

COMMENT

VOTER PHOTO ID LAWS: A SOLUTION IN SEARCH OF A PROBLEM*

“When voting rates in America are some of the lowest among advanced democracies, we should make it easier, not harder, to vote.”

— Barack Obama¹

TABLE OF CONTENTS

I.	INTRODUCTION	480
II.	OLD POISON IN NEW BOTTLES: THE RENEWED FIGHT TO BLOCK THE VOTE.....	482
	A. <i>Renewed Vigor for Voter Suppression</i>	483
	B. <i>History of Voter Identification Laws</i>	485
III.	VOTER FRAUD: A NEW SOUTHERN STRATEGY	486
	A. <i>The Rationale Behind Voter Photo ID: The Myth of In- Person Voter Fraud</i>	486
	1. <i>A Hypothetical Problem</i>	487

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1. *President Obama's Farewell Address: Full Video and Text*, N.Y. TIMES, (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/politics/obama-farewell-address-speech.html>.

2. <i>Will the Real In-Person Voter Fraud Please Stand Up: Mistake and Clerical Errors</i>	489
B. <i>Genuine Areas of Vulnerability for Election Fraud</i>	491
C. <i>What, Like It's Hard: The Challenges of Obtaining an Acceptable ID</i>	493
IV. LEGAL CHALLENGES TO VOTER PHOTO ID LAWS	495
A. <i>The Standard of Review for Voter Photo ID Laws</i>	495
B. <i>The Legacy of Shelby County and Circuit Court Splits on Voter Photo ID Analysis</i>	497
V. MODEL VOTER ID LAWS: A BETTER SOLUTION	507
VI. CONCLUSION.....	508

I. INTRODUCTION

Sammie Louise Bates was born in Mississippi in 1940.² An African-American woman, Bates has childhood memories of counting money with her grandmother for the poll taxes Mississippi required at the time.³ Bates thought the days of poll taxes were long gone, but after she moved to Texas from Illinois in 2011, she found herself in need of a \$42 birth certificate from Mississippi in order to obtain a Texas ID.⁴ Bates' monthly income at the time was \$321, and she found herself unable to save the money required to obtain the birth certificate.⁵ Bates testified that "money the way it was . . . you're going to put the money where you feel the need is most urgent at the time We couldn't eat the birth certificate, and we couldn't pay rent with the birth certificate."⁶ Although Texas' voter photo ID law has since changed after a federal district court twice found discriminatory intent to disenfranchise voters based on race, and the Fifth Circuit Court of Appeals deemed the law too restrictive,⁷ voter photo ID laws are still a subject of contention.

2. Carson Whitelemons, *Texas Photo ID Trial Update: First Witnesses*, BRENNAN CENTER FOR JUSTICE (Sept. 2, 2014), <https://www.brennancenter.org/blog/texas-voter-id-trial-update-first-witnesses> [<https://perma.cc/L3AF-BA39>]; Zachary Roth, *In Texas Voter ID Trial, Witnesses Describe Burden of Getting ID*, MSNBC (Sept. 3, 2014), <http://www.msnbc.com/msnbc/texas-voter-id-trial-witnesses-describe-burden-getting-id>.

3. Whitelemons, *supra* note 2; Roth, *supra* note 2.

4. Whitelemons, *supra* note 2; Roth, *supra* note 2.

5. Whitelemons, *supra* note 2; Roth, *supra* note 2.

6. Whitelemons, *supra* note 2; Roth, *supra* note 2.

7. *Veasey v. Abbott*, 830 F.3d 216, 238–39 (5th Cir. 2016), *cert. denied*, 137 S. Ct.

The fight to vote in the United States has always been an impassioned uphill battle,⁸ from revolutionaries during the American Revolution who believed that English members of Parliament could not adequately represent their interests,⁹ to the dynamic debates over the Reconstruction Amendments,¹⁰ to Bloody Sunday in Selma,¹¹ to recent arguments against the confirmation of Senator Jeff Sessions for Attorney General. Opponents of Sessions' confirmation argued that he was unfit to serve as the nation's top prosecutor and protector of voting rights specifically because he has referred to the Voting Rights Act ("VRA") as "intrusive" and has opposed efforts to revitalize the VRA in the wake of *Shelby County*, a 2013 case that decreased the strength of the VRA.¹² Martin Luther King Jr. once said that "the arc of the moral universe is long but it bends towards justice."¹³ More recently, another civil rights hero, John Lewis, stated that when it comes to voting rights, there is an "unfounded belief that our history of voting rights has been one of consistent progress.' In fact, 'the narrative of voting rights . . . is one of a cycle of retrenchment and reconstruction.'"¹⁴ Over the past decade, it has become increasingly clear that the fight for voting rights is in a retrenchment phase.¹⁵ After President Barack Obama's overwhelming victory in 2008, for the first time since the Jim Crow era, states collectively moved to constrain voting rights.¹⁶ Amid the new laws on ballot access, few have received more publicity and been more politically polarizing than voter photo identification laws.

612 (2017); *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871–72 (S.D. Tex. 2017), *reconsideration denied*, No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017).

8. See generally MICHAEL WALDMAN, *THE FIGHT TO VOTE* 3–32 (2016) (arguing that voting rights have always been controversial).

9. Steven Mintz, *Winning the Vote: A History of Voting Rights*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights> [https://perma.cc/RK3X-386B].

10. Eric Foner, *The Reconstruction Amendments: Official Documents as Social History*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, <https://www.gilderlehrman.org/history-by-era/reconstruction/essays/reconstruction-amendments-official-documents-social-history> [https://perma.cc/D7BZ-UMY8].

11. ARI BERMAN, *GIVE US THE BALLOT* 4–6 (2015).

12. *NAACP Legal Defense and Educational Fund, Inc. Overview of the Civil Rights Record of Reported Attorney General Nominee Jeff Sessions*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND (Nov. 18, 2016), <http://www.naacpldf.org/press-release/what-you-need-know-about-sen-jeff-sessions> [https://perma.cc/5EYF-HGTP].

13. Martin Luther King Jr., *Sermon at Temple Israel of Hollywood* (Feb. 26, 1965) (quoting Theodore Parker, *Ten Sermons of Religion* (1852)).

14. BERMAN, *supra* note 11, at 283.

15. WALDMAN, *supra* note 8, at 199–201.

16. *Id.* at 201.

This Comment examines recent voting rights issues through the lens of voter photo identification laws, including an examination of the history of voter photo ID, alleged in-person voter fraud, and circuit court splits on voter photo ID laws. This Comment compares the types of voter photo ID laws adopted across the United States and the ways in which courts have struck down or upheld voter photo ID laws, depending on their restrictiveness and the intent behind the laws. This Comment ultimately concludes that voter photo ID laws are generally used as tools to limit eligible voters' access to the ballot.¹⁷ Some voter photo ID laws are less restrictive and more reasonable, but generally these laws are problematic and violative of the Constitution and the Voting Rights Act when used as a partisan tool to disenfranchise particular voters based on race or class, which happens too often.¹⁸ Part II examines the ways in which states have moved to restrict voting generally in the wake of President Obama's election. Part II then considers the history of voter ID laws. Part III considers voter fraud, the primary rationale advanced by proponents of voter photo ID laws, and concludes that in-person voter fraud is largely mythological but voter fraud exists in other contexts. Part III then assesses common challenges voters face related to voter photo ID laws. Part IV considers various photo ID laws and litigation involving photo ID, examining the ways in which courts have upheld or overturned voter photo ID laws. Part V examines Rhode Island's voter photo ID law, which allows voters expansive choices in order to verify their identities, and concludes that Rhode Island's less restrictive version could serve as a model for states considering voter ID laws.

II. OLD POISON IN NEW BOTTLES: THE RENEWED FIGHT TO BLOCK THE VOTE

Implementing election reforms in an attempt to streamline election procedure was once a nonpartisan effort. For example, the expansion of early voting to accommodate voters who might not be able to make it to the polls on Election Day was a nonpartisan issue in the first part of the 21st century.¹⁹ However, after

17. *Voting Laws Roundup 2016*, BRENNAN CENTER FOR JUSTICE (Apr. 18, 2016), <https://www.brennancenter.org/analysis/voting-laws-roundup-2016> [https://perma.cc/6SL5-GH7Q].

18. 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, 61–63 (2014).

19. Diana Kasdan, *Early Voting: What Works*, BRENNAN CENTER FOR JUSTICE (2013), http://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf

President Obama's overwhelming victory in the 2008 presidential election, for the first time since the Jim Crow era many states moved together to limit access to the ballot.²⁰

A. *Renewed Vigor for Voter Suppression*

Election reform was popular with politicians and constituents of all parties after the 2000 recount fiasco in Florida and Ohio's record-breaking lines for voters waiting to cast their ballots in 2004.²¹ However, in the wake of Obama's 2008 election, Republican legislatures moved to restrict voting rights and regain an edge in elections by proposing and passing laws which allow them to choose their voters by limiting who has access to the polls.²² Approximately thirty percent of voters utilized early voting in the 2008 election, and Obama won the support of early voters over Senator John McCain by ten points.²³ In response, Florida decreased their number of early voting days from fourteen days to eight days.²⁴ Ohio's early voting days were reduced by more than half, changing from thirty-five days to eleven days.²⁵ Both Florida and Ohio banned Sunday voting during the weekend before Election Day, "when [B]lack churches held Souls to the Polls rallies" during Obama's campaign in 2008.²⁶

During the 2010 elections, Republicans made historic gains in state legislatures.²⁷ Accordingly, by 2011 nineteen states adopted twenty-five regulations aimed at increasing obstacles to the ballot; in forty-one states, Republican lawmakers introduced 180 bills with similar restrictions on ballot access.²⁸ In Florida and Iowa, ex-felons who had already served their prison sentences lost their right to vote, making these states two of the four states that disenfranchise felons for life, regardless of the type of felony committed or the amount of time passed since the felony occurred.²⁹ Maine's legislature repealed a statute that allowed

[<https://perma.cc/7RQX-QR56>] (stating that the trend to adopt early voting laws in a majority of states was a major adoption to traditional voting laws in order to accommodate daily life).

