

Voter ID Laws:
Reasonable Restriction or Voter Suppression Tactic?

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I. Introduction

Dorothy Cooper, a ninety-six year old African-American resident of Tennessee, made headlines for a rather unusual reason – her voting rights had been challenged.¹ Ms. Cooper is a loyal voter and has participated in every election, save one, since she was in her twenties.² “Despite living through an era when African-Americans were routinely turned away from the ballot box — and worse — Mrs. Cooper said she "never had any problems" exercising her rights. Even before the Voting Rights Act was passed in 1965.”³ However, in the fall of 2011, Ms. Cooper heard that the newly-passed Tennessee law meant that she would have to obtain a photo ID card from the Driver Service Center in order to vote; when she attempted to do so, her request was denied.⁴ Although Dorothy brought a rent receipt, a copy of her lease, her voter registration card, and her birth certificate with her, because the name on her birth certificate was her maiden name and she did not have her marriage certificate, the state refused to give her an ID.⁵ After living through the Jim Crow era, Dorothy Cooper, and others like her, are experiencing a unique phenomenon; registering to vote was easier for them *before* the Voting Rights Act was passed than it is in 2011.⁶

¹ Donna Brazile, *GOP, protect Dorothy Cooper’s right to vote*, CNN, Oct 15, 2011, http://articles.cnn.com/2011-10-15/opinion/opinion_brazile-voter-id_1_government-issued-photo-photo-id-laws-voting-rights-act?_s=PM:OPINION.

² Ansley Haman, *96-Year-Old Chattanooga resident denied voting ID*, CHATTANOOGA FREE TIMES PRESS, Oct. 5, 2011, <http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/> (“She missed voting for John F. Kennedy in 1960 because a move to Nashville prevented her from registering in time.”) *Id.*

³ Brazile, *supra* note 1.

⁴ Haman, *supra* note 2.

⁵ *Id.*

⁶ Steve Benen, *Meet Dorothy Cooper*, WASHINGTON MONTHLY, Oct. 6, 2011, http://www.washingtonmonthly.com/political-animal/2011_10/meet_dorothy_cooper032647.php.

Dorothy's struggle to vote is the result of a sweeping initiative rolling through state legislatures – laws that mandate voters present a photo ID before casting a ballot.⁷ The elderly are not the only group that suffers from such measures; additional voting requirements disproportionately affect communities of color, young voters, poor voters and voters with disabilities.⁸ These minority groups are much less likely to carry the identification accretions of mainstream society (such as a driver's licenses or passports), and would have more trouble obtaining them than the average voter.⁹

This paper explores the voter ID phenomenon from a variety of perspectives, including practicality, legality, historical significance, and as a facet of public policy. The background and analysis sections discuss the issue from an objective standpoint; the final section is based on the conclusion that voter ID laws are poor public policy and will include recommendations for opponents of the laws to challenge them. Part II of the paper will discuss the recent explosion of voter ID legislation, the main components of voter ID laws, relevant case law, and a discussion of public perception of voter ID laws and voter fraud. Part III will analyze voter ID as a matter of public policy, discuss options state legislatures have when confronted with voter ID bills, and detail the strengths, weaknesses, and practicality of challenging voter ID laws in the courts. Part IV will conclude with recommendations for combatting voter ID laws and predictions for the future of voting rights in America.

⁷ Matthew D. Neumann, *Is Indiana's Voter ID Law a Bridge to Nowhere?* 32 N.C. Cent. L. Rev. 68, 68 (2009) (“State laws requiring voters to show some form of identification . . . are [becoming] more and more commonplace.”)

⁸ Brazile, *supra* note 1.

⁹ Panel Discussion, *Policy Perspective: Voter ID Laws*, 13 GEO. PUBLIC POL'Y REV. 109, 112 (2007-2008) (“[I]n Wisconsin, eighty percent of men and eighty-one percent of women had valid driver's licenses; forty-five percent of African-American men, fifty-one percent of African-American women have driver's licenses. That's a huge difference. That's what I call the denial of the right to vote . . .”).

II. Background

A. Recent Success of Voter ID Legislation

Although elected officials have been trying for nearly a decade, prior to 2011, nearly all attempts to push voter ID bills through state legislatures were met with fierce opposition.¹⁰ Before 2011, only two states (Indiana and Georgia) had passed bills and implemented photo identification requirements for their citizens to cast a vote.¹¹ Between 2006 and 2011, no state was successful in passing such a law.¹² Yet suddenly, in the 2011 legislative session, thirty-four states saw bills that would mandate that voters show photo identification in order to vote.¹³ In a single year, voter ID bills passed in twelve state legislatures (although five were met with vetoes by their governors),¹⁴ and six additional states saw the bills pass in one chamber of their legislatures.¹⁵ At the end of the 2011 legislative session nine states had laws mandating photo ID to vote;¹⁶ the number of states that had photo identification laws quadrupled in one year.

The onslaught of voter ID legislation continued in 2012; legislation on the subject was introduced in 32 states.¹⁷ The type of legislation did vary; fourteen states saw new voter ID proposals, proposals to strengthen existing voter ID laws were seen in ten states, and bills

¹⁰ WENDY R. WEISER AND LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012, Brennan Center for Justice, 9 (2011), http://brennan.3cdn.net/9c0a034a4b3c68a2af_9hm6bj6d0.pdf [hereinafter VOTING LAW CHANGES].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2

¹⁴ *Id.* at 5 (passed in Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin; vetoed in Minnesota, Missouri, Montana, New Hampshire, and North Carolina.)

¹⁵ *Id.* at 9 (Arkansas, Colorado, Iowa, Ohio, Pennsylvania, and Virginia).

¹⁶ *Id.* at 5 (Indiana, Georgia, Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin).

¹⁷ *Voter ID: 2012 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx> (last updated June 7, 2012).

amending existing laws, many of them new voter ID laws passed in 2011, were seen in ten states.¹⁸

Some states that were unsuccessful in passing voter ID bills turned to more drastic measures – passing voter ID by way of ballot measures.¹⁹ Oklahoma was the first to see success through this avenue; they passed a ballot measure to amend their state constitution in 2010 after their governor had vetoed a voter ID bill.²⁰ Missouri attempted to follow in Oklahoma’s footsteps, however, the language of the ballot initiative was struck down by a circuit court judge and the legislature failed to revise it, meaning that the question could not appear on the ballot in November 2012.²¹ However, it is likely that Minnesotans will vote on the subject in November, a proposed voter ID amendment passed through the legislature early in the 2012 legislative session, although a lawsuit was filed in an attempt to block the ballot question.²²

Three reasons have been offered to explain the recent success of voter ID bills after many years of failure. The first is the shift in partisan control in many state legislatures after the 2010 election.²³ Stances on voter ID typically fall on partisan lines, with Republican pushing for, and Democrats resisting, the measures.²⁴ In 2010, Republicans controlled both legislative chambers

¹⁸ *Id.*

¹⁹ VOTING LAW CHANGES, *supra* note 10, at 14.

²⁰ *Id.*

²¹ *Missouri Voter Photo ID Measure Kept off Ballot*, JEFFERSON CITY NEWS TRIBUNE, May 22, 2012, <http://www.newstribune.com/news/2012/may/22/missouri-voter-photo-id-measure-kept-ballot/>.

²² Rachel E. Stassen-Berger, *State Supreme Court Moves Quickly to Hear Photo ID Challenge*, THE STAR TRIBUNE, June 6, 2012, <http://www.startribune.com/politics/statelocal/157539875.html>.

²³ VOTING LAW CHANGES, *supra* note 10, at 9.

²⁴ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 277 (Rev. ed. 2009) (identifying voter suppression as a component of Republican strategy, in the eyes of many Democrats and voting rights activists).

in twenty-six states, which was an increase of eight states from the previous session.²⁵ In every case but one, voter ID bills were authored by Republican legislators, and again with one exception (Rhode Island) every state that passed a voter ID bill into law had both houses as well as the governor's office controlled by Republicans.²⁶

The second reason for the surge of voter ID legislation is a heightened priority by Republican state legislators.²⁷ Many elected officials worked voter ID into their platform as they ran for office, and consequently pushed it as a legislative priority after they were elected.²⁸ This emphasis on the issue was rarely seen prior to 2010.²⁹

The third rationale for the new success of voter ID laws could be attributed to the American Legislative Exchange Council (ALEC), a powerful and well-funded lobbying group that advocates for a variety of conservative policy issues.³⁰ In 2009, it was reported that ALEC drafted a model voter ID bill and distributed it to its members; many bills that were eventually introduced in state legislatures resembled the ALEC sample.³¹ Although there is no direct evidence that ALEC has a grip on state legislators that are introducing voter ID bills, the circumstantial evidence is present.³²

B. Current Voter ID Statutes

²⁵ VOTING LAW CHANGES, *supra* note 10, at 10.

