

# Finding Common Ground on Voter ID Laws

EUGENE D. MAZO\*

I. INTRODUCTION.....	1234
II. AN OVERVIEW OF VOTER ID LAWS .....	1236
A. <i>History</i> .....	1236
B. <i>Popular Support</i> .....	1242
C. <i>Justifications</i> .....	1244
D. <i>Litigation</i> .....	1249
E. <i>Effects</i> .....	1254
III. RETHINKING THE VOTER ID DEBATES.....	1259
A. <i>Registration</i> .....	1259
B. <i>Distribution</i> .....	1267
C. <i>Implementation</i> .....	1268
D. <i>Marketing</i> .....	1270
E. <i>Participation</i> .....	1272
IV. CONCLUSION .....	1273

---

\* Eugene D. Mazo is Visiting Associate Professor of Law at Rutgers Law School. I presented an earlier version of this Article at “Barriers at the Ballot Box: Protecting or Limiting the Core of the American Identity?,” a symposium held at the University of Memphis Cecil C. Humphreys School of Law, in March 2019. I thank Ronald Chen, Anthony Gaughan, Derek Muller, and Daniel Tokaji for their comments, Erin Cullinan and Ikrah Ullah for research assistance, and Caroline Young and Rebecca Kunkel for library assistance. I am also grateful to the editors of the *University of Memphis Law Review*, especially Clayton Jackson, Sean O’Brien, and Whitney Robinson, for their thoughtful editing. All remaining errors are my own.

## I. INTRODUCTION

A sizable number of Americans believe that voter fraud occurs.<sup>1</sup> To combat voter fraud—or at least the perception that it exists—many states have recently enacted laws that impose documentary identification requirements on their voters. These so-called “voter ID laws” typically require a citizen to prove his identity with a government-issued ID before he can cast his ballot. Such voter ID laws come in various guises and are currently in force in thirty-five states.<sup>2</sup> In most states, these laws, which have been enacted along strictly partisan lines, have been divisive and controversial.<sup>3</sup> Our political parties see the world differently when it comes to voter ID requirements. Republicans tend to be concerned with election integrity and claim that voter ID laws are necessary to prevent fraud. Democrats liken voter ID laws to the poll taxes and literacy tests of the past and claim these laws disenfranchise minorities, the elderly, and the poor.<sup>4</sup> Because the perceptions of voter

---

1. Emily Guskin & Scott Clement, *Poll: Nearly Half of Americans Say Voter Fraud Occurs Often*, WASH. POST (Sept. 15, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/?tid=sm\\_tw\\_pp&wprss=rss\\_the-fix](https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/?tid=sm_tw_pp&wprss=rss_the-fix).

2. See *Voter ID Requirements*, NAT'L CONF. ST. LEGISLATURES (Jan. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

3. See Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES (Sept. 26, 2006), <https://www.nytimes.com/2006/09/26/us/politics/26voting.html> (describing the controversy behind voter ID requirements); Peter Wallsten, *Parties Battle over New Voter ID Laws*, L.A. TIMES (Sept. 12, 2006), <https://www.latimes.com/archives/la-xpm-2006-sep-12-na-voting12-story.html>.

4. There has been a great deal of commentary noting the divisiveness and partisanship of these laws. See, e.g., RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 1959* (2012) (arguing that “Democrats . . . are much less likely to be interested in purging voter rolls of potentially ineligible voters than Republicans are. Democrats worry about disenfranchising eligible voters; Republicans worry about the potential for fraud from bloated voter rolls.”); MARTHA KROPF & DAVID C. KIMBALL, *HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM 5* (2012) (explaining how “Republicans tend to be more interested in measures to prevent fraud, which may reduce voter turnout, while liberals and Democrats tend to be more concerned about removing barriers to voting and increasing turnout.”); Derek T. Muller, *What’s Old Is New Again: The Nineteenth Century Voter Registration Debates and Lessons About Voter Identification Disputes*, 56 WASHBURN L.J. 109, 109 (2017) (noting how “[t]hese laws have largely been promulgated by Republicans and target election fraud—real or perceived—in an attempt to restore some integrity to the electoral process. Democrats . . . have opposed these

fraud and the conclusions about the effects of voter ID laws differ between Republicans and Democrats, voter ID laws have been the subject of intense debate during the last several election cycles. They have also been subject to multiple court challenges. Even so, there is little evidence that the partisan rhetoric on either side of the aisle is at all subsiding.