20. WALDMAN, *supra* note 8, at 201.

21. BERMAN, *supra* note 11, at 262–63.

22. *Id.* at 261.

23. *Id.* at 263.

24. *Id.*

25. *Id.*

26. *Id.*

27. WALDMAN, *supra* note 8, at 200.

28. *Id.*

29. BERMAN, *supra* note 11, at 263. Kentucky and Virginia are the other states that disenfranchise felons for life. *State Criminal Re-enfranchisement Laws (Map)*, ACLU,

same-day registration, a measure which people of color were more likely to utilize on election day.³⁰ Other states including Texas, Mississippi, Alabama, Wisconsin, Tennessee, and Pennsylvania passed restrictive new voter ID laws.³¹

In this new retrenchment phase, restrictive voting laws have been proposed and adopted all over the United States. Unlike Jim Crow era laws that were primarily enacted in the South, lawmakers from every region of the country are proposing new regulations aimed at restricting voting.³² New voting regulations are often more refined, sophisticated, and procedural than poll taxes, literacy tests, and other historical voting restrictions.³³ The new laws are also more expansive than Jim Crow laws because they not only disenfranchise voters of color: they often disenfranchise young people, the elderly, and the poor.³⁴ The effects of these laws are hardly accidental; according to a study from the University of Massachusetts-Boston, laws that aim to restrict access to the ballot are “substantially more likely” to be proposed where black voters are concentrated and where there has been a recent increase in voter turnout rates for people of color and low-income voters.³⁵ Former state senator Mike Bennett reasoned in a floor debate in the Florida Senate about a new proposed law cutting early voting from fourteen days to eight that “people in Africa . . . literally walk two and three hundred miles so they can have the opportunity to do what we do, and we want to make it more convenient? Why would we make it any easier?”³⁶ Further, he argued that voting *should* be difficult: “[Voting] is something people die for The guy who died to give you that right, it was not convenient I want ‘em to fight for it. I want them to . . . have to walk across town to go over and vote.”³⁷ By 2011, the Brennan Center for Justice estimated that the new wave of voter restrictions could make it more difficult for five million American

<https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map> [<https://perma.cc/DX77-E3FR>] (noting that approximately 5.85 million Americans with felony or misdemeanor convictions are unable to vote in some states).

30. WALDMAN, *supra* note 8, at 200, 203.

31. *Id.*

32. BERMAN, *supra* note 11, at 263–64.

33. *Id.* at 264; *see also* WALDMAN, *supra* note 8, at 201–03.

34. BERMAN, *supra* note 11, at 263–64.

35. *Id.* at 260.

36. WALDMAN, *supra* note 8, at 203.

37. Aaron Sharockman, *Voting Should Be Tough, Lawmaker Says—Just Like In Africa*, POLITIFACT FLA. (May 6, 2011, 4:35 PM) <http://www.politifact.com/florida/article/2011/may/06/voting-should-be-tough-gop-senator-says-africa/> [<https://perma.cc/5ATZ-3VHV>].

citizens to vote, which is a larger number than the victory margin for the 2000, 2004, and 2016 presidential elections.³⁸

B. History of Voter Identification Laws

Although voter ID laws are not actually new,³⁹ in states with 20th century voter ID laws, “voters had some way to cast a regular ballot even if they lacked documentary proof of their identity.”⁴⁰ Voter ID laws were not particularly popular before the 2000 presidential election; only fourteen states had voter ID laws in 2000.⁴¹ Notably, the fourteen states with voter ID laws by 2000 had both Democratic and Republican majorities.⁴² However, the ID laws in place at the time were less restrictive than the new wave of voter ID laws. They required voters to present an identification document but not necessarily a photo ID, which can be harder to obtain than a piece of mail or a bill with a name on it.⁴³

The 2000 election changed the public’s political awareness of election administration laws and brought the issue to the forefront of public debate; after the Supreme Court held that Florida’s method of recounting punch-card ballots violated the Equal Protection Clause in *Bush v. Gore*,⁴⁴ election administration became a popular topic.⁴⁵ Because of the problems exposed in the 2000 election and in light of new concerns about rising immigration rates in the 1990s,⁴⁶ laws aimed at streamlining election administration received bipartisan support in Congress.⁴⁷ Accordingly, Congress passed the Help America Vote Act (“HAVA”) in 2002, which “required states to verify voter

38. BERMAN, *supra* note 11, at 263; WALDMAN, *supra* note 8, at 205; *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Feb. 2017), <https://www.nytimes.com/elections/results/president.2017>.

39. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 118 (5th ed. 2016) (“South Carolina became the first state to require ID, in 1950. But the identification could be any document bearing the voter’s name.”).

40. *Id.*

41. *Id.* When Alaska adopted a voter identification law in 1980, only five states had voter ID laws. *Id.*

42. *Id.*

43. *Id.*

44. *Bush v. Gore*, 531 U.S. 98, 109–10 (2000); DANIEL P. TOKAJI, *ELECTION LAW IN A NUTSHELL* 149 (2013).

45. ISSACHAROFF ET AL., *supra* note 39, at 118.

46. *Id.* (arguing that “political conflicts over immigration . . . of authorized immigrants and of undocumented persons . . . spilled over into voting rights . . . [and] played a role in tensions over whether measures were needed to protect the integrity of the electoral process”).

47. *Id.* at 118–19.

applications by using either an applicant's driver's license number or the last four digits of [a] social security number, and required first-time voters who had registered by mail to present some form of documentation in order to cast a ballot."⁴⁸ Under HAVA, new voters could present a driver's license or state ID; a student ID or an employee identification card; or a bank statement, utility bill, or paycheck stub in order to verify their identities.⁴⁹ However, in the decade after HAVA's adoption, many states began to propose and approve more stringent voter ID requirements to address a rising fear among American voters: election fraud.⁵⁰

III. VOTER FRAUD: A NEW SOUTHERN STRATEGY

A. *The Rationale Behind Voter Photo ID: The Myth of In-Person Voter Fraud*

Legislators fighting for voter photo ID assert lofty rationales for the laws, like protecting elections against voter fraud, protecting electoral integrity and the appearance thereof, and protecting faith and promoting confidence in the election process.⁵¹ Although some voter photo ID laws are adopted for the aforementioned reasons, some recent regulations have been adopted for less noble reasons. Voter photo ID laws allow Republicans to gain partisan advantage by "choosing their voters instead of facilitating the voters' choice of their representatives."⁵² A few legislators have even blatantly acknowledged problematic motives about their reasons for supporting voter photo ID.⁵³

In a rare moment of brutal honesty, Pennsylvania house majority leader Mike Turzai told the Republican State Committee in 2012 that Pennsylvania's new voter ID law would "allow Governor [Mitt] Romney to win the state of Pennsylvania"⁵⁴ in the

48. *Id.* at 119.

49. BERMAN, *supra* note 11, at 256–57; WALDMAN, *supra* note 8, at 201.

50. ISSACHAROFF ET AL., *supra* note 39, at 120.

51. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016), *cert. denied sub nom.* *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 606 (4th Cir. 2016).

52. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2676 (2015). *Arizona* is a redistricting case, but the rationale applies here as well in that Republican legislators use voter photo ID laws to attempt to disenfranchise voters who they think will vote Democrat, thereby choosing their voters rather than facilitating voters' choices.

53. BERMAN, *supra* note 11, at 264; WALDMAN, *supra* note 8, at 201–04.

54. BERMAN, *supra* note 11, at 264; WALDMAN, *supra* note 8, at 201.

2012 presidential election. The author of South Carolina's voter ID bill, State Representative Alan Clemmons, passed out packages of peanuts and cards that said, "Stop Obama's nutty agenda and support voter ID."⁵⁵ Former Texas Republican Party political director Royal Masset told the *Houston Chronicle* that "[a]mong Republicans, it is an article of religious faith that voter fraud is causing us to lose elections."⁵⁶ Masset did not believe that voter fraud was costing Republicans elections, but he noted that requiring government-issued photo IDs could decrease legitimate Democratic voting enough to add three percent to the Texas Republican vote.⁵⁷

At the heart of the voter photo ID debate is the idea of rampant voter fraud, which Rutgers University political science professor Lori Minnite calls a "new Southern Strategy."⁵⁸ According to Minnite's recent book, *The Myth of Voter Fraud*, "[v]oter fraud is a politically constructed myth."⁵⁹ After Donald Trump won the presidential election in 2016, Trump claimed that millions had voted illegally in the election and that all of those illegal votes had been cast solely in favor of Hillary Clinton; he argued that the alleged illegal votes were the reason she won the popular vote and wrote on his Twitter, "I won the popular vote if you deduct the millions of people who voted illegally."⁶⁰ However, in spite of President Trump's unsubstantiated claims that millions of people voted illegally and that all of them only voted for one candidate, the myth of in-person voter fraud has been largely debunked.

1. *A Hypothetical Problem.* The widespread intentional in-person voter fraud referenced by Trump is virtually nonexistent.⁶¹ Out of more than a billion cast votes, a study published in *The Washington Post* found only thirty-one plausible

55. BERMAN, *supra* note 11, at 264.

56. WALDMAN, *supra* note 8, at 190.

57. *Id.*

58. BERMAN, *supra* note 11, at 257.

59. LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010).

60. Allan Smith, *Trump Makes Outlandish Claims During Grilling by ABC News Anchor Over Voter-Fraud Falsehoods*, BUS. INSIDER (Jan. 25, 2017, 6:58 PM), <http://www.businessinsider.com/trump-voter-fraud-abc-interview-2017-1> [<https://perma.cc/SW4G-Q8EX>]; Ben Collins & Olivia Nuzzi, *Meet Gregg Phillips, The Granddad Trump is Citing for His 3M "Illegal" Voters Claim, Who Hasn't Released Any Proof*, THE DAILY BEAST (Jan. 25, 2017, 12:15 AM), <http://www.thedailybeast.com/articles/2017/01/25/he-claimed-there-were-3-million-illegal-voters-now-he-says-he-may-name-them.html> [<https://perma.cc/AB8V-QSLY>].