²⁶ *Id.* at 9–10.

²⁷ *Id.* at 11.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; see also Editorial, *The Republican Threat to Voting*, N.Y. TIMES, Apr. 26, 2011 at A26 (“[m]any of [2011’s voter ID] bills were inspired by the American Legislative Exchange Council, a business-backed conservative group, which has circulated voter ID proposals in scores of state legislatures.”).

³¹ VOTING LAW CHANGES, *supra* note 10, at 11–12.

³² *Id.* at 13 (“[a]lthough the extent of ALEC’s involvement in voter ID legislation is unknown, the organization boasts that each year more than 1,000 bills based on its models are introduced in state legislatures, and that approximately 17% of those bills become law.”).

As previously mentioned, prior to 2011, only two states, Georgia and Indiana, had photo ID requirements for voting that had been enacted and upheld by the courts. Georgia's statute reads in part "each elector shall present proper identification to a poll worker at or prior to completion of a voter's certificate at any polling place and prior to such person's admission to the enclosed space at such polling place."³³ The statute explicitly states six acceptable forms of identification: (1) A Georgia driver's license, (2) A valid Georgia voter identification card, (3) A valid United States passport, (4) A valid employee identification card issued by the government, (5) A valid United States military identification card, or (6) A valid tribal identification card.³⁴ Each of these forms of ID is required to have a photograph to be considered useable. Residents who do not have an acceptable form of ID to show on Election Day are permitted to cast a provisional ballot,³⁵ but will then need to present an appropriate photo ID at the county register's office within three days for the ballot to be counted.³⁶

Indiana's voter ID laws differ from Georgia's in a few important ways. Indiana mandates that members of the electorate show a photo ID prior to voting, but grants an exception for residents of state licensed care facilities.³⁷ Unlike Georgia's law, Indiana's statute does not explicitly list the types of acceptable identification, but mandates that the ID satisfy four criteria.³⁸ Like in Georgia, voters without proper identification may cast provisional ballots,

³³ GA. CODE ANN. § 21-2-417(a)

³⁴ § 21-2-417(a)(1-6)

³⁵ § 21-2-417(b)

³⁶ GA. CODE ANN. § 21-2-419(c)

³⁷ IND. CODE §3-11-8-25.1(a), (e)

³⁸ IND. CODE §3-5-2-40.5. The identification must (1) show the name of the individual to whom the document was issued (and the name must match the name in the individual's voter registration record), (2) show a photograph of the individual, (3) include an expiration date (and must not be expired, or may expire after the date of the most recent general election), and (4) must be issued by the United States or the state of Indiana. Documents that are issued by the Department of Defense, a branch of the uniformed services, the Merchant Marine, or the Indiana

however, the voter will need to prove his or her identity by the Monday following the election by producing proof of identification or executing an affidavit saying that they cannot show proof (either because the voter is indigent or has a religious objection to being photographed).³⁹ The vote will then be counted if it has not been challenged by a poll clerk or a member of the election board.⁴⁰

In 2011, seven states passed voter ID bills that were signed into law: Alabama, Kansas, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.⁴¹ However, the Alabama, South Carolina, and Texas laws cannot go into effect until they receive pre-clearance from the Department of Justice (DOJ) under Section five of the Voting Rights Act.⁴² Kansas, Tennessee, Wisconsin will implement their laws in 2012, while Rhode Island and Alabama have opted to wait until 2014.⁴³ In addition to the laws passed in the 2011 session, Mississippi introduced a ballot initiative that passed in November 2011 and should take effect thirty days after the election

National Guard are also accepted, even if they don't have an expiration date, as long as the other criteria are satisfied. *Id.*

³⁹ Voter ID: State Requirements, National Conference of State Legislatures, <http://www.ncsl.org/default.aspx?tabid=16602#in> (last visited Dec. 5, 2011).

⁴⁰ IND. CODE §3-11-8-25.1

⁴¹ H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf>; H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf; S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), *available at* <http://www.rilin.state.ri.us/BillText11/SenateText11/S0400A.pdf>; H. 3003, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), *available at* http://www.scstatehouse.gov/sess119_2011-2012/prever/3003_20110511.htm; S.B. 16, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), *available at* <http://www.capitol.tn.gov/Bills/107/Bill/SB0016.pdf>; S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011), *available at* <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf#navpanes=0>; Assemb. B. 7, 2011 Leg., Reg. Sess. (Wis. 2011), *available at* <http://legis.wisconsin.gov/2011/data/acts/11Act23.pdf>.

⁴² Voter ID: State Requirements, *supra* note 39.

⁴³ *Id.*

is certified, however, the state legislature will need to pass implementing legislation and the law will have to be pre-cleared by the DOJ.⁴⁴

The statutes themselves are generally viewed as strict, but vary in several respects, including the type of identification that is accepted, whether identification is needed for absentee voting as well as in person voting, what exemptions are built into the law, and whether alternative voting methods are articulated.⁴⁵ States with the most restrictive photo ID laws mandate a government-issued ID such as an (unexpired) driver's license or non-driver's ID, a U.S. passport, or U.S. military photo ID.⁴⁶ Some states will accept naturalization documents if they bear a photo; other states broadly state they will accept any photo ID issued by the state or federal government.⁴⁷ Alabama,⁴⁸ Kansas,⁴⁹ and Rhode Island⁵⁰ will accept student IDs issued by state institutions of higher education; Wisconsin claims that it will⁵¹ although it mandates criteria that current student IDs don't meet.⁵² A few states will accept concealed handgun

⁴⁴ *Id.*

⁴⁵ VOTING LAW CHANGES, *supra* note 10, at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf>.

⁴⁹ H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf

⁵⁰ S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), *available at* <http://www.rilin.state.ri.us//BillText11/SenateText11/S0400A.pdf>

⁵¹ Assemb. B. 7, 2011 Leg., Reg. Sess. (Wis. 2011), *available at* <http://legis.wisconsin.gov/2011/data/acts/11Act23.pdf> (noting that “An unexpired identification card issued by a university or college in this state that is accredited . . . that contains the date of issuance and signature of the individual to whom it is issued and that contains an expiration date indicating that the card expires no later than 2 years after the date of issuance if the individual establishes that he or she is enrolled as a student at the university or college on the date that the card is presented” is an acceptable form of identification.).

⁵² VOTING LAW CHANGES, *supra* note 10, at 5–6.

licenses, but only Alabama and Wisconsin will accept tribal IDs with a photo.⁵³ Rhode Island has by far the most lenient rules; they will accept any ID that has the voter's name and picture, and there is no mandate that it be government issued.⁵⁴

Of the seven states that currently require photo ID to vote, only two (Alabama and Kansas) require absentee voters to submit a copy of their ID with their mail-in ballots.⁵⁵

Wisconsin's law notes that permanent absentee voters only need to submit a copy of their ID the first time they vote absentee.⁵⁶

Certain states have written exemptions for particular groups into their voter ID laws. In Indiana, for example, the photo requirement in that state does not apply to absentee ballots submitted by mail or to residents of state-licensed nursing homes.⁵⁷ Other states have exempted all elderly and disabled voters, people who are hospitalized or in nursing homes, military and overseas voters, or voters deemed "confidential," such as police officers and victims of domestic violence.⁵⁸ Kansas's law is unique in that it allows voters over sixty-five to show expired photo IDs.⁵⁹

Finally, statutes vary substantially as to whether or not they allow alternative voting procedures for certain groups of citizens.⁶⁰ In Rhode Island, citizens without identification can

⁵³ *Id.* at 6.

⁵⁴ S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011).

⁵⁵ H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19-enr.pdf>; H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf

⁵⁶ 2011 Wisconsin Act 23, May 25, 2011, *available at* <http://docs.legis.wisconsin.gov/2011/related/acts/23.pdf>

⁵⁷ Steven D. Schwinn, *A Road Map for Challenging Voter Restriction Laws After Crawford*, 43 CLEARINGHOUSE REV. 49, 50—51 (2009).

