of fraud that voter ID Laws are designed to prevent, made up only 3.6 percent of those cases."); *see also Election Fraud in America*, *supra* note 455.

458. *See* Associated Press, *supra* note 450.

459. *Id.*

460. *See id.*

461. Childress, *supra* note 23 ("14 percent [of the 28 cases of voter fraud convictions between 2000 and 2012] involved absentee ballot fraud.").

462. *See supra* note 438 and accompanying text.

463. *See 2015 Voter ID Laws*, *supra* note 144 (listing states that require voters to recite their addresses).

names of deceased persons.[464] Either of these solutions would help to reduce the types of fraud that concern photo identification advocates, and either solution would be much more narrowly tailored to the problem than the current photo identification laws.

Despite the multitude of studies showing that in-person voter fraud is nearly nonexistent, some voter identification advocates argue that the lack of proof of fraud is proof in itself. These advocates argue that voter fraud is so undetectable that photo identification laws are necessary to discover it.[465] To a certain extent, the *Crawford* Court agreed.[466] Even though the state did not provide evidence of voter fraud, the Court found that the voter identification law was permissible because it anticipated fraud.[467] But how important should the existence of fraud be to the voter identification debate? If fraud of the type that can be prevented by photo identification laws does not exist, photo identification cannot be justified as a voter qualification that the state can regulate. Under a traditional strict scrutiny review, if states are going to limit a constitutional right, the states should be required to first present hard evidence.[468] Otherwise, states are disenfranchising

464. *See, e.g.*, VA. STATE BD. OF ELECTIONS, ANNUAL REPORT ON VOTER REGISTRATION LIST MAINTENANCE ACTIVITIES 5–6 (2014) (discussing the Electronic Registration Information Center ("ERIC"), a data analysis system implemented by several states that automatically checks for mistakes, voters who have moved, and registered voters who have died).

465. *See, e.g.*, John Fund & Hans von Spakovsky, *Column: Underestimating Our Voter Fraud Vulnerability*, USA TODAY (Oct. 21, 2012), http://www.usatoday.com/story/opinion/2012/10/21/voter-fraud-voter-id/1647913/ [http://perma.cc/6PZ6-E5FW] (discounting studies finding that voter fraud does not exist, arguing that, "[w]hile voter impersonation is hard to detect, it is easy to commit"); *see also, e.g.*, Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 953 (7th Cir. 2007), *aff'd*, Crawford v. Marion Cty. Election Bd., 533 U.S. 181 (2008) ("But the absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator."). It should be noted that Judge Richard Posner, who wrote the majority opinion in the Seventh Circuit's *Crawford* decision, has since changed his mind on voter identification. RICHARD A. POSNER, REFLECTIONS ON JUDGING 97–98 ("I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.").

466. *See* Crawford v. Marion Cty. Bd. of Elections, 533 U.S. 181, 203 (2008).

467. *Id.* at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters . . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.").

468. *See, e.g.*, *id.* at 195–96 (the *Crawford* Court discussed the hard evidence of absentee ballot fraud during the 2003 Indiana Democratic primary, which showed the Court that "not only [was] the risk of voter fraud real but that it could affect the outcome of a close election").

thousands based on an unproved and hypothetical situation, with little proof that the means are necessary.[469]

IV. IS THERE A BURDEN? HOW THE SUPREME COURT'S DECISION MIGHT AFFECT NORTH CAROLINA

As discussed above, there are significant doubts about whether photo identification laws are sufficiently related to regulating voter qualifications, and therefore, there are serious concerns that the laws may pose unfair limitations on voters. Thus, it becomes important to look at whether these laws are unfairly burdensome in a way that triggers a higher standard of review. A sufficiently burdensome law, like photo identification, invokes strict scrutiny and will override a state's interest in regulating elections in this manner. In an effort to illustrate the importance of which scrutiny standard is applied, this Comment will explore how the application of different standards of scrutiny would affect North Carolina.