61. MINNITE, *supra* note 59, at 6.

occurrences of in-person fraud from 2000 to 2014.⁶² The Republican National Lawyers Association conducted a study in 2011 which concluded that twenty-one states had no convictions or only one conviction for voter fraud in the decade between 2000 and 2010.⁶³ Another study pulled records from all fifty states and concluded that in-person fraud is the rarest type of voter fraud, with only ten cases alleged over a twelve-year period.⁶⁴ According to the same study, there were only fifty-six alleged instances of non-citizens with undocumented status voting during the same time period.⁶⁵ A report from the Brennan Center for Justice found incident rates between 0.0003% and 0.0025%, noting that Americans are more likely to “be struck by lightning than . . . [to] impersonate another voter at the polls.”⁶⁶

Courts have also concluded that in-person voter fraud is virtually nonexistent. In *Veasey v. Abbott*, in an opinion that held that Texas’ voter photo ID law was too restrictive, the Fifth Circuit found that there were “only two convictions for in-person voter impersonation fraud out of [twenty] million votes cast in the decade leading up to” the passage of Texas’ voter photo ID law.⁶⁷ In *North Carolina State Conference of NAACP v. McCrory*, the Fourth Circuit struck down North Carolina’s voter photo ID law, noting that the state had “failed to identify even a single individual who ha[d] ever been charged with committing in-person voter fraud in North Carolina.”⁶⁸ Even in *Crawford v. Marion County Election Board*, a case in which the Supreme Court upheld the constitutionality of a voter photo ID law in Indiana, the Court noted that the law only addressed “in-person voter impersonation at polling places” and that “[t]he record contain[ed] no evidence of

62. *Debunking the Voter Fraud Myth*, BRENNAN CENTER FOR JUSTICE (Jan. 31, 2017) <http://www.brennancenter.org/analysis/debunking-voter-fraud-myth>. [<https://perma.cc/5XYR-RFKK>].

63. *Id.*

64. *Id.*

65. Natasha Khan & Corbin Carson, *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/> [<https://perma.cc/VY5K-5ER2>]. News21 analyzed over 2,068 purported incidences of election fraud since 2000 and concluded that the type of in-person voter fraud which inspired legislatures all over the country to propose or adopt restrictive voter photo ID laws was virtually nonexistent. *Id.*

66. *Debunking the Voter Fraud Myth*, *supra* note 62.

67. *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

68. *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 210 (4th Cir. 2016), *cert. denied sub nom.* *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

any such fraud actually occurring in Indiana at any time in its history.”⁶⁹

Government investigations also show that in-person voter fraud is statistically insignificant. Out of 1.6 million ballots cast in Iowa, a two-year investigation into fraud resulted in only twenty-seven prosecutions for *all* voter fraud cases.⁷⁰ A Wisconsin task force charged twenty people with committing election fraud, but over half of those charged were felons, who are often confused about when and if they are able to cast a ballot.⁷¹ A special Department of Justice unit examined federal elections in 2002 and 2004 and concluded that 0.0000013% of ballots were fraudulent, and not a single one of the fraudulent ballots involved in-person voter fraud.⁷²

2. *Will the Real In-Person Voter Fraud Please Stand Up: Mistake and Clerical Errors.* Although in-person voter fraud is rare, when it does occur, it is typically because of clerical errors and the “fragmented, inefficient, inequitable, complicated, and overly complex electoral process run on election day essentially by an army of volunteers.”⁷³ In 2015 in Martindale, Texas, a judge ordered a recount when poll workers accidentally caused votes to be counted twice.⁷⁴ In 2008, more than 14,000 votes were not counted because poll workers allowed voters to cast ballots in the wrong precincts.⁷⁵

In-person voter irregularities or issues are more likely to occur because of mistakes rather than intentional attempts to

69. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194–95 (2008). Although the record was void of actual incidences of fraudulent in-person voter impersonation, the Court reasoned that other examples of fraud in other parts of the United States had been documented at other points throughout history and that “occasional examples [had] surfaced in recent years.” *Id.* at 195.

70. David Pitt, *Report on Iowa Voter Fraud Investigation Released*, WASH. TIMES (May 8, 2014), <http://www.washingtontimes.com/news/2014/may/8/2-year-voter-fraud-investigation-report-released/> [https://perma.cc/24ND-LFUH].

71. Sean Kirkby, *DOJ Task Force Charges 20 With Voter Fraud in '08*, THE BADGER HERALD (Feb. 1, 2011), <https://badgerherald.com/news/2011/02/01/doj-task-force-charg/#.U71R741dUq9> [https://perma.cc/HV4Z-EC6E].

72. *Debunking the Voter Fraud Myth*, *supra* note 62.

73. MINNITE, *supra* note 59, at 7.

74. Nicole Cobler, *Poll Worker's Mistake Prompts Recount in Caldwell County Elections*, AUSTIN AMERICAN-STATESMAN (Nov. 12, 2015, 12:57 PM), <http://www.mystatesman.com/news/poll-worker-mistake-prompts-recount-caldwell-county-elections/pcaFTvTnBZzBxUnOxo5w7H/> [https://perma.cc/L2HE-8CQS].

75. Robert Barnes, *Appeals Court Tells Ohio To Count Ballots Tainted by Poll Worker Mistakes*, WASH. POST (Oct. 11, 2012), <https://www.washingtonpost.com/politics/decision2012/appeals-court-tells-ohio-to-count-ballots-tainted-by-poll-worker-mistakes/2012/10/11/d5a0109a-13ce-11e2-be82->

fraudulently cast ballots and unfairly sway elections.⁷⁶ In a recent Texas case that garnered national attention, Rosa Maria Ortega, a Mexican national and permanent resident with a green card, was ordered to pay an \$8,000 fine and sentenced to eight years in jail after being convicted for illegal voting by a non-citizen.⁷⁷ Ortega argued in court that she did not know that she could not vote and that she had thought election workers would stop her from voting if she was not allowed to vote.⁷⁸ Ortega, who has lived in Texas since she was fifteen and was brought to the United States as an infant, claimed that she thought she was a citizen.⁷⁹ Texas Attorney General Ken Paxton proudly supported the conviction and result, noting that “[t]his case shows how serious Texas is about keeping its elections secure, and the outcome sends a message that violators of the state’s election law will be prosecuted to the fullest.”⁸⁰ However, even though Ortega was a registered Republican, the draconian penalty she received is a waste of tax dollars and seems to be a result of recent partisan pressures to crack down on election fraud.⁸¹ Only a few years before Ortega’s conviction, a woman convicted of voter fraud in Fort Worth in 2015

c3411b7680a9_story.html?utm_term=.7a794a29448e.

76. *Debunking the Voter Fraud Myth*, *supra* note 62; MINNITE, *supra* note 59, at 7. Minnite argues that the election system in the United States is:

designed to produce irregularities . . . the numbers of voters signing the poll book do not . . . match the numbers of ballots cast because of the . . . crush of citizens who wanted to vote and the fact that a poll worker’s bathroom break was not covered; confused voters go here and there trying to cast ballots in their precinct . . . only to find their wanderings recorded as double votes; absentee ballots do not reach their rightful destination in time . . . John Smith Sr. . . . signs for John Smith Jr. . . . another voter is ensnared in a fraud.

Id.

77. Andrew Kragie, *Texas Jury Convicts Mexican Woman of Illegal Voting*, THE HOUS. CHRON. (Feb. 9, 2017, 2:54 PM), <http://www.chron.com/news/houston-texas/texas/article/Texas-jury-convicts-woman-voter-fraud-10921152.php>; Michael Wines, *Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html>.

78. Kragie, *supra* note 77.

79. *Id.*; Wines, *supra* note 77. Ortega’s lawyer said, “[Ortega] has a sixth-grade education. She didn’t know she wasn’t legal . . . she can own property; she can serve in the military; she can get a job; she can pay taxes. But she can’t vote, and she didn’t know that.” *Id.*

80. Kragie, *supra* note 77.

81. Wines, *supra* note 77; *Costs: Death Penalty Costs in Texas Outweigh Life Imprisonment*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/costs-death-penalty-costs-texas-outweigh-life-imprisonment> [https://perma.cc/E4DA-34JB]. On average, it costs \$47.50 per day to house an inmate in a Texas prison. *Id.* If Ortega serves all eight years, it will cost tax payers \$138,000 or more to house her for those eight years to punish her for accidentally voting.

received only probation.⁸² In 2012, in stark contrast to Ortega's accidental error and eight-year jail sentence, a woman in Brownsville received probation for *purposefully* using absentee ballots to vote five times under different names, an issue which voter photo ID laws do not address.⁸³

In spite of the narrative advanced by conservative politicians like Texas Governor Greg Abbott that intentional in-person voting fraud is commonplace,⁸⁴ in-person voter fraud is both uncommon and often accidental. In-person voter fraud is more likely to result from mistakes by poll workers and uneducated voters, mistakes which are not addressed through voter photo ID laws.⁸⁵ Thus, by crafting in-person voter photo ID laws, legislators are largely creating a solution to an unlikely problem, and real areas of concern regarding voter fraud are not addressed or alleviated.