⁵⁸ VOTING LAW CHANGES, *supra* note 10, at 6.

⁵⁹ H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011).

⁶⁰ VOTING LAW CHANGES, *supra* note 10, at 6.

cast a provisional ballot, which will be counted if the election official believes the signature on the provisional ballot and envelope match with the signature on the voter's registration.⁶¹ Other states allow citizens who for good reason (such as a religious objection to being photographed) do not have a photo ID to sign an affidavit explaining why they do not have proper identification.⁶² The ballots accompanying those affidavits are to be counted unless there is reason to believe they are false.⁶³

C. The Constitutionality of Voter ID Laws

Prior to 2011, most states did not have photo ID laws on their books,⁶⁴ so there have been few challenges to these laws to date.⁶⁵ The most prominent case over photo ID is *Crawford v. Marion County Election Board*, decided by the Supreme Court in 2008.⁶⁶ *Crawford* brought a facial challenge to the Indiana law that mandated that all voters present a government issued photo ID at their polling place if they wanted to vote.⁶⁷ The Plaintiffs argued that the law was unconstitutional "on its face" because it significantly restricted voting rights, which are protected by the Fourteenth Amendment.⁶⁸ The Supreme Court affirmed the decisions of the district court and the court of appeals, concluding that there was not sufficient evidence to support a facial challenge of the law.⁶⁹

⁶¹ S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), *available at* <http://www.rilin.state.ri.us/BillText11/SenateText11/S0400A.pdf>

⁶² VOTING LAW CHANGES, *supra* note 10, at 6.

⁶³ *Id.*

⁶⁴ *Id.* at 4 (noting that at the start of the 2011 legislative session, only two states had previously imposed strict photo ID requirements on voters).

⁶⁵ David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 503 (2008).

⁶⁶ 553 U.S. 181 (2008).

⁶⁷ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008).

⁶⁸ *Id.* at 187.

⁶⁹ *Id.* at 188–89.

The majority in *Crawford* cited a dogma set out in a 1992 decision in *Burdick v. Takushi*.⁷⁰ In that case, the Court determined that certain restrictions of voting rights are reasonable and acceptable if they help promote integrity of the electoral process.⁷¹ *Burdick*'s legacy was a less-rigorous standard for interpreting voting rights legislation.⁷² The Court distinguished between “severe restrictions” and “reasonable, nondiscriminatory restrictions,” and attempted to align the standards appropriately (strict scrutiny to severe burdens and a lesser standard to reasonable burdens).⁷³ However, the Court failed to define what constitutes a “reasonable” burden, making it difficult to know which level of scrutiny to apply.⁷⁴

The *Crawford* court noted that because the petitioners were attempting to have the entire law thrown out in a facial challenge (instead of bringing an as-applied challenge, discussed in Part III), they bore a particularly high burden of proof, mainly in showing the undue burdens of the law.⁷⁵ The state argued that the law was meant to serve two valid state interests: (1) improving and modernizing the election procedures in Indiana; and, (2) preventing voter fraud.⁷⁶ The plaintiffs argued that the true impact of the law was to disenfranchise voters and stated that it would unduly burden thousands of voters who, for whatever reason, did not have the proper photo identification.⁷⁷ However, the petitioners had no empirical evidence on the number of Indianans burdened by the law (i.e. how many registered voters in the state did not have proper identification), and since an election had not yet occurred under the new rules, it was difficult to

⁷⁰ 504 U.S. 428 (1992).

⁷¹ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

⁷² Schultz, *supra* note 65, at 492.

⁷³ *Burdick*, 504 U.S. at 434.

⁷⁴ Schultz, *supra* note 65, at 492.

⁷⁵ *Crawford*, *supra* note 67, at 200.

⁷⁶ *Id.* at 191.

⁷⁷ *Id.* at 187.

show exactly which groups were most burdened.⁷⁸ Additionally, since the law provided an exception for absentee voters and voters in nursing homes,⁷⁹ the state could argue that it took care not to burden those who would have the hardest time obtaining ID. Because the plaintiffs had not proved otherwise, the court ruled that the statute served the valid interest of “protecting the integrity and reliability of the electoral process” and was therefore constitutional.⁸⁰

Several state courts have addressed voter ID laws of differing severity. Courts in Arizona,⁸¹ Georgia,⁸² and Michigan⁸³ have upheld the laws while similar laws in Missouri⁸⁴ and New Mexico⁸⁵ were struck down by courts.⁸⁶ The Missouri case, *Weinschenk v. Missouri*, is of particular significance because it is the only decision to date that invalidated the law using the strict scrutiny test, as articulated in *Harper*.⁸⁷ *Weinschenk* differed from previous cases because the plaintiffs chose not to rely on theoretical arguments, but instead presented empirical data on the specific burdens their citizens would endure as a result of the voter ID mandate.⁸⁸ The plaintiffs showed statistics of how many citizens would be burdened, displayed the monetary costs of that burden, and showed the true cost (factoring in additional considerations like time

⁷⁸ *Id.* at 200.

⁷⁹ *Id.* at 185.

⁸⁰ *Id.* at 204.

⁸¹ *Gonzalez v. Arizona*, 485 F.3d 1041 (7th Cir. 2007).

⁸² *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

⁸³ *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1 (2007).

⁸⁴ *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

⁸⁵ *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007).

⁸⁶ Schultz, *supra* note 65, at 503.

⁸⁷ *Weinschenk*, 203 S.W.3d at 211 (“[I]n order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests.”).

⁸⁸ *Id.* at 214 (stating that obtaining a birth certificate would cost between \$12-20 and the photo ID card would cost an additional \$11, which constitutes a de-facto fee, or poll tax, to vote).

and energy) to an individual who needed to obtain ID in order to comply with the law.⁸⁹ The state, on the other hand, was unable to prove that combating fraud, the compelling state interest, was persuasive because they could not prove that fraud was a serious problem in Missouri elections, especially when examining in-person voting.⁹⁰ So although the court admitted that preventing fraud was a compelling interest in theory, the lack of evidence of fraud made the interest not compelling in Missouri and the statute was declared inadmissible.⁹¹ Additionally, the court noted that more stringent rights of voters could be read from the Missouri constitution, and as such, there was a higher burden on the state to ensure the right to vote.⁹² This observation will be especially relevant in Part III, when looking at ways to challenge voter ID laws using state constitutional arguments.

In the New Mexico case, *American Civil Liberties Union of New Mexico v. Santillanes*,⁹³ the federal district court took the opposite approach, insisting on using the *Burdick* balancing test instead of the tougher *Harper* strict scrutiny test.⁹⁴ As in *Weinschenk*, the state claimed that voter fraud was the compelling state interest their law meant to combat,⁹⁵ however, only one case of voter impersonation could be presented to the court.⁹⁶ The court made clear that although

⁸⁹ Schultz, *supra* note 65, at 516.

⁹⁰ *Weinschenk*, 203 S.W.3d at 217–18 (stating that in most cases, voter fraud was attempted through absentee voting, not by voter impersonation at the polls, so the benefit of identification was greatly diminished).

⁹¹ *Id.* at 215.

⁹² *Id.* at 214 (“Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.”).

⁹³ 506 F. Supp. 2d 598 (D.N.M. 2007).

⁹⁴ Schultz, *supra* note 65, at 518.

⁹⁵ *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, 506 F. Supp. 2d 598, 606 (D.N.M. 2007).

⁹⁶ *Id.* at 637.

voter fraud is a compelling governmental interest,⁹⁷ simply asserting it as a rationale to limit voting rights is not sufficient, the problem of voter fraud must be evident to warrant a remedy.⁹⁸ The takeaway from the New Mexico case is that if a state uses combatting voter fraud as a defense for their law, they need to present sufficient evidence to prove that their rationale is truly a compelling government interest.

III. Analysis

The debate surrounding voter ID laws is one of conflicting values and a difference of opinion concerning a reasonable restriction to voting and an undue burden for citizens seeking access to the ballot box. Proponents of voter ID laws cite preventing voter fraud as a compelling reason to mandate photo identification before voting. Opponents of voter ID laws cite the lack of evidence of voter fraud to assert their claim that obtaining a photo ID burdens voters and limits voting rights. The heart of the issue is whether Dorothy Cooper, from the opening section of this paper, is unreasonably burdened when she attempts to obtain a photo ID in order to cast her vote.