Though many states have enacted voter identification laws, North Carolina is a helpful case study for several reasons: First, North Carolina's law was criticized for being one of the most restrictive voter identification laws in the nation.[470] Significant research about its potential impact was conducted in the years following its passage, and the law was ultimately amended, providing interesting insight into its lifespan.[471] Second, unlike Indiana, the state involved in *Crawford*, North Carolina has a particularly turbulent past when it comes to voting restrictions.[472] The state's voter identification law stands against a background of historically tense race relations and limited voting rights.[473] Finally, the law's passage a mere month after the Supreme Court struck down federal preclearance requirements in *Shelby County* raises suspicion about the motives of the North Carolina state legislators.[474]

North Carolina's voter identification law was recently amended to allow an alternative for voters who do not have photo identification. This "reasonable impediment declaration" allows voters to claim one of eight reasons for not having identification, such as lack of

469. *See* LEVITT, *supra* note 424, at 6.

470. *See supra* Section I.C.3.

471. *See infra* Section IV.C.

472. *See supra* notes 225–241 and accompanying text.

473. *Id.*

474. *See* Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506 (codified at N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015)).

transportation, disability or illness, lost or stolen identification card, or a lack of identifying documents.[475] Voters who fill out the declaration may then prove their identity by providing a social security number or voter registration card.[476] This Comment will first analyze the impact the original, unamended law would have had on the state, arguing that because of the number of voters the law would have impacted, the significant burden on certain voters, and the state's history of discrimination, North Carolina's voter identification law should have been evaluated under a strict scrutiny analysis. Although the law has been amended, the unamended law is still a relevant study because (1) its severity illustrates the potential detrimental impact of voter identification laws if left unchecked, and (2) it is similar to voter identification laws in other states, like Texas and Ohio, but is unique in that it was resolved through the legislation. Finally, this Comment will discuss the recent amendment as further evidence that the photo identification law is unconstitutional.

A. The Application of the Crawford *Balancing Test to the New North Carolina Law*

The result of the *Crawford* balancing test on a challenge to North Carolina's voter identification law is fairly straightforward: the voter identification law is upheld. The North Carolina General Assembly ostensibly passed the law in an attempt to protect elections from voter fraud.[477] As evidence of its motivation, the name of the bill is "An Act to Restore Confidence In Government By Establishing The Voter Information Verification Act . . . ."[478] The Act describes itself as "promot[ing] the electoral process through education and increased registration of voters . . . ."[479] Under the *Crawford* standard, states do not even have to show evidence of fraud or demonstrate that their current fraud prevention systems are failing.[480] Because the act is not facially discriminatory, under the current Court's conception of the law, the fact that the law was motivated by "voter fraud" is likely enough to suggest a connection between photo identification and election procedures. This connection is enough for the law to pass.

475. Act of June 18, 2015, ch. 103, § 8.(d), 2015 N.C. Sess. Laws ___ (codified at N.C. GEN. STAT. § 163-166.15 (2015)).

476. *Id.*

477. *See generally* Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505, 1506 (codified in scattered sections of N.C. GEN. STAT. ch. 163 (2013), *amended by* N.C. GEN. STAT. ch. 163 (2015)).

478. *Id.*

479. *Id.*

480. *See* Hasen, *supra* note 186, at 73.

However, this approach ignores the huge impact the law could have on voting in North Carolina. Unlike the Indiana law, which permitted any form of identification issued by Indiana or the federal government, as long as it included the voter's name, photo and address,[481] the North Carolina law was limited to eight specific types of identification.[482] Because North Carolina's law is much more restrictive, some studies have estimated that nearly 300,000 registered voters do not have photo identification,[483] while the North Carolina State Board of Elections found that there were up to 613,000 voters who would be affected—9.25% of the voting population.[484] Therefore, there is a significant chance that North Carolina's law will disenfranchise a large number of voters—evidence that was not presented in the Indiana case. Moreover, unlike Indiana, North Carolina has a history of discriminatory voting laws and was previously protected under the VRA; the Court should consider evidence that North Carolina's law affects certain demographics disproportionately. In North Carolina, twenty-two percent of the registered voter population is black, but black voters make up nearly a third of those who lack photo identification.[485] The same over-representation is true for other minority groups.[486] Because of these dramatic effects, the Court should more closely evaluate the actual effects of the law before deciding that the voter identification requirement is constitutional.