B. Genuine Areas of Vulnerability for Election Fraud

In spite of the evidence that in-person voter fraud is either rare or accidental, there are genuine concerns of voter fraud in other contexts that need to be addressed with targeted legislation. Electronic voting machines are susceptible to hacking in our interconnected world.⁸⁶ This issue came to light recently in the 2016 presidential election. When Donald Trump was elected, some who opposed him made unsubstantiated claims that Russia

82. Wines, *supra* note 77.

83. *Id.* Note that absentee ballot fraud is not addressed by voter photo ID laws, as mail-in ballots do not require an ID. Sarah Childress, *Why Voter ID Laws Aren't Really About Fraud*, PBS (Oct. 20, 2014), <http://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud/> [<https://perma.cc/NB3G-J4GB>].

84. Kragie, *supra* note 77. In 2016, Abbott claimed that "voter fraud is rampant." W. Gardner Selby, *Light a Match to Greg Abbott's Ridiculous Claim About 'Rampant Voter Fraud'*, POLITIFACT TEX. (Mar. 17, 2016, 10:18 AM), <http://www.politifact.com/texas/statements/2016/mar/17/greg-abbott/light-match-greg-abbotts-claim-about-rampant-voter/> [<https://perma.cc/FY9N-BQGL>]. Texas' version of PolitiFact said that Abbott's statement was false and noted that voter fraud "remains extremely rare." *Id.* A month before the 2016 election, President Trump tweeted, "Of course there is large scale voter fraud happening on and before election day." Donald Trump (@realDonaldTrump), TWITTER (Oct. 17, 2016, 5:33 AM), <https://twitter.com/realDonaldTrump/status/787995025527410688> [<https://perma.cc/6DVF-35H8>]. Breitbart, a conservative news organization, ran a story after the 2016 election with the headline, "Voter Fraud Has Been 'Institutionalized,' Allowing Non-Citizen Voters to 'Flood Our Rolls.'" John Hayward, *Catherine Engelbrecht: Voter Fraud Has Been 'Institutionalized,' Allowing Non-Citizen Voters to 'Flood Our Rolls,'* BREITBART (Nov. 29, 2016), <http://www.breitbart.com/radio/2016/11/29/catherine-engelbrecht-voter-fraud-institutionalized-non-citizen-voters-flood-rolls/> [<https://perma.cc/BM2M-WUWK>].

85. MINNITE, *supra* note 59, at 6.

86. WALDMAN, *supra* note 8, at 249.

hacked electronic voting machines and stole the vote for Trump.⁸⁷ However, there is no substantiated evidence that Russians or anyone else hacked voting machines.⁸⁸ Still, it is reasonably foreseeable that electronic voting machines and voting technology generally are susceptible to hacking.⁸⁹ Accordingly, all but a few states have attempted to remedy this issue with targeted solutions like “paper records, an ‘audit trail’ to thwart fraud, regular audits, and recounts.”⁹⁰

Another genuine area of concern for voter fraud is absentee ballot fraud.⁹¹ This makes sense because absentee ballot fraud only requires a forged signature rather than impersonation of a voter in person at a polling place—and it can be done from the privacy of one’s own home.⁹² The majority of instances of voter fraud cited by conservative groups like the Heritage Foundation in support of strict voter photo ID laws actually involve illegally cast mail-in ballots, which would not be deterred by stringent laws requiring government-issued photo IDs for in-person voting because absentee ballots do not require an ID at all.⁹³ Notably, in Texas, a voter could conceivably go through the entire voter registration and voting process without any government-issued photo ID. Texas voters can register to vote through the mail with a social security number, a Texas driver’s license number, or a personal identification number from the Texas Department of Public Safety.⁹⁴ Then, voters can request to vote early by mail,⁹⁵

87. Joshua A. Douglas, *Russia’s Role Is Shocking But There’s No Evidence the Vote Was Hacked*, CNN (Dec. 12, 2016, 6:16 PM), <http://www.cnn.com/2016/12/12/opinions/russia-role-shocking-but-not-hacked-douglas/>; Philip Rucker, *“I would be your president”: Clinton blames Russia, FBI chief for 2016 election loss*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/politics/hillary-clinton-blames-russian-hackers-and-comes-for-2016-election-loss/2017/05/02/e62fef72-2f60-11e7-8674-437ddb6e813e_story.html?utm_term=.faff9360f717.

88. Douglas, *supra* note 88 (noting that, while there may be merit to the argument that Russia tried to influence the 2016 presidential election in favor of Donald Trump, the Clinton Campaign, the Obama Administration, and the federal judge that rejected Green Party candidate Jill Stein’s lawsuit arguing for a recount in Pennsylvania all agree that there is no evidence that Russia actually hacked voting machines).

89. WALDMAN, *supra* note 8, at 249.

90. *Id.*

91. *Id.*

92. Mark Joseph Stern, *Voter Fraud Exists. Republican Restrictions Won’t Stop It.*, SLATE (Feb. 28, 2017, 6:25 PM), http://www.slate.com/blogs/the_slatest/2016/09/01/voter_fraud_exists_through_absentee_ballots_but_republicans_won_t_stop_it.html [<https://perma.cc/LA3T-8E6V>].

93. *Id.*

94. *Voter Registration in Texas*, DMV.ORG, <http://www.dmv.org/tx-texas/voter-registration.php> [<https://perma.cc/BKW9-6H8U>].

95. *Id.* (Texas no longer refers to mail-in voting as “absentee voting” and instead refers to the process as “vote by mail”).

and mail-in ballots only require a signature in order to be cast.⁹⁶ Anyone can vote early by mail for specific reasons: if the voter will be away from their county on Election Day and during early voting, if the voter is sick or disabled, if the voter is sixty-five years or older, or if the voter is confined in jail.⁹⁷

If conservative legislatures were genuinely concerned with voter fraud, they would pass laws restricting mail-in voting in addition to voter photo ID laws; although mail-in fraud is still rare, it is more likely than in-person voter fraud. However, unlike voter photo ID laws, constituents who use mail-in voting are more likely to vote Republican, so Republicans have not moved to address potential fraud issues with absentee voting.⁹⁸ On the contrary, voters least likely to have government-issued photo IDs overwhelmingly vote Democrat.⁹⁹

C. *What, Like It's Hard: The Challenges of Obtaining an Acceptable ID*

As discussed in Section V, not all voter photo ID requirements are disenfranchising. Voter photo ID laws are broadly supported by the public; many supporters argue that identification is already required for much of civic life, from driving to filing for government benefits to renting an apartment to obtaining a marriage license.¹⁰⁰ However, some voters do not have government-issued photo IDs; people of color, low-income voters and the elderly are disproportionately likely to be affected.¹⁰¹ Some people may have photo IDs but not the type that the state allows at the polls, and the burden on voters who must obtain one can be high.

A 2006 study conducted by the Brennan Center for Justice concluded that “up to 11 percent of U.S. citizens—twenty-one million eligible voters—did not have government-issued photo IDs . . . includ[ing] 25 percent of African-Americans, 18 percent of seniors sixty-five and over, and 15 percent of those making less

96. APPLICATION FOR BALLOT BY MAIL, <http://www.sos.state.tx.us/elections/forms/pol-sub/5-15f.pdf> [<https://perma.cc/FGE4-4QXC>].

97. Texas Secretary of State, *Can Anybody Vote Early by Mail (Also Referred to as 'Absentee Voting')*, VOTETEXAS.GOV, <http://www.votetexas.gov/faq/early-voting.html> [<https://perma.cc/75J2-ZVFG>].

98. Stern, *supra* note 92; BERMAN, *supra* note 11, at 258.

99. Stern, *supra* note 92; CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION, BRENNAN CENTER FOR JUSTICE (Nov. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [<https://perma.cc/NJU2-FL7Z>] [hereinafter CITIZENS WITHOUT PROOF].

100. WALDMAN, *supra* note 8, at 201.

101. CITIZENS WITHOUT PROOF, *supra* note 99.

than thirty-five thousand dollars a year.”¹⁰² In contrast, only eight percent of white voters lacked government-issued photo ID.¹⁰³ In Texas, Hispanic voters are “46 percent to 120 percent more likely than white voters to not have” a government-issued photo ID.¹⁰⁴

Voter ID laws are frequently discriminatory in effect and application. The state often prohibits certain forms of government-issued ID in a discriminatory way.¹⁰⁵ For example, Texas allows voters to provide a license to carry a handgun as a form of acceptable ID, but does not allow student IDs; people of color are more likely to possess student IDs than handgun licenses, and white voters are much more likely than black or Hispanic voters to possess a handgun license.¹⁰⁶ Before North Carolina’s restrictive voter ID law was struck down by the Fourth Circuit, it excluded state-issued public assistance IDs and state employee IDs, which black voters are more likely to possess.¹⁰⁷ Moreover, a Caltech/MIT study found that people of color are more likely to be asked to show a photo ID at the polls than white voters.¹⁰⁸

Other issues arise when voters without ID try to obtain the requisite photo ID. Some voters might struggle to pay for the underlying documents they need to obtain a voter photo ID card.¹⁰⁹ On average, a birth certificate costs \$8 to \$25.¹¹⁰ Women may face an additional hurdle: certain states require that if a woman’s name does not match her birth certificate, she must also provide a copy of her marriage license, which can cost an additional \$8 to \$20.¹¹¹ Further, in Texas, simply getting to a Department of Motor Vehicles (“DMV”) office can be a challenge.¹¹² There are 254 counties in Texas, and a striking eighty-one of those counties do

102. Berman, *supra* note 11, at 254.

103. CITIZENS WITHOUT PROOF, *supra* note 99. The same study found that up to seven percent of U.S. citizens—13 million people—do not have easy access to documents proving citizenship, like a U.S. passport, naturalization papers, or a birth certificate. *Id.* Of citizens whose annual income is less than \$25,000, twelve percent do not have access to documents proving citizenship. *Id.* Additionally, nearly half of female voters do not have access to a birth certificate with their current legal name. *Id.*

104. BERMAN, *supra* note 11, at 266.

105. *Oppose Voter ID Legislation—Fact Sheet*, ACLU, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/DDM5-MMFT>].