To move the conversation forward, this Article seeks to forge a new path. Part II presents a picture of America's current voter ID landscape. It recounts the history of voter ID laws in the United States, looks at their justifications, and probes their popular support. It also discusses the litigation involving these laws and examines the scholarly literature concerning their effects. Some of this literature suggests that these laws might have less impact than is commonly believed, both in terms of preventing voter fraud and in terms of suppressing turnout.<sup>5</sup> As such, Part III explores how the proponents and opponents of voter ID laws could be brought together to achieve their common goals. These goals are to protect the integrity of American elections while not making it any more difficult for ordinary citizens to participate in the democratic process. Part III offers a proposal for how these twin goals could be achieved with a voter ID requirement.

First, any state mandating a voter ID requirement would have to agree to take on the burden of providing voter IDs free of charge to all citizens when they register to vote, and it would have to ease the barriers to voter registration. The state's goal in doing so would be to broaden the electorate in the short and long term. Second, the state would have to make sure that its voter ID requirement was population-neutral. This means the requirement would have to be designed so that it does not discriminate against any group.<sup>6</sup> Third, states requiring

---

laws and often critiqued them as a kind of voter suppression tactic, one that disproportionately burdens racial minorities, the poor, and those who have recently moved into a precinct.”).

5. See Ross Douthat, *The Myths of Voter ID*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/opinion/voter-id-study-republicans-democrats.html>.

6. A sizable literature addresses the ways in which voter ID laws in the states discriminate or are biased against various groups in American society. See, e.g., Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1026 (2009) (arguing that voter ID laws discriminate by socioeconomic status); Sally Harrison, Comment, *May I See Your ID?: How Voter Identification Laws Disenfranchise Native Americans' Fundamental Right*

voter IDs would have to take steps to ensure that voters who lose or forget their IDs have a safety net and that there is still a way for them to cast a ballot, if they can later prove their identity. The best way for a state to implement all of these reforms would be to delay the implementation of its voter ID requirement until after it runs a multi-year marketing and public relations campaign educating its citizens about its new requirement. In short, this Article argues that voter ID laws should be used to enlarge, rather than restrict, a state's voting electorate, and ultimately, to strengthen a state's democratic base.

## II. AN OVERVIEW OF VOTER ID LAWS

### A. History

In an effort to make voting easier for Americans, Congress passed the National Voter Registration Act of 1993 ("NVRA"),<sup>7</sup> a statute that commonly came to be known as the Motor Voter Law.<sup>8</sup> Its nickname derived from the statute's mandate that individual states had to provide an opportunity for citizens to register to vote when they applied for a driver's license at a state motor vehicle office.<sup>9</sup> In addition to this well-known requirement, the NVRA required states to accept new voter registration applications by mail,<sup>10</sup> mandated states to keep accurate registration lists of voters who had voted in federal elections, and made it difficult for states to remove voters from these lists for not

---

*to Vote*, 37 AM. INDIAN L. REV. 597, 597 (2013) (arguing that voter ID laws discriminate against Native Americans); Matthew Petruszak, Note, *Thinning the Gray Vote: State Voter Identification Laws and the Nation's Elderly*, 23 ELDER L.J., 227, 228 (2015) (arguing that voter ID laws discriminate against the elderly).

7. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (originally codified as amended at 42 U.S.C. §§ 1973gg-1973gg-10 (2012), currently codified as amended at 52 U.S.C. §§ 20501-20511 (2012 & Supp. 2015)).

8. See *About the National Voter Registration Act*, U.S. DEPT. OF JUST., <https://www.justice.gov/crt/about-national-voter-registration-act> (last updated Aug. 5, 2015) ("Congress enacted the National Voter Registration Act of 1993 (also known as the 'NVRA' and the 'Motor Voter Act'), to enhance voting opportunities for every American."); see also National Voter Registration Act of 1993, 52 U.S.C. § 20504 (2012 & Supp. 2015).

9. *About the National Voter Registration Act*, *supra* note 8.