Moreover, some scholars have pointed out that the financial burden of securing voter identification functions similarly to a poll tax.[487] Voters cannot vote unless they have identification, and because identification costs money, the state has imposed a cost on voters.[488]

481. IND. CODE ANN. § 3-5-2-40.5 (2012).

482. Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506 (codified at N.C. GEN. STAT. § 163-166.13 (2013), *amended by* N.C. GEN. STAT. § 163-166.13 (2015)).

483. Reid Wilson, *Report: Voter ID Laws Reduce Turnout More Among African American and Younger Voters*, WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/report-voter-id-laws-reduce-turnout-more-among-african-american-and-younger-voters/ [http://perma.cc/VA8W-42V5]; STATE BD. OF ELECTIONS, *supra* note 1, at 1.

484. Ryan J. Reilly, *North Carolina Voter ID Law Could Impact 613,000 Voters, Report Says*, HUFFINGTON POST (Jan. 9, 2013, 1:14 PM), http://www.huffingtonpost.com/2013/01/09/north-carolina-voter-id_n_2440916.html [http://perma.cc/J4GJ-GP45].

485. *Why Oppose Photo ID for Voters?*, DEMOCRACY N.C., http://www.nc-democracy.org/downloads/WhyOpposePhotoIDforVoters.pdf [http://perma.cc/ZJ4W-LL29].

486. *See, e.g.*, *id.* ("[W]omen are 54% of voters, but are 66% of those without a NC photo ID. Seniors are 18% of voters, but 26% of those without a NC photo ID. Youth are 13% of active voters, but 16% of those without a NC photo ID.").

487. *See, e.g.*, Friedman, *supra* note 407, at 380–81.

488. *Id.*

Charging a fee for voting is prohibited under the Twenty-Fourth Amendment.[489] As the dissent in *Crawford* points out, the financial burden of obtaining photo identification can be upwards of $100;[490] arguably, the state is indirectly imposing a fee on potential voters. Admittedly, the North Carolina law provided some alternatives. Voters who were unable to pay for necessary identifying documents could have those fees waived, and voters without a license were eligible for a free voter identification card. However, even in states where costs are waived, and the state provides a special, "free" form of identification, the associated costs of gathering documents or taking time off of work can range from $75–$175.[491] Comparatively, the $1.50 poll tax in *Harper* was found to be an unconstitutional burden on voting.[492]

The early effects of this law may be evinced by the 2014 midterm election. While overall voting was up in North Carolina,[493] some critics claim that confusion about the impending law discouraged many from going to the polls, reporting increased numbers of voters being denied from the polls or calling in to local election-help hotlines with questions.[494] Although not necessarily convincing from a

489. *Id.*; *see also* U.S. CONST. amend. XXIV, § 1.

490. Crawford v. Marion Cty. Bd. of Elections, 533 U.S. 181, 238 (Breyer, J., dissenting) (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 664 n.1, 666 (1966) ("For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system. *See ante*, at 213–15 (SOUTER, J., dissenting) (noting that out of Indiana's 92 counties, 21 have no public transportation system at all and 32 others restrict public transportation to regional county service). For another, many of these individuals may be uncertain about how to obtain the underlying documentation, usually a passport or a birth certificate, upon which the statute insists. And some may find the costs associated with these documents unduly burdensome (up to $12 for a copy of a birth certificate; up to $100 for a passport). By way of comparison, this Court previously found unconstitutionally burdensome a poll tax of $1.50 (less than $10 today, inflation-adjusted).")).

491. *See* SOBEL, *supra* note 4, at 2.

492. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966). Calculated for inflation, $1.50 in the 1960s would be $11.36 today. *CPI Inflation Calculator*, U.S. DEP'T OF LAB., http://www.bls.gov/data/inflation_calculator.htm [http://perma.cc/U3TB-DMNH] (insert value, select year, select calculate).