106. *Id.*

107. *Id.*

108. *Id.*

109. BERMAN, *supra* note 11, at 268.

110. Krissah Thompson, *Study Finds Costs Associated With Voter IDs*, WASH. POST (July 18, 2012), https://www.washingtonpost.com/politics/study-finds-costs-associated-with-voter-ids/2012/07/17/gJQAlrcXsW_story.html?utm_term=.a8722780b8eb.

111. *Id.*

112. BERMAN, *supra* note 11, at 266.

not even have a DMV office.¹¹³ Notably, Texas' public transportation system is sorely lacking; there is virtually no public transit outside of major cities in Texas.¹¹⁴ Thus, if a Texas voter lives in one of the eighty-one counties without a DMV office, they most likely do not have access to public transportation, which means that voters in those areas would have to own or have access to a car in order to get to a DMV office and obtain the required ID. Even if a voter is lucky enough to live in a county with a DMV and to be able to access transportation to get to the DMV office, some DMVs are only open part-time.¹¹⁵

In a six to three decision in *Crawford v. Marion County Election Board*, with passionate dissents from Justices Souter, Ginsburg, and Breyer, the Supreme Court rejected a facial challenge to voter photo ID laws.¹¹⁶ The Court specifically rejected the idea that *all* voter photo ID laws categorically pose a substantial burden.¹¹⁷ However, in the same split decision, the Court left open the possibility for as-applied challenges of voter photo ID laws, which has resulted in floods of litigation.¹¹⁸

IV. LEGAL CHALLENGES TO VOTER PHOTO ID LAWS

Predictably, restrictive voter photo ID laws have caused an abundance of litigation.¹¹⁹ Circuit courts are split in their reasoning and conclusions on voter photo ID laws, especially regarding the types of arguments and evidence that courts accept as indicative of discriminatory purpose and those that are rejected as weak evidence of discriminatory purpose.

A. *The Standard of Review for Voter Photo ID Laws*

In voting rights challenges, courts balance the alleged burden on voting and the interests put forth by the state on a sliding scale of review.¹²⁰ According to the sliding scale standard, "severe" burdens on voting are subject to strict scrutiny, meaning that they

113. *Id.* "[S]ome voters would have to travel up to 250 miles to get to [a DMV office] . . . [and] counties with significant Hispanic populations were less likely to have a DMV office, while Hispanic residents in such counties were twice as likely as whites to not have the right ID, nor to have a car." *Id.*

114. BERMAN, *supra* note 11, at 266.

115. Thompson, *supra* note 110.

116. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198–202 (2008).

117. *Id.* at 202–03.

118. *Id.* at 202.

119. Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES (Apr. 29, 2008), <http://www.nytimes.com/2008/04/29/washington/29scotus.html>.

120. TOKAJI, *supra* note 44, at 165.

must be narrowly tailored to serve a compelling state interest . . . ‘reasonable, nondiscriminatory restrictions’ are subject to less searching review, and may generally be justified by ‘the State’s important regulatory interests.’”¹²¹

The sliding scale was first articulated in *Anderson v. Celebrezze*, a 1983 case striking down an early filing deadline in Ohio for an independent presidential candidate.¹²² The Court clarified the standard in *Burdick v. Takushi* in 1992.¹²³ In *Burdick*, the Court rejected a constitutional challenge to Hawaii’s ban on write-in votes and specifically rejected the idea that any law that imposed a burden on the right to vote should be subject to strict scrutiny.¹²⁴ The Court recognized that the government must, by necessity, play a practical role in structuring and regulating elections and that all election laws will burden individual voters in some way.¹²⁵ The Court affirmed its *Anderson* standard, noting that “the rigorousness of . . . inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens . . . rights.”¹²⁶

When restrictive voter photo ID laws gained traction in the United States, voting rights advocates tried to argue that the laws created a substantial burden on the right to vote. Indiana’s voter photo identification law was one of the first strict voter photo ID laws requiring voters to present a government-issued photo ID when voting in person.¹²⁷ In *Crawford v. Marion County Election Board*, the Supreme Court upheld the law’s constitutionality¹²⁸ against a facial challenge by the Indiana Democratic Party, the Marion County Democratic Central Committee, several elected officials, and numerous nonprofits representing “elderly, disabled,

121. *Id.*; *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

122. *Anderson*, 460 U.S. at 788–89. In *Anderson*, the Supreme Court noted that “the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Id.* at 788. If strict scrutiny were applied to every voting regulation, governments would not be able to regulate elections at all. ISSACHAROFF ET AL., *supra* note 39, at 92. It would be difficult for governments to defend “open[ing] their polls at 6:00 a.m. on Election Day and allow[ing] voters to vote until 9:00 p.m., while others don’t open theirs until mid-morning or close them at 6:00 p.m. How could a state show that a shorter window for voting was *necessary* to achieve a compelling government purpose?” *Id.*

123. *Burdick*, 504 U.S. at 428, 433–34.

124. *Id.* at 432.

125. *Id.* at 433.

126. *Id.* at 434.

127. ISSACHAROFF ET AL., *supra* note 39, at 119; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008).

128. *Crawford*, 553 U.S. at 204.

poor and minority voters.”¹²⁹ The law’s challengers argued that Indiana’s law violated the Fourteenth Amendment because it substantially burdened the right to vote and was an inappropriate and unnecessary method of avoiding alleged voter fraud.¹³⁰ Challengers also argued that the law would disenfranchise voters, especially low-income voters, the elderly, the disabled, and people of color, all of whom were less likely to possess and often unable to reasonably obtain the requisite government-issued photo ID.¹³¹ The state argued that it had a valid interest in protecting the public’s confidence in its elections systems and in promoting electoral integrity.¹³²

The Court conceded that “[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election.”¹³³ In spite of the Court’s concession that the government lacked evidence of voter fraud, the Court applied the sliding scale of scrutiny and evaluated the burden on voting rights in order to decide which level of scrutiny to apply.¹³⁴ The Court concluded that the law was not substantially burdensome, characterizing the burden of trips to government offices to obtain ID and the burden of obtaining the appropriate documents required for an ID as a mere inconvenience.¹³⁵ Accordingly, strict scrutiny did not apply.¹³⁶ The Court accepted the government’s reasons as legitimate, but it left open the possibility of future challenges by confining the ruling narrowly to the particular record in the case.¹³⁷

B. The Legacy of Shelby County and Circuit Court Splits on Voter Photo ID Analysis

The Supreme Court decided *Crawford* in 2008.¹³⁸ After *Crawford*, more states began to adopt voter photo ID laws.¹³⁹ By 2016, thirty-three states had adopted laws requiring some type of

129. *Id.* at 186–87.

130. *Id.* at 187.

131. *Id.*

132. *Id.* at 197.

133. *Id.* at 194 (quoting a report issued by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III).

134. *Id.* at 194–96.

135. *Id.* at 198.

136. *Id.*

137. *Id.* at 202–03.

138. *Id.* at 181.

139. ISSACHAROFF ET AL., *supra* note 39, at 119.

photo ID at the polls.¹⁴⁰ The rapid adoption of voter photo ID laws by state legislatures all over the country was accelerated by the *Shelby County* decision. Before *Shelby County v. Holder*, certain covered jurisdictions under Section 5 of the Voting Rights Act were required to submit any changes to their election laws to the Department of Justice for “preclearance” approval.¹⁴¹ Through Section 4’s coverage formula,¹⁴² Section 5 applied to jurisdictions with a history of discrimination in voting.¹⁴³ In a five to four decision, the Court held that Section 4’s coverage formula was unconstitutional, reasoning that the coverage formula no longer responded to current conditions.¹⁴⁴ During oral arguments, Justice Scalia went so far as to characterize reauthorization of the VRA as a “racial entitlement.”¹⁴⁵ In contrast, in Justice Ginsburg’s dissent, she argued that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁴⁶ As critics of the Court’s decision pointed out, there was no discussion of recently proposed restrictive voting legislation, which “dramatized the need for Section 5.”¹⁴⁷ Although Congress had amassed a 15,000-page record when it reauthorized

140. *Id.* Note that some states do not require voter photo ID and try to make ballot access easier rather than more challenging: “North Dakota [] has no voter registration system at all, and . . . several states—for example, Idaho, Minnesota, New Hampshire, Wisconsin, and Wyoming—permit day-of-election registration Note that Minnesota, Wisconsin, and Wyoming rank among the top states in the percent of eligible voters registered.” *Id.*

141. TOKAJI, *supra* note 44, at 94–95. Preclearance was created to respond to the realities of “experience with recalcitrant southern officials in the years preceding [the enactment of the VRA] Under previous federal laws, the burden was on the United States government to go to court and prove that existing election practices in each . . . county discriminated against black voters.” *Id.*

142. *Id.* at 95. Section 4 created two criteria for “covered” jurisdictions: “(1) the use of a test or device for voting, such as a literacy test; and (2) fewer than 50% of voting-age residents registered or voting in the 1964 presidential election.” *Id.* The coverage formula “was designed to include those portions of the South with the worst voting problems (Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and much of North Carolina).” *Id.*

143. *Id.*

144. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631–32 (2013).