The contentious nature of this issue has been realized as opponents of the laws have attempted to question them in several different venues. The following section will analyze voter ID laws, both before and after the laws take effect. The first section will utilize a public policy lens to weight the benefits of the laws against their drawbacks. The second section will examine legislative actions that can affect the practical outcome of voter ID laws. Finally, the third section will discuss legal methods of addressing voter ID laws.

A. Public Policy

⁹⁷ *Id.* at 636.

⁹⁸ *Id.* at 637.

1. Define the Problem

Are voter ID laws an unreasonable encumbrance to the ballot box, or are they a simple precaution to protect election integrity? This question cuts to the core of the voter ID debate. The following section attempts to determine, as a matter of public policy, whether voter ID laws are reasonable restrictions or unreasonable voter suppression tactics.

2. Assemble Evidence

At the heart of the debate over voter ID is the fear of voter fraud.⁹⁹ The issue of voter fraud has been debated at length, but little consensus has been reached about the scope of the problem, mainly because there are no comprehensive peer-reviewed studies on the topic.¹⁰⁰ Proponents of stricter voting laws often cite the Carter-Baker Commission, which issued a report entitled “Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform.”¹⁰¹ The report cites 180 Department of Justice investigations that eventually resulted in fifty-two convictions for voter fraud from 2002 to 2005.¹⁰² The report asserts that although voter fraud is incredibly rare, it could happen, and if it did, it could change an election.¹⁰³

Conversely, the Brennan Center for Justice has conducted substantial research on the topic and published a response, crying “foul” to many of the accusations of the Carter-Baker Commission. It notes that even if the Carter-Baker Commission is correct and its fifty-two cases

⁹⁹ 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, 1746 (2008) (citing a survey that indicates that about a quarter of respondents believed that voter fraud is very common and an additional third believe it occurs occasionally).

¹⁰⁰ Schultz, *supra* note 65, at 494.

¹⁰¹ CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, AMERICAN UNIVERSITY, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM (2005) http://www.american.edu/ia/cfer/report/full_report.pdf [hereinafter CARTER-BAKER COMMISSION].

¹⁰² *Id.* at 18.

¹⁰³ *Id.*

of voter fraud were all valid, the voter fraud rate in a federal election would be 0.00003%.¹⁰⁴ The report (tongue in cheek) points out that Americans are more likely to be killed by lightning than to engage in voter fraud.¹⁰⁵

Professor David Schultz sums up the issue well, “the best available evidence shows that voter fraud is a minor issue in American elections. There is little hard evidence that it occurs, even less evidence that it is widespread, and almost no indication that it has altered election outcomes.”¹⁰⁶ When the statistics on voter fraud come to the forefront of a voter ID debate, the issue appears much more to be a political maneuver rather than a substantive threat to democracy.¹⁰⁷

Additionally, voter fraud is not a single-type problem; voter impersonation, voting multiple times, and voting after disenfranchisement are a few different types of what is considered “voter fraud.”¹⁰⁸ Voter ID laws would only address the first type – voter impersonation.¹⁰⁹ Fraud by absentee ballot is rare, but happens if citizens don’t understand the rules of voting absentee.¹¹⁰ Another type of voter fraud is people who have committed felonies voting before their voting rights have been restored.¹¹¹ In a striking number of cases, felons were improperly or not at all informed that they had lost their voting rights because they had been

¹⁰⁴ WENDY R. WEISER ET AL., RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 10 (2005), *available at* http://www.brennancenter.org/content/resource/response_to_the_carter_baker_commission/.

¹⁰⁵ *Id.*

¹⁰⁶ Schultz, *supra* note 65, at 501.

¹⁰⁷ Pam Fessler, *The Politics Behind New Voter ID Laws*, NPR, July 18, 2011, *available at* <http://www.npr.org/2011/07/18/138160440/the-politics-behind-new-voter-id-laws> (asserting that voter ID laws are a component of a GOP plan to suppress the vote).

¹⁰⁸ LORRAINE MINNITE, THE MYTH OF VOTER FRAUD, 19–36 (2010).

¹⁰⁹ OVERTON, *supra* note 145, at 155 (“[A] photo-ID requirement guards against only one type of fraud: individuals arriving at the polls to vote using false information, such as the name of another registered voter or a recent but not current address”).

¹¹⁰ MINNITE, *supra* note 108, at 34.

¹¹¹ *Id.* at 29.

convicted of a felony, and as a result, participated in an election while still disenfranchised, which is another felony offense.¹¹²

3. Construct Alternatives

The Brennan Center for Justice has examined a variety of alternatives to voter ID laws that address the problems targeted by ID requirements.¹¹³ Some options are already utilized by states.¹¹⁴

Federal law now mandates that each state keep a statewide voter registration database, which is a change from previous city or county lists, which were often incorrect and duplicative.¹¹⁵ Utilizing a statewide database would reduce the likelihood of padding and increase efficiency.¹¹⁶

The Help America Vote Act (HAVA) as well as the National Voter Registration Act provides specific guidance to ensure that states keep databases that only include eligible voters.¹¹⁷ The laws not only mandate that ineligible voters be removed, they also provide safeguards to ensure that eligible voters are not mistakenly removed.¹¹⁸ Such safeguards can include using state death records and felony status records (where applicable) as well as soliciting responses by questionable voters through postcard mailings.¹¹⁹

¹¹² OVERTON, *supra* note 145, at 154–55.

¹¹³ Policy Brief on Alternatives to Voter Identification, Brennan Center for Justice, Sept 2006, http://www.brennancenter.org/content/resource/policy_brief_on_alternatives_to_voter_identification/.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* “Padding” occurs when individuals move to a different city or county within a state, yet their name ends up on the voter rolls of both locations.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

HAVA also introduced a non-intrusive form of identification verification for voters, a unique identifying number.¹²⁰ The number can be either the last four digits of the person's social security number or the individual's driver's license number.¹²¹ Both numbers protect the confidentiality of the individual but also can be verified through government records.

An in-person affirmation can be a powerful tool in deterring voter fraud.¹²² Individuals sign an oath or affirmation when registering to vote, and in some cases, before actually voting.¹²³ Allowing a person to affirmatively state his or her eligibility to vote, under penalty of perjury, can effectively illustrate the severity of committing voter fraud.

Signature comparison is yet another method of preventing voter fraud.¹²⁴ Most jurisdictions require a signature when registering to vote, which is then copied into a poll book; when casting a ballot, individuals must again provide a signature.¹²⁵ The two signatures can then be compared, which is how absentee ballots and provisional ballots are legitimized.¹²⁶ Applying this method to in-person voting would work in an identical fashion.

In many cases, states already have digital photographs of voters, obtained through issuing driver's licenses and other forms of identification.¹²⁷ Those images could easily be transferred to voter registration records when an individual submits a voter registration application, and made available at the polls.¹²⁸ Such a system would provide an identity check without burdening the voter.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

Finally, prosecuting voter fraud can serve as a powerful deterrent for future fraud.¹²⁹ Most states criminalize election fraud, and election fraud in both registration and voting is a federal offense with severe penalties attached.¹³⁰ Publicizing voter fraud cases and convictions can provide an extra layer of security, as perpetrators are made aware of the risks associated with the crime.

4. Select the Criteria

Several criteria must be considered in order to decide whether voter ID laws are a help or a hindrance to our electoral system. The first is how severe the burden on voters will be if voter ID becomes law in a state. The second is whether voter fraud is a sufficient justification for voter ID laws. The final issue is whether the public would react negatively to the implementation of voter ID laws.

Although polls show that Americans wouldn't feel inconvenienced if asked to show ID to vote, further study shows that a striking number of Americans *would*, in fact, be inconvenienced. A 2006 survey found that twenty-one million Americans don't have a driver's license, and eleven percent of the population does not have any current government-issued photo identification.¹³¹ This number rises when looking specifically at the elderly, as eighteen percent of Americans sixty-five and up do not have ID.¹³² Minority groups are also less likely to have proper identification; twenty-five percent of African Americans and sixteen percent of Hispanics

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ BRENNAN CENTER FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3* (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf [hereinafter *CITIZENS WITHOUT PROOF*].