493. *See* Matthew Burns, *NC Voter Turnout Sets Midterm Record*, WRAL (Raleigh Nov. 4, 2014), http://www.wral.com/nc-voter-turnout-sets-midterm-record/14149506/ [http://perma.cc/G3D4-HRNP] (indicating that in 2014, there were at least 17,000 more voters than there were in 2010).

494. *E.g.*, *Election Day 2014: Democracy Should Not Be This Hard*, ELECTION PROTECTION (Nov. 4, 2014), http://www.866ourvote.org/newsroom/releases/election-day-2014-democracy-should-not-be-this-hard [http://perma.cc/ZKS4-4RSJ] (summarizing the group's surge in requests for help with voting, due, in their opinion, to restrictive laws); Howard Koplowitz, *Midterm Election Results 2014: Did Voter ID Laws Help Republicans Win the Senate Majority?*, INT'L BUS. TIMES (Nov. 5, 2014, 3:09 PM), http://www.ibtimes.com/midterm-election-results-2014-did-voter-id-laws-help-republicans-win-senate-

constitutionality standpoint, the impact on this particular election may indicate what is to come. Arguably, the burden caused by photo identification is at least making it more difficult to get to the polls. The next inquiry is whether a higher standard of scrutiny would afford more protection in this situation.

B. Application of a Higher Standard of Scrutiny

Under a strict scrutiny approach, the Court would be more deferential to the disenfranchised voters' interest, as outlined above. Additionally, the Court would have to more critically examine the state's alleged interest. Because of the heavy burden imposed on voters, the law would likely fail.

Though it seems unlikely that a photo identification law could survive strict scrutiny, it is not a guarantee. There is a chance that North Carolina's voter identification could pass strict scrutiny.[495] The old characterization of strict scrutiny review as "strict in theory, fatal in fact"[496] has weakened over the years.[497] In fact, the law provides many exceptions for those who cannot afford voter identification.[498] Indigent voters can obtain free identification[499] and get the necessary documents (a birth certificate or marriage license) for free.[500] Moreover, even if the voter is unable to get the necessary documents, the DMV will consider alternative documents to prove the voter's identity.[501] North Carolina could also increase its mobile DMV presence, which may offset the issue of lack of DMV access. These sorts of safeguards may be enough to save the law.

majority-1715785 [http://perma.cc/J9ZA-U2DZ] ("The complaints suggest that a slew of laws passed in recent years by GOP lawmakers and blasted by critics as a modern-day poll tax aimed at suppressing Democratic turnout may have influenced the results in some of the nation's most contested contents.").

495. *See* Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 777–78 (2008) (describing how to evade poll tax concerns before *Crawford*).

496. Winkler, *supra* note 283 (arguing that the strict scrutiny is actually relatively lenient).

497. *Id.*

498. *See, e.g.*, N.C. GEN. STAT. § 163-166.13(e)(2) (2013), *amended by* N.C. GEN. STAT. § 163-166.13(e)(2) (2015); *id.* § 20-37.7(d)(1)–(6) (2013).

499. *Id.*

500. *Id.*

501. *Requirements and Documents To Obtain a Non-Operator ID Card*, N.C. DEP'T OF TRANSP. (Nov. 18, 2014), http://ncdot.gov/download/dmv/DMV_voter_id_list.pdf [http://perma.cc/DAN8-KTUZ] ("If you are unable to provide two forms of identification from the approved list of acceptable documents, DMV will review documents that you have in your possession.").

To prove that the law does not discriminate, North Carolina would have to produce statistics on the number of voters who take advantage of the provisional ballot and special identification exceptions, and whether or not the law has impacted voter turnout. For instance, although the state is willing to consider other forms of identification, there is nothing in the law that forces the state to actually accept other forms of identification.[502] Statistics relating to how frequently North Carolina allows these other forms of identification, what types of alternate identification forms the state allows, and the impact this has on minority and poor groups would help bolster the state's argument that the law is not burdensome. Furthermore, if identification is widely available, this could support the state's claim that the law is sufficiently narrowly tailored.