145. BERMAN, *supra* note 11, at 276.

146. *Shelby Cty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

147. BERMAN, *supra* note 11, at 277. “The justices did not hear . . . that six of the nine fully covered states under Section 5 had passed new voting restrictions since 2010, including voter ID laws . . . [n]or did they hear that the Justice Department and federal courts had blocked four major discriminatory voting changes from becoming law in 2012 under Section 5.” *Id.*

the Voting Rights Act in 2006, the majority opinion in *Shelby* framed the issue as reviewing an outdated statute.¹⁴⁸

Justice Ginsburg's dissent accurately predicted the deterrent power of preclearance.¹⁴⁹ The Supreme Court ruled in *Shelby* on June 25, 2013, effectively eliminating preclearance requirements.¹⁵⁰ The very next day in North Carolina, where a voter photo ID law was already pending in the state legislature, Republican state senators declared that, in light of *Shelby*, they would go forward with "the full bill."¹⁵¹ They then moved to change a single-issue bill into an omnibus election law.¹⁵² Legislators specifically requested data on African-American voting patterns in the state and then crafted the law specifically to make it harder for African-Americans in North Carolina to vote.¹⁵³ For example, the North Carolina legislature requested research that showed which IDs African-American voters were most likely to have.¹⁵⁴ Before *Shelby*, the proposed law allowed voters to use all government-issued photo IDs to verify their identities at the polls, even some expired ones.¹⁵⁵ Then, "with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans."¹⁵⁶ The legislature also requested data on racial demographics of early voting trends.¹⁵⁷ Upon learning that African-American voters were significantly more likely to use early voting, especially during the first seven days of early voting, legislators altered the law to cut the first week of early voting.¹⁵⁸ Similarly, legislators requested data on the racial breakdown of same-day registration usage, preregistration, provisional voting, and out-of-precinct voting and, for each issue, specifically made cuts to the programs and tools most utilized by African-American voters.¹⁵⁹

148. ISSACHAROFF ET AL., *supra* note 39, at 762–63.

149. *Shelby Cty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

150. Jedediah Purdy, *A Voting-Rights Victory in North Carolina*, THE NEW YORKER (Aug. 2, 2016), <http://www.newyorker.com/news/news-desk/a-voting-rights-victory-in-north-carolina>.

151. *Id.*

152. *Id.*

153. *Id.*

154. *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 217.

159. *Id.* at 217–18.

North Carolina's governor signed the bill into law on August 12, 2013.¹⁶⁰ On the same day, the League of Women Voters and other advocacy organizations filed suit to challenge the law, alleging that the restrictions on early voting, same-day registration, and out-of-precinct voting violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments because the provisions were motivated by discriminatory intent and had a discriminatory effect.¹⁶¹ Also on the same day, the North Carolina State Conference of the NAACP and other advocacy organizations filed a separate suit to challenge the voter photo ID requirement.¹⁶² The NAACP argued that the voter photo ID provision violated the Fourteenth and Fifteenth Amendments' prohibition of intentional discrimination and that the provision violated the Voting Rights Act under Section 2's prohibition on discriminatory effects.¹⁶³

After a district court upheld the law, the Fourth Circuit Court of Appeals reversed, reasoning that the challenged provisions of the omnibus law "target[ed] African Americans with almost surgical precision."¹⁶⁴ The Fourth Circuit held that the law was unconstitutional and violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments because it was proposed and adopted with discriminatory intent, but the court did not address the discriminatory effects claims.¹⁶⁵ Although the State tried to argue that they had passed the provisions not because they wanted to disenfranchise voters based on race but because they wanted to disenfranchise Democrats,¹⁶⁶ the Fourth Circuit found irrefutable evidence of discriminatory intent and noted that "in what comes as close to a smoking gun as we are likely to see in modern times, the State's very justification for a challenged statute hinges *explicitly* on race—specifically [the legislature's] concern that African Americans, who had overwhelmingly voted for Democrats, had *too much* access to the franchise."¹⁶⁷

160. *Id.* at 218.

161. *Id.*

162. *Id.* Another group filed suit against the law as well. "Finally, a group of 'young voters' intervened, alleging that these same provisions violated their rights under the Fourteenth and Twenty-Sixth Amendments. The district court consolidated the cases." *Id.*

163. *Id.*

164. *Id.* at 214–15.

165. *Id.* at 219.

166. *Id.* at 226.

167. *Id.*

The Fourth Circuit specifically found that the voter photo ID requirement would inevitably slow down the process of voting.¹⁶⁸ In combination with the cuts to early voting days and the fact that many voters wait in line only to find that they are in the wrong precinct, the restrictive ID requirement would produce longer lines on Election Day.¹⁶⁹ The court noted that all of the combined restrictions in the omnibus bill produced disenfranchisement on a larger scale than any of the individual provisions in and of themselves.¹⁷⁰ The government argued that their motivation for the voter photo ID provision was to prevent and combat fraud and promote public confidence in elections.¹⁷¹ However, the Fourth Circuit found that the law was both too broad and too narrow.¹⁷² It was too broad because it created irrational restrictions, like the choice to exclude forms of government-issued IDs most likely to be used by African-Americans, which were unrelated to the stated goal of preventing fraud.¹⁷³ It was simultaneously too narrow because it focused only on in-person voter fraud without any actual evidence of a person who had ever been charged with in-person voter fraud and neglected to address absentee ballot fraud.¹⁷⁴ The Fourth Circuit noted that the legislature had data available showing that white voters used absentee ballots much more often than black voters, which the court found persuasive as additional evidence of intent to specifically disenfranchise and affect black voters; an amendment had been proposed and rejected requiring photo ID for absentee ballots, even though the bipartisan State Board of Elections had specifically recommended changes to address the potential for mail-in ballot fraud.¹⁷⁵ Thus, the Fourth Circuit enjoined the provisions of the law “regarding photo ID, early voting, same-day registration, out-of-precinct voting, and preregistration.”¹⁷⁶

Other states have been more careful than North Carolina in crafting discriminatory voter photo ID laws, although courts have sometimes still found them discriminatory in spite of the lack of a “smoking gun.”¹⁷⁷ In Texas in 2011, the legislature adopted one of

168. *Id.* at 231.

169. *Id.*

170. *Id.*

171. *Id.* at 235.

172. *Id.*

173. *Id.* at 236.

174. *Id.* at 235–36.

175. *Id.*

176. *Id.* at 239.

177. *Id.* at 226; *see infra* notes 178–79 and accompanying text.

the most restrictive voter photo ID laws in the country.¹⁷⁸ In *Veasey v. Abbott*, a district court held that SB 14 was adopted with “a racially discriminatory purpose, has a racially discriminatory effect, [and] is a poll tax.”¹⁷⁹ The Fifth Circuit addressed each issue separately on appeal.¹⁸⁰

When the legislature enacted SB 14, it required local registrars, county clerks, and the Bureau of Vital Statistics to collect a \$2 or \$3 fee for a certified copy of a birth certificate, in addition to the fees required by the Department of State Health Services for obtaining a birth certificate.¹⁸¹ The Texas legislature later eliminated the fee requirement, but the Fifth Circuit held that, even as originally enacted, the fee did not qualify as a poll tax in violation of the Twenty-Fourth Amendment and Fourteenth Amendment because it did not impose a requirement specifically on those who refused to pay but instead was incidental to the State’s power to prescribe voter qualifications by requiring voters to present government-issued photo ID at the polls.¹⁸² Thus, the Fifth Circuit vacated the district court’s assessment of the birth certificate fee as a poll tax.¹⁸³

The Fifth Circuit affirmed the district court’s assessment that SB 14 violated Section 2 of the Voting Rights Act “by disparately impacting minority voters.”¹⁸⁴ In Texas, 4.5% of registered voters

178. *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017). Before SB 14, voters could verify their identities at the polls with a registration certificate. *Id.* at 225. If a voter did not have a registration certificate, he or she could sign an affidavit and present one of multiple forms of ID. *Id.* Acceptable forms of ID included, “a current or expired driver’s license, a photo ID (including employee or student IDs), a utility bill, a bank statement, a paycheck, a government document showing the voter’s name and address, or mail addressed to the voter from a government agency.” *Id.* Under SB 14, voters had fewer choices to verify their identities at the polls. *See id.* Voters could show a Texas Driver’s license or other ID card issued by Texas DPS, a U.S. military ID, a U.S. citizenship certificate, a U.S. passport, a license to carry a concealed handgun, or a DPS-issued Election Identification Certificate (“EIC”). *Id.* However, the court in *Veasey* found that Texas voters faced heightened difficulties in obtaining the appropriate identification and supporting documents to acquire an EIC if they did not already have required identification under SB 14. *Id.* at 267–68.

179. *Id.* at 225. Note that the district court also found that SB 14 unconstitutionally burdened the right to vote, but the Fifth Circuit dismissed the constitutional burden claim entirely under the doctrine of constitutional avoidance: “We decline to decide this question, under the ‘well established principle governing the prudent exercise of this [c]ourt’s jurisdiction that normally th[is] c[our]t will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Id.* at 265 (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984)).

180. *Id.* at 229, 243, 265.

181. *Id.* at 226.

182. *Id.* at 266.

183. *Id.* at 272.

184. *Veasey v. Abbott*, 830 F.3d 216, 252 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612

did not have acceptable IDs under SB 14, which particularly affected minority voters; Hispanic voters were 195% less likely than white voters to have acceptable ID, while black voters were 305% less likely to have acceptable ID.¹⁸⁵ The district court found that SB 14 burdened many people living in poverty who were less likely to have one of the qualified photo IDs, less likely to need the ID for other purposes, and less able to obtain the ID.¹⁸⁶ Further, the court found that a disproportionate amount of people living in poverty in Texas are African-American and Hispanic because “they continue to bear the socioeconomic effects caused by decades of racial discrimination.”¹⁸⁷

However, the court reversed and remanded for further findings on the discriminatory purpose claim.¹⁸⁸ The Fifth Circuit rejected the way in which the district court weighed Texas’ history of racially discriminatory voting measures as indicative of discriminatory purpose, citing *Shelby County* for the idea that “history did not end in 1965.”¹⁸⁹ The Fifth Circuit recognized that history is important in determining discriminatory purpose but particularly rejected the district court’s reliance on long-ago history; the Fifth Circuit reasoned that evidence of relatively recent discrimination is “more probative of discriminatory intent.”¹⁹⁰ The Fifth Circuit also rejected the district court’s usage of post-enactment speculation by opponents of SB 14, noting that discovering the purpose of an entire legislative body is challenging.¹⁹¹ According to the Fifth Circuit, contemporary statements at the time of the passage of the law are better support for deciphering intent than post-enactment statements.¹⁹²

Under Loretta Lynch’s leadership, the DOJ had sided with the challengers of Texas’ voter photo ID law on the question of intent.¹⁹³ After the Fifth Circuit remanded the case back to the

(2017).