10. *Id.*

voting.<sup>11</sup> The NVRA also enforced safeguards under which registered voters retained the right to vote even if they happened to move.<sup>12</sup> Under the NVRA, a voter who relocated within a state or voting precinct retained his right to vote in federal elections even if he did not re-register with the state at his new address.<sup>13</sup>

The NVRA's mandate to make voting open to persons who may have registered by mail, combined with its prohibition on removing certain voters' names from state voter registration lists, caused several state legislatures to argue that Congress's new federal law compromised the integrity of state elections and curtailed the ability of the states to prevent fraud.<sup>14</sup> State voter registration lists began to swell, as they now contained the names of people that the states could no longer remove. This made some of the state registration lists less accurate.<sup>15</sup> Several states began to worry that they would not be able to identify voters who showed up at the polls on Election Day.<sup>16</sup>

Several years after the NVRA's adoption, the 2000 presidential election put the issue of how elections are administered on the national radar and made voting a topic of national concern. In the wake of *Bush v. Gore*, the Supreme Court decision that ended Florida's electoral vote recount and effectively handed the presidency to George W. Bush,<sup>17</sup> Congress began to take election reform more seriously. The Florida

---

11. See 52 U.S.C. § 20507(a)–(d) (2012 & Supp. 2015). Removal of a voter from a registration list could only be done after meeting certain requirements provided in the NVRA. For example, the law allowed for voters to be removed from registration lists after they have been convicted of a crime or adjudged mentally incapacitated. *Id.* § 20507(a)(3)(A).

12. See *id.* § 20507(c)–(d).

13. *Id.*

14. See LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 321–22 (1996); Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 744 (2008).

15. See Langholz, *supra* note 14, at 744 (“With the limits NVRA places on states’ ability to ensure the integrity of their voter-registration lists, the lists have become bloated with the names of people who have moved, died, committed felonies, or never existed in the first place . . .”).

16. ERIC A. FISCHER ET AL., CONG. RESEARCH SERV., R42806, *STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS* 1–2 (2016).

17. 531 U.S. 98 (2000).

election debacle of 2000 shook people's confidence in the nation's electoral system. In 2002, Congress responded by passing the Help America Vote Act ("HAVA"), another federal statute aimed at improving the administration of elections.<sup>18</sup> HAVA imposed various new requirements on the states, including a limited new voter ID requirement.<sup>19</sup> Specifically, HAVA mandated that an individual who registered to vote in a federal election by mail now had to present a valid photo ID before he could cast his ballot, whether in person or by mail.<sup>20</sup> HAVA also made it clear that states could adopt more stringent voter ID requirements of their own.<sup>21</sup>

Only fourteen states had voter ID laws in place in 2000.<sup>22</sup> In 1950, South Carolina became the first state to require that its voters show a form of identification at the polls when voting.<sup>23</sup> The document did not have to be a photo ID card; rather, any document bearing the voter's name would suffice.<sup>24</sup> In 1970, Hawaii followed South Carolina.<sup>25</sup> Texas then did so in 1971, Florida in 1977, and Alaska in 1980.<sup>26</sup> In these states, provisions existed for a voter to cast a regular ballot

---

18. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (originally codified as amended at 42 U.S.C. §§ 15301–15545 (2012), currently codified as amended at 52 U.S.C. §§ 20901–21145 (2012 & Supp. 2015)).

19. See 52 U.S.C. § 21083(b)(1)–(3) (2012 & Supp. 2015); see also Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428–30 (2004).

20. If photo identification was not available, the voter could also present a copy of a current utility bill, bank statement, government check, paycheck, or other government document with the voter's name and address. See 52 U.S.C. § 21083(b)(2)(A)(i)(I)–(II) (requiring "a current and valid photo identification . . . [or] a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."); see also Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 639 (2007).

21. See 52 U.S.C. § 21084.

22. *Voter ID History*, NAT'L CONF. ST. LEGISLATURES (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

23. *Id.*

24. 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."); see also *Voter ID History*, *supra* note 22.

25. *Voter ID History*, *supra* note 22.

26. *Id.*

even if she did not bring the required ID.<sup>27</sup> But only after the federal government interfered in how states register their voters and run elections—first with the passage of the NVRA and then with the passage of HAVA—were the voter ID floodgates opened.