Additionally, the state could try to argue that it has a compelling interest—voter fraud. Though there is no hard evidence of fraud currently, North Carolina is currently conducting its own investigation.[503] In April 2014, the North Carolina Board of Elections released a report finding that 35,570 people voted in 2012 with names and birth dates that matched other voters.[504] Though initially heralded as proof of voting fraud, further analysis revealed that unique individuals with coincidentally matching names and birthdates are much more common than originally thought. The more alarming number is the 765 cases in which the names, birth dates and last four digits of social security numbers matched.[505] Whether this is sufficient evidence to show that the state's interest in passing the voter identification law is compelling will depend on further inquiry into the results.[506] Information about how accurate these numbers are and

502. *See id.* The law does not speak to whether or not the DMV will consider alternate documents. *See, e.g.*, N.C. GEN. STAT. § 163-166.13(e)(2) (2013), *amended by* N.C. GEN. STAT. § 163-166.13(e)(2) (2015); *id.* § 20-37.7(d)(1)–(6) (2013). Moreover, the text of these informal guidelines is discretionary, stating that the "DMV *will* review documents . . . ." *Requirements and Documents To Obtain a Non-Operator ID Card*, *supra* note 501 (emphasis added).

503. KIM STRACH, MARC BURRIS & VERONICA DEGRAFFENREID, PRESENTATION TO JOINT LEGISLATIVE ELECTIONS OVERSIGHT COMMITTEE (2014), http://www.wral.com/asset/news/state/nccapitol/2014/04/02/13534230/SBOE_JointCommittee_April_2014.pdf [http://perma.cc/4XJT-BRED] (presenting alleged voter fraud in North Carolina).

504. *Id.*

505. *Id.*

506. *See* Doug Chapin, *North Carolina Analysis of Multi-State Voters Likely Sets Up Familiar Drama*, HUMPHREY SCH. OF PUB. AFFAIRS (Apr. 3, 2014), http://editions.lib.umn.edu/electionacademy/2014/04/03/north-carolina-analysis-of-mul/ [http://perma.cc/8TEP-XNWJ]; Zachary Roth, *Voter Fraud in North Carolina? Not So Fast*, MSNBC (Apr. 3, 2014), http://www.msnbc.com/msnbc/voter-fraud-north-carolina-not-so-fast-0 [http://perma.cc/AEQ4-DC6R] (describing the common cycle of partisan reactions to

whether photo identification would have prevented this kind of fraud will be helpful. However, because there is little evidence of actual fraud in North Carolina, the state would likely need to investigate further.

Without additional facts, it is hard to tell which way a court would rule on voter identification. However, this lack of certainty helps prove that the Court should take a closer look at voter identification laws and their potential impact. While it may be easy to dismiss these claims on the basis of anticipated fraud, the reality is that the effects of these laws are complicated. Until the Court can find an actual relationship between voter identification and ability to vote, voter identification deserves a higher standard of review.

C. North Carolina's Amendment as an Alternative to Litigation

On June 18, 2015, five days before hearings were set to begin in the state-level trial against North Carolina's voting law changes, the North Carolina General Assembly amended the voter identification law.[507] The general assembly passed House Bill 836 in response to mounting evidence that the law would prevent many citizens from voting.[508] The new amendment allows voters without identification to sign an affidavit swearing to one of eight reasons for not having identification.[509] These voters can then provide the last four digits of their social security numbers or show their voter registration card as proof of identity.[510] Essentially, the new amendment renders the photo identification requirement moot. Lawmakers heralded the new bill as a way "to make sure everyone who is eligible to vote has the opportunity to vote and have their vote count."[511] However, both critics and supporters of voter identification seemed disappointed. Voter identification advocates lamented the amendment, claiming that it had taken the teeth out of the original photo identification requirement.[512] Meanwhile, critics of identification requirements commented that the

claims of fraud, and the later fizzling out when these "facts" turn out to be less shocking than originally appeared).