185. *Id.* at 250.

186. *Id.* at 264.

187. *Id.*

188. *Id.* at 272. The district court enjoined SB 14 entirely, but the Fifth Circuit held that the remedy might be too broad without a finding of discriminatory purpose. *Id.* at 268. Thus, on remand, the district court was instructed to evaluate again whether the law was adopted with a discriminatory purpose in order to decide a remedy. *Id.* at 243.

189. *Id.* at 231 (quoting *Shelby County v. Holder*, 133 S. Ct. 2612, 2628 (2013)).

190. *Id.* at 232.

191. *Id.* at 233.

192. *Id.*

193. *Id.* at 333; see also Attorney General Loretta E. Lynch Statement on Court of Appeals Ruling in Texas Voter ID Case, DEPT. OF JUSTICE OFFICE OF PUB. AFFAIRS (July 20, 2016) <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-court-appeals-ruling-texas-voter-id-case-0> [<https://perma.cc/7WSG-W92L>].

district court to rule on the issue of discriminatory intent, the DOJ under the newly-appointed leadership of Jeff Sessions decided to drop its claim that Republican legislators in Texas enacted the law with racially discriminatory intent.¹⁹⁴ In reconsidering the question of discriminatory intent on remand, the court noted that “discriminatory intent is shown when racial discrimination was a motivating factor in the governing body’s decision.”¹⁹⁵ It further articulated that discriminatory purpose means more than the mere awareness of the potential consequences on a particular demographic; discriminatory purpose means *choosing* a particular option at least partially *because* of the negative effects that option will have on a particular group.¹⁹⁶

In response to the Fifth Circuit’s rejection of the court’s prior reliance on history, the court clarified its reasons for acknowledging Texas’ vast history of discriminatory practices as “for context only.”¹⁹⁷ The court reasoned that the historical analysis was only meant to provide perspective; accordingly, the court said that it “did not, and does not, assign distant history any weight in the discriminatory purpose analysis.”¹⁹⁸ However, the court adopted more recent historical evidence dating from 2000 forward, including the demographic changes “by which Texas ha[s] become a majority-minority state and polarized voting patterns [have allowed] the suppression of the overwhelmingly Democratic votes of African–Americans and Latinos to provide an Anglo partisan advantage.”¹⁹⁹ The court specifically rejected contemporaneous statements about legislative intent and again relied on evidence that the relationship between the reasons put forth for the bill and the actual language of the bill was feeble at best.²⁰⁰ The court also mentioned that the bill did not address other types of fraud, like mail-in ballot fraud, which is more prevalent than in-person voter fraud.²⁰¹ The court reasoned that the terms of the legislation were irrationally harsh and that many types of photo IDs which other states permitted as acceptable

194. *Veasey v. Abbott*, 249 F. Supp. 3d 868, 868 (S.D. Tex. 2017), *reconsideration denied*, No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017); Vann R. Newkirk II, *The Department of Justice Stands by Texas’s Voter ID Law*, THE ATLANTIC (July 8, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-department-of-justice-stands-by-texas-voter-id-law/532980/>.

195. *Veasey*, 249 F. Supp. at 872.

196. *Id.*

197. *Id.* at 873.

198. *Id.*

199. *Id.* at 874.

200. *Id.* at 875.

201. *Id.*

forms of identification were omitted from the Texas bill.²⁰² Again, it ultimately concluded that the evidence showed that “a discriminatory purpose was at least one of the substantial or motivating factors behind passage of SB 14” and held again that “SB 14 was passed with a discriminatory purpose in violation of Section 2 of the Voting Rights Act.”²⁰³ However, as evidenced by the “White Primary Cases” in the first half of the twentieth century, Texas is persistent,²⁰⁴ and the state has already adopted new voter photo ID legislation which merely softens the harsh requirements.²⁰⁵ Chad Dunn, one of the attorneys representing plaintiffs in the ongoing legislation, noted that Texas’ strategy is a “litigation strategy masquerading as a legislative function.”²⁰⁶

Other voter photo ID laws have been challenged in court as both discriminatory in effect and purpose, but only Texas’ and North Carolina’s voter photo ID laws have been held by circuit courts as violative of the Voting Rights Act, although other courts have found voter photo ID laws unconstitutional, and other challenges are pending.²⁰⁷ In July 2016, a district court partially invalidated Wisconsin’s voter photo ID law as unconstitutionally burdensome on the right to vote in violation of the First and Fourteenth Amendments and held that it disparately burdened African American and Hispanic voters by requiring them to produce photo IDs that they are less likely to possess.²⁰⁸ However, the district court rejected the Voting Rights Act challenge to Wisconsin’s ID law²⁰⁹ and did not strike down the law in its

202. *Id.*

203. *Id.* at 875–76.

204. TOKAJI, *supra* note 44, at 22.

“Democratic Party officials often excluded blacks from voting in their primaries. Because the South was solidly Democratic, the Democratic primary was the only game in town, so exclusion from that party’s primary was the functional equivalent of disenfranchisement . . . In a series of cases decided between the 1920’s and 1950’s, culminating with *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), the Supreme Court struck down laws and practices that excluded blacks from voting in Texas primary elections. These cases . . . are collectively known as the ‘White Primary Cases.’”

Id. at 21–22.

205. Jim Malewitz, *Scrap New Texas Voter ID Law, Plaintiffs Tell Federal Judge*, TEX. TRIB. (June 7, 2017), <https://www.texastribune.org/2017/06/07/legal-foes-call-judge-scrap-new-texas-voter-id-law/>.

206. *Id.*

207. Tribune News Services, *Appeals Court: North Carolina Voter ID Law is Discriminatory*, CHI. TRIB., <http://www.chicagotribune.com/news/nationworld/ct-north-carolina-voter-id-law-20160729-story.html>.

208. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 916, 949, 957 (W.D. Wis. 2016).

209. *Id.* at 960.

entirety²¹⁰ but instead required changes,²¹¹ ordering the government to “promptly issue a credential valid as a voting ID to any person.”²¹² The NAACP filed a lawsuit challenging Alabama’s voter photo ID law in 2016; it is set for trial in December 2017.²¹³ In contrast to the North Carolina decision, the Fourth Circuit upheld Virginia’s voter photo ID law in 2016.²¹⁴

The Supreme Court will likely grant certiorari on another voter photo ID case, although the Court denied certiorari on both the North Carolina and Texas cases.²¹⁵ Hopefully the Court will eventually hold that, while expansive voter photo ID laws are constitutional (although not necessarily sound policy choices), the restrictive laws implemented by states like Texas and North Carolina are violative of the Voting Rights Act and the Constitution. However, even if the Supreme Court eventually addresses more restrictive voter photo ID laws and holds that they are constitutional and that they do not violate the Voting Rights Act, legislators should consider that just because a policy is constitutional does not make it sound. Accordingly, if a state deems it necessary to pass a voter photo ID law, it should be as expansive as possible to avoid the problems mentioned above.

210. *Id.* at 917. The court noted that “a targeted remedy [could] cure the constitutional flaws” of Wisconsin’s voter photo ID law and that the Seventh Circuit’s previous opinion in *Frank v. Walker*, which upheld Wisconsin’s voter photo ID law against a facial challenge, “effectively foreclose[d] invalidating Wisconsin’s voter ID law outright.” *Id.*; *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014).

211. Both sides appealed the district court’s decision, and the State filed for a stay on the court’s injunction pending appeal. *One Wis. Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4250508, at *1 (W.D. Wis. Aug. 11, 2016). The district court stood by its decision that reforms to the voter photo ID law were necessary, but it approved a stay for the 2016 election cycle and held that “the required reform [could] wait until the parties complete[d] their appeal.” *Id.* The appeal is still pending. Lorraine Bailey, *Seventh Circuit Gives Little Hope to Opponents of Wisconsin Voter ID Law*, COURTHOUSE NEWS (Feb. 24, 2017), <https://www.courthousenews.com/seventh-circuit-gives-little-hope-to-opponents-of-wi-voter-id-law/> [<https://perma.cc/5KJS-NF7C>].

212. *Thomsen*, 198 F. Supp. at 964.

213. Mary Orndorff Troyan, *Voter ID Rulings Could Impact Alabama*, MONTGOMERY ADVISER (Aug. 3, 2016, 5:08 PM), <http://www.montgomeryadvertiser.com/story/news/local/alabama/2016/08/03/voter-id-rulings-could-impact-alabama/88006740/> [<https://perma.cc/96GY-X323>]; *Federal Court Denies Motion to Dismiss NAACP LDF’s Lawsuit Against Discriminatory Alabama Voter ID Law*, NAACP LEGAL DEFENSE FUND (Apr. 6, 2017), <http://www.naacpldf.org/update/federal-court-denies-motion-dismiss-naacpldf%25E2%2580%2599s-lawsuit-against-discriminatory-alabama-voter-> [<https://perma.cc/AY32-X4GM>].

214. Ann E. Marimow & Rachel Weiner, *Appeals Court Upholds Virginia’s Voter-ID Law*, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/local/public-safety/appeals-court-upholds-virginias-voter-id-law/2016/12/13/3888f46e-c150-11e6-9a51-cd56ea1c2bb7_story.html?utm_term=.1ae0b75caa70.

215. *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017); *Abbott v. Veasey*, 137 S. Ct. 612 (2017).