¹³² *Id.*

of voting age do not have photo ID.¹³³ Income level is also a telling factor of whether an adult as ID; those earning less than \$35,000 per year are more than twice as likely to lack ID than those making more than that amount.¹³⁴ Finally, even for those who have acceptable identification, often times the information on that ID is not current.¹³⁵ For example, ten percent of adults with current ID do not have their current address and their current legal name; eighteen percent of citizens ages eighteen to twenty-four do not have an ID with their current name and address.¹³⁶ These people would also have trouble with a voter ID law, although their photo ID is government issued and not expired.

As previously discussed,¹³⁷ evidence of voter fraud, to date, is inconclusive and does not illustrate a compelling trend. Although voter fraud has been prosecuted in recent years, most of those cases did not involve voter impersonation, which is the only form of fraud that voter ID laws would address. Moreover, given the small number of voter fraud cases detected in recent years, it appears to be highly unlikely that fraud could, in fact, alter the outcome of an election.

Despite the lack of clear empirical evidence for voter fraud, public support for voter ID laws is remarkably uniform.¹³⁸ A Rasmussen poll from June of 2011 showed that seventy-five percent of likely voters “believe voters should be required to show photo identification, such as a driver’s license, before being allowed to vote.”¹³⁹ The issue does not split on traditional party lines; eighty-five percent of Republicans support voter ID, as do sixty-three percent of

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See notes 99-112 and accompanying text.

¹³⁸ Peter Roff, *Poll: Democrats and Republicans Support a Voter ID-Check Law*, U.S. NEWS & WORLD REPORT, June 10, 2011, available at <http://www.usnews.com/opinion/blogs/peter-roff/2011/06/10/poll-democrats-and-republicans-support-a-voter-id-check-law>.

¹³⁹ *Id.*

Democrats and seventy-seven percent of Independents.¹⁴⁰ This indicates that voter ID is a non-issue; most Americans don't mind flashing their driver's license when they pick up their ballot. For most Americans, showing ID is part of everyday living; you need it to order a drink in a restaurant, board an airplane, or even enter a tall building.¹⁴¹ Most people don't think mandating ID is a discriminatory action, and many are convinced that showing ID at the polls would eliminate voter fraud.¹⁴²

5. Project the Outcomes

Given the explosion of voter ID legislation in recent years, the nearly unanimous passage in states with Republican majorities, and the failure of the Supreme Court to strike down a law when it was presented to them, it seems clear that voter ID laws will continue to appear in state legislatures and on ballots as constitutional initiatives. As voter ID laws are implemented and tested, if the majority of voters do not feel burdened, it is likely that the laws will continue to go into effect across the country.

If, however, public opinion turns against voter ID laws, it is likely that they will quickly fade from the spotlight, given their partisan affiliation. In a political system of bi-yearly elections, it would be important for Republicans to distance themselves from the policy if they fade from favor in order to keep their majorities in the states. A public shift could end all voter ID discussions, although given the previously mentioned public opinion polling data, this shift is somewhat unlikely.¹⁴³

A third possible outcome, which has not received much consideration in the voter ID debate is that one of the alternative measures for voter protection may gain favor in the states and

¹⁴⁰ *Id.*

¹⁴¹ Panel Discussion, *supra* note 9, at 110.

¹⁴² Roff, *supra* note 138.

¹⁴³ See notes 138-140 and accompanying text.

could eliminate the need for photo identification at the polls. Electronic databases, more accurate poll books, or the increased use of signature comparison could serve as additional protection against voter fraud, in place of voter ID laws.

A final possible outcome is that a court rules that voter ID laws place substantial burdens on voters, a hailstorm of litigation would likely follow and the laws would either disappear completely, or the opinion would be trumped by a higher court. Since it is unlikely that the Supreme Court would about-face on the issue, such litigation would likely take place in state courts, in which case, the laws would need to be challenged state by state.

6. Confront the Trade-offs

If voter ID laws become common practice in the U.S., it will become crucial for voter registration to include an additional component, securing proper identification for use at the polls. A massive push to educate voters and encourage them to take additional steps to remain eligible to vote would likely require a public education campaign either by the state or political parties.

If the popularity of voter ID laws fades, it is unlikely that laws already in place will be repealed, so states might differ in their requirements at the polls. If voter ID laws become politically damaging, it would become more likely that other voter protection measures would be utilized in their place. The other measures could likely be implemented without using much political capital, as they are generally less controversial and costly.

Finally, if the courts begin striking down voter ID laws, there will likely be disarray amongst the states, as the political leanings of the state courts are realized. If the laws in the states start varying wildly, the Supreme Court might feel compelled to again rule on the issue to

settle the issue permanently. However, given that the Court has already heard a voter ID case, it is unlikely they will take the issue up again unless there is substantial pressure to do so.

7. Decide

Given the sparse evidence of voter fraud, the cost and inconvenience involved in complying with photo identification requirements, and the disparate impact the laws have on minority groups, it seems that voter ID laws are sufficiently burdensome to voters. If states truly believe that voter fraud is a problem worth addressing, other methods can do so more efficiently and effectively. Voter impersonation is the only kind of voter fraud that would be affected by voter ID laws, while other safeguards can address impersonation as well as other forms of fraud.

8. Tell Your Story

If voting rights advocates want to prevent passage of voter ID laws, they might decide to take a grassroots approach and attack the issue from the ground up. However, this approach will not be easy. As noted in Part II, public opinion on the issue is remarkably uniform, even across partisan lines.¹⁴⁴ Most Americans don't see voter ID laws as infringing their right to vote.

Additionally, if showing ID would (as most Americans believe) help combat voter fraud, then the change is not only acceptable, but welcome. Changing the minds of the public on such a concrete position is no small task, but with more education regarding the truth about voter fraud and the discriminatory effect of voter ID, the support for voter ID laws might wane.

The first issue to address is false conceptions about voter fraud. Americans believe that voter fraud is a major problem in our electoral system¹⁴⁵ although research has shown that this

¹⁴⁴ Roff, *supra* note 138.

¹⁴⁵ See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 151 (2006) (“Drawing on historical images of Democratic big-city political machines stuffing ballot boxes with votes of dead people, integrity advocates claim voting has become too easy. They warn that legitimate votes are diluted by fraudulent ballots cast by felons, migrant

simply is not the case.¹⁴⁶ Disbursing information would be crucial in helping Americans understand the *true* problem of voter fraud and would help them realize that photo ID would do little to remedy the problem (if they still believe that a problem indeed exists). If voter ID laws were no longer seen as a practical solution, they would be viewed as an unnecessary impediment or an unneeded layer of government regulation surrounding voting rights.

Stories such as Dorothy Cooper’s help illustrate the discriminatory effects of voter ID laws. Dorothy’s narrative paints exactly the right picture – a faithful, lifelong voter who, through no fault of her own, experienced undue burdens in order to exercise a right she had diligently utilized for over seventy years.¹⁴⁷ This story could be anyone’s grandmother or grandfather; it makes the idea of not having an ID palpable to those who would not otherwise think twice about flashing an ID on their way to the ballot box.

Building on the idea of stories of the disenfranchised, voting rights advocates should diligently and consistently discuss particular groups who would be affected by a voter ID law.¹⁴⁸ Senior citizens like Dorothy are a prime example, but there are many others.¹⁴⁹ College students who attend school out of state could find themselves in a tough position when they go to vote.¹⁵⁰ Similarly, members of the military could be disenfranchised if they are overseas and unable to provide a copy of their ID with an absentee ballot, if that is what their state’s law demands.¹⁵¹ Finally, members of minority groups are much less likely to have proper identification, which

farmworkers, terrorists, and homeless people who vote multiple times in exchange for cigarettes and cash.”).

¹⁴⁶ *Id.* at 155 (“incidence of individual voter fraud at the polls is negligible”).

¹⁴⁷ Brazile, *supra* note 1.

¹⁴⁸ See OVERTON, *supra* note 145, at 153 (noting that “the poor, the disabled, the elderly, students, and people of color would bear the greatest burden.”).

¹⁴⁹ *Id.*

¹⁵⁰ VOTING LAW CHANGES, *supra* note 10, at 8.

¹⁵¹ *Id.* at 6 (noting that although the Alabama, Wisconsin, and Kansas laws exempt military and overseas voters, Tennessee and Texas laws do not).

could disproportionately affect minimum residency immigrants who wish to exercise their new freedoms.¹⁵² A public movement against voter ID laws will only take hold if people begin viewing the issue outside their own lens, and more with a view on society at large.