507. *See* Sarah Moncelle, *Changes Made to North Carolina Voter ID Requirements*, S. COALITION FOR SOC. JUSTICE (June 18, 2015), https://www.southerncoalition.org/changes-made-to-north-carolina-voter-id-requirements/ [http://perma.cc/5XNA-6BLX].

508. *See id.*; *see also* Act of June 18, 2015, ch. 103, § 8.(a), 2015 N.C. Sess. Laws ___ (codified at N.C. GEN. STAT. § 163-166.13 (2015)).

509. Act of June 18, 2015, ch. 103, § 8.(a), 2015 N.C. Sess. Laws ___ (codified at N.C. GEN. STAT. § 163-166.13 (2015)).

510. *Id.*

511. Blythe & Campbell, *supra* note 246 (quoting Senate leader Phil Berger).

512. *See id.* (" 'It's a shame to lose a court case without ever walking into court,' said Francis De Luca, president of the Civitas Institute, a conservative organization that lobbied for voter ID rules.").

bill "makes a bad bill a little less worse."[513] Not long after, the Court of Appeals for the Fifth Circuit ruled that Texas's similarly restrictive voter identification law violated the Voting Rights Act.[514] Even without section 4(b) and section 5, the court held that Texas's voter identification law had a "discriminatory effect" on Hispanic and black voters and was illegal under section 2 of the VRA.[515]

If anything, the Texas decision shows that North Carolina was correct to amend its law, and that the law might not have withstood the pending legal challenges. But more broadly, the Fifth Circuit's opinion points to a need for a higher level of scrutiny when analyzing these laws, one that will prevent their implementation in the first place.[516] Texas's law had been in place for nearly four years by the time this decision was handed down,[517] and the effects of North Carolina's law were felt even before its 2016 implementation in the 2014 midterm election.[518] Though the Court of Appeals for the Fifth Circuit remanded to determine the proper remedy,[519] it is hard to imagine a way to properly remedy the harm caused by these laws. If we accept as a fact that these laws burden certain voters to the point that they cannot vote, which the North Carolina amendment seems to concede, then how do we compensate them for the lost voting opportunity? And if these voters were unable to vote, their absence may have affected elections; however, there is no way to turn back the clock and change the results.

V. IN SUPPORT OF A HIGHER STANDARD OF SCRUTINY

Allowing voter identification laws to go into effect without taking the chance to evaluate them may have massive implications for voters.[520] Because these laws lack an appropriate remedy, unduly burden voters to the point of disenfranchisement, and are no longer subject to the VRA, the Court should accept facial challenges to these

513. *See* Moncelle, *supra* note 507 (quoting Rep. Henry Michaux, D-Durham).

514. Veasey v. Abbott, 796 F.3d 487, 520 (5th Cir. 2015).

515. *Id.*; *see supra* notes 51, 105, and accompanying text. Section 2 of the Voting Rights Act prohibits all discriminatory voting laws. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437–46 (codified as amended at 52 U.S.C. § 10301 (2014)) (formerly 42 U.S.C. § 1973). *Shelby County* did not affect this section of the VRA. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2619 (2013) ("Section 2 is permanent, applies nationwide, and is not at issue in this case.").

516. Because the law was illegal under the VRA, the Fifth Circuit did not reach the constitutional analysis. *Veasey*, 796 F.3d at 520.

517. *Id.* at 493.

518. *See supra* note 493–494 and accompanying text.

519. *Veasey*, 796 F.3d at 520.

520. *See, e.g.*, *supra* Part IV.

laws. When it does accept these challenges, it should evaluate these laws with a higher standard of scrutiny.

The lack of appropriate remedy may be one of the most important reasons to afford photo identification laws stricter scrutiny. The current system requires voters to suffer harm before they can bring a challenge; however, the harm of losing a fundamental right has no appropriate remedy that can make voters whole again. Court orders cannot force elections to be rerun, require the decisions by lawmakers elected under a discriminatory law to be reversed, or give disenfranchised voters the ability to recast their votes.