V. MODEL VOTER ID LAWS: A BETTER SOLUTION

Even though most voter photo ID laws are adopted as solutions to a statistically insignificant problem, and in the most extreme cases, specifically to disenfranchise, not all voter photo ID laws are restrictive. Although still unnecessary, voter photo ID is less problematic in and of itself when the laws allow voters to provide numerous types of identification in order to vote or allow for many choices of documents which can be presented to obtain a voter ID card. Some ID laws are implemented because of genuine concerns with electoral integrity and to assuage voters' authentic anxieties about potential election fraud, particularly in states with a history of corruption in elections.²¹⁶

Rhode Island's law is a strong example of a photo ID law which does not disenfranchise constituents. Voter photo ID laws tend to be a polarizing partisan issue amongst legislators, with Republicans voting strongly in favor of voter photo ID and Democrats vehemently opposing it.²¹⁷ However, when Rhode Island adopted its voter photo ID law in 2011, it had a liberal governor and a Democratic legislature.²¹⁸ Rhode Island implemented a voter photo ID law with an expansive list of choices for voters to verify their identities.²¹⁹ It allows the following list of photo IDs at polling places: a driver's license or permit; a U.S. passport; an ID card issued by any federally recognized tribal government; an ID card issued by an educational institution in the United States; a U.S. military identification card; an ID card issued by the U.S. government or the State of Rhode Island, including Rhode Island bus passes; a government issued medical

216. WALDMAN, *supra* note 8, 248–50; Michael Waldman, *Playing Offense: An Aggressive Voting Rights Agenda*, DEMOCRACY (Spring 2013), <http://democracyjournal.org/magazine/28/playing-offense-an-aggressive-voting-rights-agenda/> [<https://perma.cc/TJ2L-DAKD>]; Simon Van Zuylen-Wood, *Why Did Liberal African-Americans in Rhode Island Help Pass a Voter ID Law?*, NEW REPUBLIC (Feb. 6, 2012), <https://newrepublic.com/article/100429/rhode-island-voter-id-laws-hispanic> [<https://perma.cc/KBB7-FZHU>].

217. Aman Batheja, *Texas House Passes Voter ID Bill*, STAR-TELEGRAM (Mar. 23, 2011, 11:47 PM), <http://www.star-telegram.com/living/family/moms/article3827488.html>. When the Texas House voted in favor of Texas' voter photo ID law, all forty-eight votes against the bill were cast by Democrats. *Id.* When North Carolina's restrictive HB 589 passed in the House, every representative who voted in favor of the law was a white Republican, and every black representative voted to oppose it. *Id.* William Wan, *How Republicans in North Carolina Created a 'Monster' Voter ID Law*, CHI. TRIB. (Sept. 2, 2016, 7:54 PM), <http://www.chicagotribune.com/newsnationworld/politics/ct-north-carolina-voter-id-law-20160902-story.html> [<https://perma.cc/99U4-8526>]. "As the final vote was cast, Democratic representatives all stood up, held hands and bowed their heads in prayer." *Id.*

218. Zuylen-Wood, *supra* note 217.

219. *Voter ID*, RHODE ISLAND DEPARTMENT OF STATE, <http://sos.ri.gov/divisions/elections/Voters/voter-id> [<https://perma.cc/R3AF-FH4N>].

card or a Rhode Island voter ID card. Voters can obtain the last option, a free voter ID card, by presenting any number of documents or identification, including a utility bill; a health club ID card; a public housing ID card; a bank statement, and “ID documents issued by homeless shelters and other temporary or transitional facilities.”²²⁰ Because of the vast array of options available to potential voters, Rhode Island’s law does not disenfranchise voters in the way that more restrictive voter photo ID laws unfairly impede ballot access.²²¹ Thus, Rhode Island’s law is a stronger policy choice than the discriminatory laws attempted by Texas’ and North Carolina’s legislatures, and Rhode Island’s law could serve as a model for other states considering voter photo ID legislation.

VI. CONCLUSION

Voter photo ID laws are probably inevitable. They are not irrational when the government makes it easy and free for voters to obtain IDs by providing expansive lists of acceptable documents for voters to use to verify their identities. However, there are still issues with inefficient and ineffective state education efforts to notify voters about new requirements. One study found that fifty percent of voters who claimed that they did not vote in a 2014 election because they did not have the required ID actually had acceptable identification.²²² Voters also face transportation problems, especially rural voters who do not have easy access to offices which provide government-issued photo IDs.²²³ If these and other similar issues were addressed, voter photo ID laws could be reasonable. However, they are problematic and reminiscent of Jim Crow era laws when used as a partisan tool to target voters based on race. Voter photo ID laws are too often veiled attempts at preventing people of color and people living in poverty from

220. *Id.*

221. Michael Waldman, *Playing Offense: An Aggressive Voting Rights Agenda*, DEMOCRACY (Spring 2013), <http://democracyjournal.org/magazine/28/playing-offense-an-aggressive-voting-rights-agenda/> [<https://perma.cc/FHH3-P7UM>].

222. Sarah Smith, *Wisconsin’s Voter ID Law Requires an Education Campaign, Which the State Hasn’t Funded*, PROPUBLICA (Mar. 24, 2016, 8:53 AM), <https://www.propublica.org/article/wisconsin-voter-id-law-education-campaign-state-hasn't-hasn't-funded> [<https://perma.cc/74PE-3C79>]; *The Texas Voter ID Law and the 2014 Election: A Study of Texas’s 23rd Congressional District*, UNIV. OF HOUS. HOBBY CENTER FOR PUB. POLICY & RICE UNIV. BAKER INST. FOR PUB. POLICY (Aug. 2015), <http://www.bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf> [<https://perma.cc/D7DD-9TB8>].

223. BERMAN, *supra* note 11, at 266.

accessing the ballot.²²⁴ The government should make it easier to vote, not more challenging.

On March 7, 2015, President Barack Obama, Representative John Lewis, and former U.S. attorney general Eric Holder marched in Selma, Alabama alongside thousands of other people to commemorate the fiftieth anniversary of “Bloody Sunday.”²²⁵ What should have been a day of celebration was tainted by recent attacks on voting rights. Eric Holder somberly acknowledged that “[i]t has been clear in recent years that fair and free access to the franchise is still, in some areas, under siege.”²²⁶ Martin Luther King III said, “we can’t celebrate yet . . . our voting rights have been decimated.”²²⁷ If legislators do not want to disenfranchise people with voter photo ID laws, then they should only enact expansive forms of voter photo ID laws like Rhode Island’s law, along with providing funding for targeted education efforts and streamlining the process of obtaining a government-issued photo ID. The details of particular plans would have to be local to respond to the needs of each particular community. President Jimmy Carter recently said, “I believe we all know how Dr. King

224. *Congressional Forum on Voting Rights Requests Statement of Legal Center Executive Director*, THE CAMPAIGN LEGAL CENTER (July 30, 2012), <http://www.campaignlegalcenter.org/news/press-releases/congressional-forum-voting-rights-requests-statement-legal-center-executive> [<https://perma.cc/V3QN-4EWQ>].

The issues of voter fraud and voter ID in Texas have been tinged with race since day one. Major Forest Mitchell, an employee with the Special Investigations Unit of the Texas Attorney General’s Office, testified . . . that the Attorney General of Texas traveled around the state . . . educating local district attorneys on how . . . to combat voter fraud. Excerpts of the Texas Attorney General’s training materials [revealed that] . . . [n]ot a single slide in the presentation addressed the need for a photo ID, but it addressed mail-in fraud. Attorney General Abbott told local DAs to look for ‘unique’ postage stamps as a sign of possible fraud, [like] a stamp commemorating sickle cell anemia patients that reads ‘Test early for sickle cell’ and pictures an African-American woman holding an African-American child Then when he warned about in-person voter fraud, Texas Attorney General Greg Abbott showed [a] slide that contained a photograph of Black people lined up at the polls.

Id.

225. *Bloody Sunday 50th Anniversary: Thousands Crowd Selma Bridge*, L.A. TIMES (Mar. 8, 2015), https://www.washingtonpost.com/national/thousands-join-second-day-of-selma-remembrances/2015/03/08/60d6784c-c5da-11e4-a1996cb5e63819d2_story.html?utm_term=.b7df100c6165. “On March 7, 1965 . . . approximately 600 voting rights advocates set out from the Brown Chapel AME Church for . . . a 54-mile march from Selma to the state capital of Montgomery . . . [S]tate troopers brutally assaulted [the] peaceful civil rights marchers . . . shock[ing] millions of Americans and galvaniz[ing] Congress to pass the Voting Rights Act of 1965.” Christopher Klein, *Remembering Selma’s Bloody Sunday*, HISTORY (Mar. 6, 2015), <http://www.history.com/news/selmas-bloody-sunday-50-years-ago> [<https://perma.cc/WB4N-W6CS>].

226. *Bloody Sunday*, *supra* note 226.

227. *Id.*

would have reacted to the new I.D. requirements to exclude certain voters, especially African Americans [t]here's a tremendous agenda ahead of us, and I'm thankful to Martin Luther King Jr. that his dream is still alive."²²⁸ If lawmakers are truly only concerned with electoral integrity, then it is important to examine the losses to electoral integrity and the integrity of the United States generally when legislators continue adopting laws aimed at making it harder for people of color and people in poverty to vote, laws which make it seem as if the political process is rigged by design against groups of people who have been marginalized repeatedly throughout American history.²²⁹

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228. *Jimmy Carter: Think of how King would have reacted to voter I.D. Laws*, WASH. POST (Aug. 28, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/08/28/jimmy-carter-think-of-how-king-would-have-reacted-to-voter-i-d-laws/?utm_term=.72fe4873a869.

229. *See generally* Renee Davidson, *Powerful Quotes on Voting Rights from the March on Washington* (Sept. 4, 2013), <http://lww.org/blog/powerful-quotes-voting-rights-march-washington> [<https://perma.cc/M5JH-LQ26>] (discussing the continued importance of protecting voting rights to those who attended the fiftieth anniversary celebration of the 1963 March on Washington).