B. Legislative Options

In the face of pending voter ID legislation, much can be done to affect the final product through variations of statutory language. As discussed in Part II, voter ID bills vary in several respects, which can result in a system in which implementation is incredibly burdensome or relatively simple. If a state is faced with a voter ID bill and believes a legal challenge after passage is unlikely (or predicts that the law would be upheld), changing certain aspects of the bill might make it more palatable and less likely to disenfranchise large numbers of voters.

The most drastic way to alter a bill mandating photo identification would be to omit “photo” from the requirement. Many states currently ask first time voters to bring something with their name printed on it (such as a utility bill or rent payment stub) to verify their residence before they vote.¹⁵³ Not all states require showing identification at all,¹⁵⁴ so in some cases, a law like this would be seen as a “step in the right direction” to those concerned about a lack of accountability at the polling place. Clearly, such a variation from the original bill calling for photo identification makes this option politically unlikely, but it might be sufficient to quell some of the public concern over voter fraud.

¹⁵² OVERTON, *supra* note 145, at 153 (noting that fewer people of color own cars or are willing to pay for a state-issued ID card).

¹⁵³ Keyssar, *supra* note 24, at 283 (“[A] wide array of documents . . . could satisfy the requirements: utility bills, paychecks, bank statements, and driver’s licenses commonly did the trick”).

¹⁵⁴ *Id.* at 284 (stating that in nearly half of the states, no identification is demanded unless the person was a first-time voter who had registered by mail and had not provided identification at the time of registration); see also text accompanying notes 46—54

Adding express language regarding the types of acceptable identification can also combat the problems associated with voter ID laws. Allowing a variety of forms of identification would significantly lessen the burden on groups who are likely to be disenfranchised by a strict photo ID mandate. For instance, college students, who in many cases attend school outside of their home state, would be able to vote in the state of their university using their college ID, which would alleviate the burden of establishing residency, changing their driver's license, or voting absentee in their home state.¹⁵⁵ As discussed in Part II, states with photo ID laws are strikingly inconsistent as to which forms of identification they deem acceptable for voting purposes.¹⁵⁶ Rhode Island, the only state to allow non-government issued IDs, would likely be the state to follow if legislators wanted to institute a broad voter ID rule.¹⁵⁷ States with strict rules, such as South Carolina,¹⁵⁸ should not be used as a template.

As previously noted, only two states with voter ID laws (Alabama and Kansas) require absentee voters to submit a copy of their ID with their mail-in ballots.¹⁵⁹ Omitting the mandate

¹⁵⁵ VOTING LAW CHANGES, *supra* note 10, at 8 (explaining that students have been targeted as a group to be excluded from voting because they tend to vote Democratic).

¹⁵⁶ *Id.* at 5–6.

¹⁵⁷ R.I. Gen. Laws §17-19-24.2 (2011). “[A]ny person claiming to be a registered and eligible voter who desires to vote at a primary election, special election or general election shall provide proof of identity. For purposes of this section, proof of identity shall include: (1) A valid and current document showing a photograph of the person to whom the document was issued, *including without limitation*: (i) Rhode Island driver's license; (ii) Rhode Island voter identification card; (iii) United States passport; (iv) Identification card issued by a United States educational institution; (v) United States military identification card; (vi) Identification card issued by the United States or the State of Rhode Island; (vii) Government issued medical card.” (emphasis added) *Id.*

¹⁵⁸ S.C. CODE ANN. §7-13-710 (2011) “When any person presents himself to vote, he shall produce his valid South Carolina driver's license or other form of identification containing a photograph issued by the Department of Motor Vehicles, if he is not licensed to drive” *Id.*

¹⁵⁹ H.B. 19, 2011 Gen. Assemb., Reg. Sess., Act No. 2011-673 (Ala. 2011), *available at* <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles//HB19->

for ID from absentee voters would align with the majority of other states and would alleviate the burden for those who do not vote at a polling place.

Writing exemptions into the statutes is another effective way to lessen a photo ID burden. Ensuring that the elderly are exempt can be easily accomplished. Indiana made an exception for residents of state-licensed nursing homes.¹⁶⁰ Kansas somewhat addressed the problem by allowing citizens sixty-five and older to vote using an expired ID.¹⁶¹ Other states have their own exemptions.¹⁶² Tennessee exempts people who are hospitalized or in nursing homes.¹⁶³ Wisconsin exempts military or overseas voters, as well as voters with confidential identities, such as police officers and victims of domestic violence.¹⁶⁴ Advocates for a flexible law would want to build as many exceptions into the pending bills as they could, and it would be prudent for them to focus on groups that would be most likely affected – the poor, elderly, and immobile.¹⁶⁵

Finally, voter ID bills should contain alternative voting procedures that assume that there is no fraud, rather than that there is. A good example of provisional voting is Rhode Island's system, where citizens without identification can cast a provisional ballot which will be counted as long as the election official believes the signature on the provisional ballot and envelope

enr.pdf.; H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://kslegislature.org/li/b2011_12/year1/measures/documents/hb2067_enrolled.pdf.

¹⁶⁰ Schwinn, *supra* note 57, at 50-51.

¹⁶¹ H.B. 2067, 2011 Leg., Reg. Sess. (Kan. 2011).

¹⁶² VOTING LAW CHANGES, *supra* note 10, at 6.

¹⁶³ S.B. 16, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), *available at* <http://www.capitol.tn.gov/Bills/107/Bill/SB0016.pdf>.

¹⁶⁴ Assemb. B. 7, 2011 Leg., Reg. Sess. (Wis. 2011), *available at* <http://legis.wisconsin.gov/2011/data/acts/11Act23.pdf>.

¹⁶⁵ Schwinn, *supra* note 57, at 49.

match with the signature on the voter's registration.¹⁶⁶ Although this is a subjective standard, it does not place additional burdens on the voter to report to the county seat to prove their identity within a few days. Other states allow citizens who for good reason (such as a religious objection to being photographed) do not have a photo ID to sign an affidavit explaining why they do not have proper identification.¹⁶⁷ The ballots accompanying those affidavits are to be counted unless there is reason to believe they are false.¹⁶⁸ Allowing an affidavit at the polling place would lessen the burden on citizens who have an impediment to obtaining proper identification, and would weaken the grip of a voter ID mandate.

The *Crawford* court was emphatic that if a state required a government-issued photo ID in order to vote, that ID must be made available to citizens free of charge.¹⁶⁹ The states, however, seem to have quite wide leeway in how they carry out that mandate. In Wisconsin, for example, citizens must expressly request a "free" ID before one is offered to them; if a person is unaware that a free ID is available, and as a result, does not ask for one, he or she will not be informed of the law and told to ask.¹⁷⁰ State laws are ambiguous as to whether the additional costs of obtaining preliminary documents, such as a birth certificate, that must be presented in order to obtain a driver's license or photo ID, would be covered in order for the ID to vote to be

¹⁶⁶ S.B. 400 Sub. A, 2011 Leg., Jan. Sess. (R.I. 2011), *available at* <http://www.rilin.state.ri.us/BillText11/SenateText11/S0400A.pdf>

¹⁶⁷ VOTING LAW CHANGES, *supra* note 10, at 6.

¹⁶⁸ *Id.*

¹⁶⁹ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008).

¹⁷⁰ Shawn Doherty & Jessica Vanegeren, *Top DOT Official Tells Staff Not to Mention Free Voter ID Cards to the Public, Unless They Ask*, Madison.com (Sept. 7, 2011), http://host.madison.com/ct/news/local/govt-and-politics/capitol-report/article_335f59fa-d8fe-11e0-8a23-001cc4c03286.html, *see also* Brad Friedman, *Video: WI Citizen Jumps Through DMV Hoops to Get Photo ID in Order to Cast Legal Vote*, Brad Blog (July 26, 2011, 5:58 PM), <http://www.bradblog.com/?p=8626>.

truly “free,” as mandated by the court.¹⁷¹ Ensuring the state covers all costs associated with obtaining ID would be a crucial component to a bill that is not excessively burdensome on those likely to be disenfranchised because of a lack of photo ID.