Suddenly, states were forced to consider how they would change their laws to satisfy these new federal requirements, which in turn served to put the issue of voter ID laws on the table.<sup>28</sup> Though HAVA's voter ID requirement was modest, many states nonetheless had to pass new legislation to comply with it.<sup>29</sup> When HAVA became law, forty-four states were not in compliance with its new voter ID requirement, and this promoted state legislative action.<sup>30</sup> Soon the states began enacting laws to implement HAVA's voter ID requirement, and in many cases they added more stringent provisions of their own.<sup>31</sup> It did not go unnoticed on state lawmakers that HAVA explicitly allowed the states to enact even stricter voter ID requirements if they chose to do

---

27. *Id.*

28. In 2005, Congress created the bipartisan Carter-Baker Commission on Election Reform to study election administration and help with HAVA's implementation. It recommended that safeguards be put in place to detect and deter possible voter fraud, not necessarily because it existed, but to inspire confidence in elections. *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18 (2005), <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> (explaining how “[p]hoto IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.”). Noting that HAVA's identification requirement was modest, the Carter-Baker Commission considered several alternatives, including having American citizens use a single national voter ID card to vote, although it ultimately rejected this idea because of its expense. *Id.* at 18–19.

29. The Carter-Baker Commission recommended that states use REAL ID cards for voting purposes, similar to the requirements that already exist for their driver's licenses under the REAL ID Act. *Id.* at 19; *see* Real ID Act of 2005, Pub. L. 109–13, 119 Stat. 231 (codified as amended at 49 U.S.C. §§ 30301–30308 (2012)). The REAL ID Act requires states to verify each individual's full name, date of birth, address, Social Security number, and U.S. citizenship before that individual is issued a driver's license or personal photo ID. *See* 49 U.S.C. § 30304(b) (2012); COMM'N ON FED. ELECTION REFORM, *supra* note 28, at 19. For voters who do not drive, or are older, the Commission recommended that the IDs should be issued for free. COMM'N ON FED. ELECTION REFORM, *supra* note 28, at 19.

30. *See* Langholz, *supra* note 14, at 747–48.

31. *See id.* at 748 (“In the five years after the passage of HAVA, legislators in forty states introduced legislation to increase voter-identification requirements beyond HAVA's mandates.”).

so.<sup>32</sup> State legislators who had an interest in implementing stricter voter ID laws before, but who felt they could not do so, were now given a prime opportunity under HAVA.<sup>33</sup>

The proponents of the new state voter ID laws moved quickly. By the end of 2007, thirty-four states had enacted voter ID provisions that were stricter than the minimum standards mandated by HAVA.<sup>34</sup> These new ID laws varied from state to state, though in almost every case their requirements went significantly beyond the requirements that Congress had mandated.<sup>35</sup> Although the new state voter ID laws came in various guises, two main distinctions could be found among them. First, these laws could be divided into those with a “photo” ID requirement and those with a “non-photo” ID requirement. Some states required their voters to show an ID with a photo on it to vote.<sup>36</sup> In these “photo” states, a state driver’s license, state-issued ID card, military ID, tribal ID, or another form of photo ID would usually suffice, as long as it contained an actual photo of the voter.<sup>37</sup> On the other hand, “non-photo” states accepted other types of IDs as well, such as a bank statement with a voter’s name and address or another document that did not necessarily contain a photograph of the voter.<sup>38</sup> In 2018, seventeen

---

32. *Id.* at 747–48.

33. *Id.*

34. *Id.*

35. *Id.* at 748–51.

36. *See Voter Identification Requirements, supra* note 2, at tbl.1.