Moreover, by making voting harder, voter identification laws negatively affect democracy as a whole. To a certain extent, the bigger question behind the voter identification argument is this: what is the ideal democracy? Is it one where only the best and most qualified voters participate? Should elected leaders be the "best" of all of us, elected by the most intelligent and informed voters? Or instead, is it a democracy with universal participation, where the best candidate is one who represents the interests of all? Arguably it is the latter. The United States was built on the idea of widespread political participation,[521] and although the qualifications of who can vote have changed over time,[522] states should stay true to the ideal of a democracy by "We the people"[523]—and not just the people with driver's licenses.

Furthermore, even if limiting participation to those "best suited" to vote is the goal, photo identification is a poor metric for determining who is qualified. Although voter identification proponents argue that the law affects very few voters, and the costs to voting rights are incremental compared to the prevention against voter fraud, the reality is quite different. In a study of Ohio's 2002 and 2004 elections, four out of 9,078,728 voters were fraudulent, a fraud rate of 0.000044%.[524] Unless the state can show a real and growing threat to the quality of elections, the Court should not permit the state to infringe on voting rights without providing more accessible means to identification.

The burden photo identification imposes is unique, and the Court should not give so much deference to state governments. Unlike

521. *See, e.g.*, ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 245–50 (1839) ("In these States, it is not only a portion of the people which is busied with the amelioration of its social condition, but the whole community is engaged in the task; and it is not the exigencies and the convenience of a single class for which a provision is to be made, but the exigencies and the convenience of all ranks of life.").

522. *See supra* Part II.

523. U.S. CONST. pmbl.

524. Overton, *supra* note 422, at 654.

requiring voters to register, a measure that is needed to hold elections in the first place, voter identification goes beyond what is necessary to run an election. Rather than making sure that elections are run efficiently, voter identification laws begin to shape the voter pool. The strictest photo identification laws mean that only those lucky enough to work flexible jobs that let them leave work to go to the DMV, those who have the means to get identification, and primarily those who drive and likely own a car, may participate in elections.

Given the severity of the harm, both to voters and democracy as a whole, the Court should reexamine voter identification laws. The *Crawford* Court's intermediate balancing test[525] failed to adequately consider the burden on voters, a factor this Comment argues the Court should have weighed more heavily. The Court's precedent has set two standards: one for ballot access cases, which receive a balancing test, and another for cases involving voters' ability to vote, where the Court applies strict scrutiny. Compared to these precedents, voter identification laws create a burden more akin to the cases that trigger strict scrutiny.

The current system, which allows a state to merely cry "fraud!" and immediately pass the balancing test, fails to adequately protect voters. The Court cannot ignore the potential damage of voter identification laws generally. It cannot merely gloss over the disenfranchised voters in favor of the state's interest, as it did in *Crawford*. The Court should take into account the reality of the situation, which is rife with decades of racism and countless discriminatory election laws, and evaluate these cases with a higher standard of scrutiny.

CONCLUSION

Though in *Crawford*, the Court used a balancing test to evaluate Indiana's photo identification requirement, current photo identification laws evolved in a much different context. Given the fact that there is much more information available about the burdens these laws impose on voters and the severity of their harm, it is time for the Court to reevaluate the standard it uses when reviewing photo identification laws. The Court should examine these laws under a standard of strict scrutiny.

Most voter identification advocates press that these laws help ensure fair elections, claiming that current elections are tainted by

525. *See generally* Crawford v. Marion Cty. Bd. of Elections, 553 U.S. 181 (2008) (holding that strict scrutiny did not apply to photo identification cases).

voter fraud and inaccurately represent public opinion. But these advocates fail to address the other side of the issue. By enacting voter identification laws, lawmakers perpetuate another form of fraudulent election: one that misrepresents public opinion by disenfranchising hundreds of thousands of voters. Regardless of whether the risk of fraud exists, the risk to our fundamental rights is great. We should not be so quick to sacrifice that right for illusory peace of mind.

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