A final legislative option is for Congress to enact a federal voter ID law that is lenient in the ways just discussed and takes the burdens to adversely affected groups of voters into account.¹⁷² If the legislature and the administration are receptive to building in a protection for citizens who might be subjected to a harsh state voter ID law, it might simply be politically beneficial to take action on the federal level and not leave the issue up to the states.¹⁷³ The law could be supported by the Twenty-Fourth Amendment¹⁷⁴ and framed to protect voters from the costs of obtaining identification, or documents necessary to obtain identification in order to secure the proper photo ID to vote. Although it is unlikely that this issue will be addressed on the federal level (other than in the courts), there seems to be a legal argument that could be made if legislators opted to do so.

C. Legal Methods to Challenge Voter ID Laws

Taking legal action is the final option to address voter ID laws after they have passed state legislatures. The most famous challenge to date is the *Crawford* case discussed in Part II, which attempted to strike down Indiana’s law before it was implemented. However, this challenge was not successful, which leaves legal minds searching for other paths towards success. A few of the possible options include facial challenges¹⁷⁵ (much like *Crawford*), an as-

¹⁷¹ VOTING LAW CHANGES, *supra* note 10, at 7.

¹⁷² Kelly, *supra* note 211, at 273—74.

¹⁷³ *Id.* at 274.

¹⁷⁴ U.S. CONST. amend XXIV, §1 (“The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax.”)

¹⁷⁵ BLACK’S LAW DICTIONARY 244 (8th ed. 2004). A facial challenge is “a claim that a statute is unconstitutional on its face – that is, that it always operates unconstitutionally.” *Id.*

applied challenge¹⁷⁶ (which could only be utilized after the law has gone into effect), or a challenge based on a particular state’s constitution.¹⁷⁷ Each option has benefits as well as shortcomings, which will be discussed in turn.

1. Facial Challenges

The Supreme Court made quite clear through their decision in *Crawford* that a facial challenge is insufficient to strike down a voter ID law.¹⁷⁸ The Court explicitly stated, “Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483 [Indiana’s voter ID law], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.”¹⁷⁹ The plaintiffs in *Crawford* put forth a variety of individuals that would be burdened by the law in different ways, but the court dismissed each one in turn and said, in the aggregate, that these examples were not sufficient to show an extreme burden on specific groups of voters.¹⁸⁰

To win a facial challenge, plaintiffs need compelling evidence that large groups of voters would be disenfranchised if the law was allowed to stand. The problem in *Crawford* was a lack of evidence; the plaintiffs did not produce a single Indianan who would be completely unable to vote under the new law (although they showed many that would bear a burden to comply),¹⁸¹ and there was no hard data produced that showed how many Indianans lacked the proper

¹⁷⁶ *Id.* An as-applied challenge is “a claim that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, usu. because of a discriminatory effect.” *Id.*

¹⁷⁷ *Id.* A constitutional challenge is “a claim that a law or governmental action is unconstitutional.” *Id.*

¹⁷⁸ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 (2008) (explaining that a facial challenge must fail if there is not compelling evidence of a clearly excessive burden).

¹⁷⁹ *Id.* at 200.

¹⁸⁰ *Id.* at 201—203 (“When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.”).

¹⁸¹ *Id.* at 187.

identification to vote under the new law.¹⁸² Additionally, attempts made to give evidence were dismissed by the court as unbelievable¹⁸³ or anecdotal.¹⁸⁴ However, the Court was somewhat vague as to how much evidence (and of what type) would have been necessary to cross the threshold and show a burden that would have warranted striking the law down on its face, or what evidence should be brought in future cases to prove the law was unconstitutional.¹⁸⁵ But it is clear from *Crawford* that a smattering of statistics and examples is not nearly sufficient, and showing disenfranchisement is more compelling than showing burdens.

Additionally, the Court noted that the Indiana law contained an accommodation, providing provisional ballots to citizens who could not comply with the voter ID law on Election Day.¹⁸⁶ Such a provision provides additional insulation for the law because it lessens the burden on voters; if a voter doesn't have ID they are not barred from voting.¹⁸⁷ The presence of provisional ballots might be enough for the court to find that a facial challenge is not compelling because the burden argument is substantially weakened.¹⁸⁸

It is noteworthy that political considerations were discussed in the opinion, as the Court responded to the argument that the bill was passed on strictly partisan lines, indicating its true

¹⁸² *Id.* at 200.

¹⁸³ *Id.* at 187 (noting that the District Court Judge rejected an expert's report that up to 989,000 registered voters in Indiana did not have acceptable ID as "utterly incredibly and unreliable.").

¹⁸⁴ *Id.* at 201—202. The record notes six elderly plaintiffs, one who could be considered indigent, and one homeless woman; these individuals fell far short of showing widespread burden. *Id.*

¹⁸⁵ Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1668-69 (2009).

¹⁸⁶ *Crawford*, 553 U.S. at 209.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 216. "Indiana has a provisional-ballot exception to the ID requirement for individuals the State considers 'indigent' as well as those with religious objections to being photographed, and this sort of exception could in theory provide a way around the costs of procuring an ID." (Souter, dissenting).

aim was to gain a political advantage.¹⁸⁹ The Court acknowledged the potential for that scenario but dismissed it stating “[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”¹⁹⁰ This statement is telling: the Court is not likely to take a stance on the issue simply because it could tip the scales of political influence.

Future facial challenges of voter ID laws will face similar obstacles as were seen in *Crawford*. The Roberts Court has set a high bar for facial challenges,¹⁹¹ and is showing a strong preference for as-applied challenges in cases concerning election law topics.¹⁹² Although the Court in *Crawford* split three ways, only three Justices (Souter, Ginsberg, and Breyer) would have struck down the Indiana law on its face.¹⁹³ Facial challenges are the most attractive option for opponents who do not want to see a voter ID law enacted, however, it is clear that this approach is unlikely to be successful, especially with *Crawford v. Marion County* as compelling precedent.

2. As-Applied Challenges

A careful reading of the *Crawford* decision shows that Justice Stevens’ opinion in conjunction with Justice Souter’s dissent illustrates the deficiencies of the plaintiff’s case and provides a roadmap for a future as-applied challenge, even with the current makeup of the

¹⁸⁹ *Id.* at 203 (noting Judge Barker’s characterization of the case as a partisan dispute that had “spilled out of the state house into the courts”).

¹⁹⁰ *Id.* at 204.

¹⁹¹ Schwinn, *supra* note 57, at 54.

¹⁹² Persily, *supra* note 185, at 1644.

¹⁹³ *Crawford*, 553 U.S. at 209 (Souter, J., dissenting); *Crawford*, 553 U.S. at 237 (Breyer, J., dissenting).

Supreme Court.¹⁹⁴ Both opinions agree that the strict scrutiny test from *Harper* applies to restrictions on the right to vote, such as voter ID laws.¹⁹⁵ Additionally, they agree that the *Burdick* balancing test applies to evenhanded restrictions on voting if the stated goal is to protect the integrity of elections.¹⁹⁶ Noting these preferences, plaintiffs could attempt to shape a challenge to meet the burdens that the majority thought were not met in *Crawford*.

First, plaintiffs must show “concrete, specific, and identifiable harm” if they wish to secure heightened scrutiny.¹⁹⁷ Showing harm would entail proving that individuals were completely denied their right to vote either because they were homeless, poor, or immobile, and therefore unable to obtain the needed identification.¹⁹⁸ The goal is to show that even if the restrictions are the same across the board, they affect some subsets substantially more than others, resulting in disenfranchisement.¹⁹⁹ Since *Crawford* was decided, academics have begun collecting empirical information detailing the results of the new laws; such data will help combat the heightened scrutiny given to future challenges.²⁰⁰

Secondly, plaintiffs must show the harm caused by the burden is widespread, which may be difficult given the “escape provisions” built into most of these laws.²⁰¹ However, Justice Souter, in his dissent, notes that provisional balloting may not render the burden argument

¹⁹⁴ Schwinn, *supra* note 57, at 57.