37. *See id.* There is a range of the kinds of photo IDs that the states will accept. *See FISCHER ET AL., supra* note 16, at 9. All states accept driver’s licenses or non-driver state-issued IDs. *Id.* All except for North Dakota accept federally issued IDs, such as a United States passport. *Id.* Some states, such as Arizona and Ohio, require that a voter’s address be listed on the ID for it to be accepted. *Id.* A total of 16 states accept tribal IDs. *Id.*

38. FISCHER ET AL., *supra* note 16, at 9. Additional IDs that voters could use include:

[B]irth certificates, Bureau of Indian Affairs cards, certified court records with adoption or name changes on them, hunting or fishing licenses, Indian census cards, leases or mortgages, local election authority IDs, naturalization documents, official election materials mailed to voters, pilot’s licenses, property tax statements, recorder’s certificates, Social Security cards, tribal treaty cards, vehicle registration or insurance cards, verification of residency in group facility or medical confinement, voter confirmation notices, and voter registration cards, as well as documents required for some voters by



states did not allow voting without a photo ID, while another eighteen states accepted non-photo IDs as proper documentation for voting.<sup>39</sup>

Second, these state laws could be divided into those with “strict” ID requirements and those with “non-strict” ID requirements. In “strict” states, voters who are unable to show an ID are given a provisional ballot.<sup>40</sup> If the voter returns to election officials within a short period of time after the election and presents an acceptable form of ID, the state counts the provisional ballot; otherwise, it does not.<sup>41</sup> In “non-strict” states, voters without an ID do not need to cast a provisional ballot and are given other options for casting a regular ballot. These states may permit voters to sign an affidavit of identity, present a non-photo ID, or confirm their identity by a signature that the election office has on file.<sup>42</sup> In other words, in non-strict states, voters who fail to bring their ID on Election Day are not required to return to election officials and show their ID later on for their ballot to be counted.<sup>43</sup> The categorization schemes of photo/non-photo ID laws and strict/non-strict ID laws frequently overlap. The differences among these requirements are nuanced enough that observers may reasonably differ in categorizing a state’s law as falling into one category or the other. The table below, provided by the National Council of State Legislatures (“NCSL”), summarizes the voter ID laws in effect from 2000 to 2016.

---

Section 303(b) of HAVA—bank statement, government check, paycheck, utility bill, and other government document with the name and address of the voter.

*Id.* at 10 & 33–38 tbl.A-2.

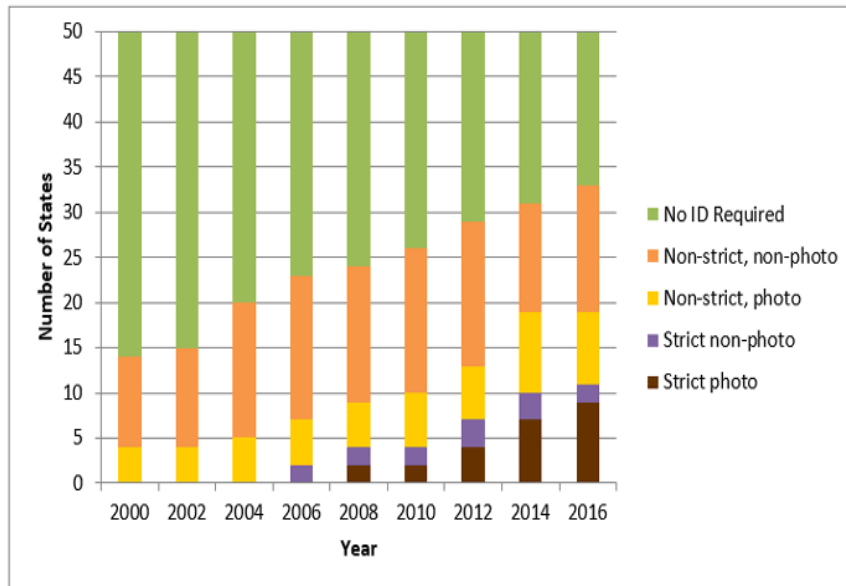
39. *See Voter ID Requirements, supra* note 2, at tbl.2.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

VOTER ID ENACTMENTS, 2000-2016<sup>44</sup>

## B. Popular Support

Whatever the wisdom of voter ID laws may be, public opinion surveys show that the majority of Americans nonetheless support requiring voters to show a photo ID when they vote. In a national survey of voter opinions on various election-related reform proposals, Michael Alvarez, Thad Hall, Ines Levin, and Charles Stewart III found only one prominent election-related reform that was supported overwhelmingly nationwide—the requirement that voters show a photo ID when they vote.<sup>45</sup> These scholars surveyed 10,000 voters registered in all fifty states during the 2008 presidential election and found that 75.6% of respondents supported requiring citizens to show a photo ID when voting.<sup>46</sup> A majority of voters in every state, their study found, supported the photo ID requirement.<sup>47</sup> In Massachusetts, the state with the lowest level of support for voter IDs, 60.9% of respondents supported the

44. *Voter ID History*, *supra* note 22.