¹⁹⁵ *Id.* at 54.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 55.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 56 “[I]n the 2008 primaries . . . nearly 400 voters cast provisional ballots because they lacked photo-identification, and about 80 percent of them were not counted.” Since voter turnout in primary elections is quite low to begin with, these statistics are telling of a burden that will only appear more prominently in a general election contest. *Id.*

²⁰¹ *Id.* at 55 (casting a provisional ballot is an escape provision for citizens without the proper ID).

moot.²⁰² Because a voter still has to get to the county seat within ten days of an election to verify their vote by showing ID or signing an affidavit,²⁰³ the burden on them to vote has simply shifted (from obtaining ID to verifying their ballot) and has not been alleviated. Even with provisional balloting and other exceptions, if a party challenging the law can adequately show a “concrete and significant burden to a great number of individuals,” the court might consider that evidence sufficiently burdensome.²⁰⁴

As detailed above, it is possible that after one election cycle, Indianans could prove the law challenged in *Crawford* was unconstitutional as-applied if they brought evidence that substantial numbers of people were unable to vote, and the barrier for these people did not justify the anti-fraud state interests.²⁰⁵ Another way to challenge the law as-applied would be to find an individual plaintiff with an especially compelling story of disenfranchisement and argue that the law is unconstitutional as applied to them.²⁰⁶

Although one can argue that a strong as-applied challenge can be successfully litigated, even in the post-*Crawford* Supreme Court, this option can be seen as too little, too late for those who seek to protect voting rights. It is difficult (nearly impossible, after *Crawford*) for plaintiffs seeking to prevent voter ID laws from going into effect after they have become law. The injury of bad election outcomes cannot be remedied by a retroactive law reversal, and it seems likely that most people would be unwilling to wage that war after losing an election.²⁰⁷ Not to mention, accumulating enough evidence to prove that the ID requirement is sufficiently burdensome

²⁰² *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 217 (2008) (“Provisional ballots do not obviate the burdens of getting photo identification.”).

²⁰³ *Id.* at 216.

²⁰⁴ Schwinn, *supra* note 57, at 55.

²⁰⁵ Persily, *supra* note 185, at 1669.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1645.

would require large a large and well-organized grassroots team along with ample funding.²⁰⁸ Individuals who fall victim to a voter ID law are very unlikely to pursue litigation on their own, and attorneys would likely shy away from such cases because of the expense and the slim opportunity to recover fees.²⁰⁹ In many cases, obtaining an ID, while potentially burdensome, is much less burdensome than launching an as-applied challenge in the courts to protect their voting rights.²¹⁰ If a voting rights organization chooses to take on voter ID laws by way of an as-applied challenge, they will have to do so on principle, rather than to prevent a particular election outcome; it appears inevitable that political injuries will be sustained if a proper challenge is to be brought.

3. State Constitution Challenges

State constitutions provide an alternative basis upon which to challenge voter ID laws. Although federal decisions like *Crawford* limit the litigation strategy in future federal cases, they have surprisingly little impact on state courts; state courts will only be bound by them when they are interpreting federal law.²¹¹ So although the *Crawford* Court ruled on the Indiana law from a federal perspective, that ruling does not preclude a state court to examine the law on state constitutional grounds.²¹² “Due to the state’s history and tradition, textual differences in the state constitution, or the prevailing state court interpretations, the state constitution is often read more expansively to protect a right than the analogous federal constitutional right is in federal

²⁰⁸ *Id.* at 1669.

²⁰⁹ Julien Kern, *Developments in the Law: Election Law: As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marian County Election Board*, 42 LOY. L.A. L. REV. 629, 634 (2009).

²¹⁰ Persily, *supra* note 185, at 1670.

²¹¹ Neil P. Kelly, *Lessening Cumulative Burdens on the Right to Vote: A Legislative Response to Crawford v. Marion County Election Board*, 19 CORNELL J. L. & PUB POL’Y 243, 272 (2009) (noting that some legal commentators called *Crawford* the most important election law case since *Bush v. Gore*).

²¹² *Id.* at 273.

court.”²¹³ Some scholars see state constitutions as more effective tools for protecting individual rights.²¹⁴

Voting rights are one of the instances where a state constitutional argument could tip the scales.²¹⁵ For instance, the Minnesota constitution devotes an entire article to “Elective Franchise,”²¹⁶ and Section 1 clearly states:

Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.²¹⁷

The article does not leave open any option to add additional requirements on the right (such as providing photo identification). Additionally, the provision alleviates any doubt over whether there is a right to vote and expressly lays out the requirements to exercise the franchise.

Similarly, the *Crawford* plaintiffs could mount a formidable challenge to the Indiana voter ID law under the Indiana constitution. Article II of that constitution states:

Section 2. (a) A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election.

(b) A citizen may not be disenfranchised under subsection (a), if the citizen is entitled to vote in a precinct under subsection (c) or federal law.

(c) The General Assembly may provide that a citizen who ceases to be a resident of a precinct before an election may vote in a precinct where the citizen

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Minn. Const. art VII.

²¹⁷ Minn. Const. art VII, §1.

previously resided if, on the date of the election, the citizen's name appears on the registration rolls for the precinct.²¹⁸

Indiana law is even more straightforward than Minnesota law. It states that “a citizen may not be disenfranchised”²¹⁹ unless certain occurrences laid out in that section occur. Providing photo identification is not included in the provision. The Indiana law, therefore, could be challenged as a violation of article II, section 2, thereby skirting the arduous burden of gathering evidence of harm that would be necessary in an as-applied challenge

If a voter ID law is passed in a state that has a similar provision in their state constitution, a challenge in state court on these grounds would have a substantial merit. There would be no need to prove burdens or argue over compelling state interests; the only assertion necessary is that the law violates the state constitution, which should give the plaintiffs a much lower burden of proof.

The glaring exception to this legal strategy, however, is if a state has passed a voter ID by way of a constitutional amendment. Oklahoma (as previously mentioned)²²⁰ has already taken this route, and Minnesota will vote on a potential amendment to the state constitution in the 2012 election. Given the legal consequence of passing a constitutional amendment to enact voter ID, state legislatures need to seriously consider whether they would prefer to allow a bill to pass as law to leave the potential of a state constitutional law challenge in their legal toolbox. In many cases, it might be more politically salient (and legally beneficial) to allow a statute to pass and then challenge it as a violation of the state constitution.

²¹⁸ Ind. Const. art II.

²¹⁹ Ind. Const. art II, section 2(b).

²²⁰ See *supra* text accompanying notes 19-20.

The other potential issue of fighting voter ID in state courts is the absence of a bright line rule that a federal decision would bring and the potential for states to produce contrasting results.²²¹ Additionally, some areas of state constitutional law have not been subjected to many challenges, and the court's unfamiliarity with the area of law could result in them deferring to the prevailing federal approach.²²²

IV. Conclusion

Although the Supreme Court did not seize their opportunity to strike down voter ID laws when they considered *Crawford*, it does not necessarily mean that photo IDs at the ballot box are here to stay. State courts will undoubtedly be seeing challenges of these laws in the future, and the cases stand on a strong foundation, whether it is documented evidence of burdens on voters or the holy grail of that state's constitution.

However, moving beyond legal strategy, it is important to keep in mind the implications of voter id laws from a policy perspective. Clearly, disenfranchising a subset of the population could seriously alter electoral outcomes, but furthermore, it's worth considering what burdening voters says about our nation's electoral system. Our country has prided itself on expanding suffrage and making voting easy and convenient, but voter ID laws are moving us away from that tradition. No American should feel like "the unwanted voter,"²²³ and given the proven rarity

²²¹ Kelly, *supra* note 211, at 273.

²²² *Id.*

²²³ Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 58 (2008).

of voter fraud,²²⁴ Americans should be considered trustworthy voters until evidence proves otherwise.

Our country seems to be at a crossroads in terms of how we view elections. On one hand, we want fair elections, but on the other, we want to feel confident that only eligible people are casting ballots.²²⁵ Voter ID is not the only restrictive measure making the rounds in state legislatures. Felon disenfranchisement has seen renewed interest, as have purges of voter rolls, often in a very partisan fashion.²²⁶ Invariably, there will be some discomfort as the push/pull between these interests continues, especially as they encompass the much less lofty goal of excluding voters who would adversely affect a particular political point of view.²²⁷

Elections should be fought on the campaign trail, as candidates jockey for the hearts and minds of voters. Disrupting the system and attempting to lock out voters that might not go your way is simply a cheap, partisan trick, and should not be tolerated in our electoral system. On the macro level, whether or not ID is needed at a polling place is not truly the issue. The issue is democracy, the true purpose of voting.

²²⁴ Schultz, *supra* text accompanying note 106.

²²⁵ Daniels, *supra* note 223, at 111.

²²⁶ *Id.* at 59.

²²⁷ *Id.* at 111.