45. See Michael Alvarez et al., *Voter Opinions About Election Reform: Do They Support Making Voting More Convenient?*, 10 *ELECTION L.J.* 73, 74 (2011).

46. *Id.* at 78.

47. *Id.*

measure.<sup>48</sup> In Hawaii and Indiana, the states with the highest level of support, 88.3% and 84.8% of respondents, respectively, supported a voter ID requirement.<sup>49</sup>

Polling in other years has largely reproduced these results. In 2012, the *Washington Post* asked people if voters should be required to show an official, government-issued photo ID, such as a driver's license, when they vote.<sup>50</sup> In this poll, 74% of the respondents answered affirmatively.<sup>51</sup> Four years later, in 2016, a Gallup Poll found that 80% of adults supported requiring all adult voters to present a photo ID at their polling place.<sup>52</sup>

Nuances do appear in the results, however, when the questioning is broken down to include information on the political persuasion or race of respondents. In 2016, for example, Gallup found that support for voter ID laws was higher among Republicans than among Democrats: while 95% of Republicans supported voter ID laws, only 63% of Democrats did.<sup>53</sup> The number for Independents was 83%.<sup>54</sup> Likewise, surveys have found whites to be slightly more likely than non-whites to support voter ID laws.<sup>55</sup>

---

48. *Id.*

49. *Id.* The next-highest level of support for any other election-related reform was to make Election Day a national holiday; nationwide, 57.2% of respondents supported that policy. *Id.*

50. *Voter Identification Law—Washington Post Poll July 7–19, 2012: Fear of Voter Suppression High, Fear of Voter Fraud Higher*, WASH. POST (Aug. 13, 2012) [hereinafter *Washington Post Poll*], [https://www.washingtonpost.com/politics/polling/fear-voter-suppression-high-fear-voter/2012/08/13/13590fa8-e419-11e1-89f7-76e23a982d06\\_page.html](https://www.washingtonpost.com/politics/polling/fear-voter-suppression-high-fear-voter/2012/08/13/13590fa8-e419-11e1-89f7-76e23a982d06_page.html).

51. *Id.*; see also *78% Favor Proof of Citizenship Before Being Allowed to Vote*, RASMUSSEN REPS. (Mar. 25, 2014), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/march\\_2014/78\\_favor\\_proof\\_of\\_citizenship\\_before\\_being\\_allowed\\_to\\_vote](http://www.rasmussenreports.com/public_content/politics/general_politics/march_2014/78_favor_proof_of_citizenship_before_being_allowed_to_vote) (finding 78% support for requiring a voter ID among likely voters in 2016).

52. Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP (Aug. 22, 2016), <https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx>.

53. *Id.*

54. *Id.*

55. *Id.* (finding that 81% of whites and 77% of non-whites support a photo ID requirement); see also Antoine J. Banks & Heather M. Hicks, *Fear and Implicit Racism: Whites' Support for Voter ID Laws*, 37 POL. PSYCHOL. 641, 648 (2016) (finding that 73% of whites support voter ID laws).

Most of the polls conducted do not offer voters a nuanced choice between supporting or opposing the different kinds of voter IDs that the various states require<sup>56</sup>—which is unfortunate because these nuances are very important and because they would presumably elicit different levels of support among different voters.

It is also not necessarily clear why voters support voter ID laws so overwhelmingly.<sup>57</sup> For instance, when the *Washington Post* asked voters whether they were more concerned with combating voter fraud or the possibility of denying some eligible voters the right to vote, the population appeared to be much more evenly split: 49% of respondents said they were more concerned with voter fraud, while 44% said they were more worried about denying someone the right to vote.<sup>58</sup> This more equal division among respondents suggests that citizens would exhibit different levels of support for voter ID laws if they understood or were informed about the potential effects ahead of time. Finally, the latest public opinion research shows that while support for voter ID laws has been very strong among most of the public, this support has also frayed over time, probably as a consequence of our polarized politics.<sup>59</sup>

### C. Justifications

Voter ID laws have been justified on various grounds. The first is that they are meant to protect the integrity of the election process—namely, by preventing voter fraud. What constitutes voter fraud has

---

56. FISCHER ET AL., *supra* note 16, at 4.

57. See John V. Kane, *Why Can't We Agree on ID?: Partisanship, Perceptions of Fraud, and Public Support for Voter Identification Laws*, 81 PUB. OPINION Q. 943, 952 (2017) (arguing that the attitudes of citizens toward voter ID laws may be guided by their own partisan and strategic predispositions, and finding that support among Republicans for voter IDs rises upon learning of a minuscule amount of fraud, while support among Democrats for voter IDs depends upon their understanding of which party stands to benefit from such laws).

58. *Washington Post Poll*, *supra* note 50. Other studies have found ensuring access to the polls to be even *more* important than preventing voter fraud. See, e.g., Lonna Rae Atkeson et al., *Balancing Fraud Prevention and Electoral Participation: Attitudes Toward Voter Identification*, 95 SOC. SCI. Q. 1381, 1381 (2014) (finding access to be the dominant concern for voters).

59. See Paul Gronke et al., *Voter ID Laws: A View from the Public*, 100 SOC. SCI. Q. 215, 215 (2019).

been debated. Some scholars view voter fraud broadly. Lori Minnite and David Callahan define it as “the corruption of the process of casting and counting votes.”<sup>60</sup> Under this definition, voter fraud can occur on an individual level or on an organizational level.<sup>61</sup> Individually, it occurs when someone ineligible to vote casts a ballot.<sup>62</sup> If a felon or a noncitizen votes, or if a person votes more than once, that is voter fraud.<sup>63</sup> Organizationally, voter fraud takes place when elected officials, candidates, party organizations, or campaign workers coordinate to impact the outcome of an election on a mass scale.<sup>64</sup> Tampering with voter registration forms, filling out fraudulent absentee or mail-in ballots, or not counting ballots all constitute organizational voter fraud.<sup>65</sup>

Other scholars have defined voter fraud much more narrowly. For instance, Justin Levitt deems voter fraud to take place only “when individuals cast ballots despite knowing that they are ineligible to vote, in an attempt to defraud the election system.”<sup>66</sup> Levitt argues that we should not conflate this type of fraud with other kinds of misconduct or election irregularities.<sup>67</sup>

However the concept is defined, scholars and politicians have disagreed about the extent to which voter fraud occurs. Much of this disagreement, perhaps unsurprisingly, falls along partisan lines. Levitt finds that an individual impersonating another voter at the polls is “an occurrence more rare than getting struck by lightning.”<sup>68</sup> This is so because the penalty for committing voter fraud—for a federal election,

---

60. See LORI MINNITE & DAVID CALLAHAN, DEMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD 14 (2003), [https://www.demos.org/sites/default/files/publications/EDR\\_-\\_Securing\\_the\\_Vote.pdf](https://www.demos.org/sites/default/files/publications/EDR_-_Securing_the_Vote.pdf).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 4 (2007).

67. *Id.*

68. *Id.* at 6.

it is five years in prison and a \$10,000 fine—greatly exceeds the reward.<sup>69</sup> On the other hand, many Republicans dispute these conclusions and claim that voter fraud persists.<sup>70</sup>

The disagreements between the opposing camps are in many ways philosophical. Most serious studies agree that instances of in-person voter fraud are exceedingly rare and that there have not been very many convictions for fraudulent voting.<sup>71</sup> But these studies do not claim that voter fraud is totally non-existent; rather, they claim that instances of it are minuscule in number.<sup>72</sup> Opponents of strict ID laws have pointed to these findings to argue that voter ID laws are unwarranted, calling them “a solution in search of a problem.”<sup>73</sup> Proponents of these laws, however, argue that focusing on determining voter fraud’s magnitude is misguided, given that even a small amount of it could constitute the margin of difference in a close election.<sup>74</sup> In many of these debates, the various strands of voter fraud are uncharitably

---

69. *Id.* at 7.

70. *See, e.g.*, JOHN FUND & HANS VON SPAKOVSKY, WHO’S COUNTING?: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK 33–44 (2012); Hans A. von Spakovsky, *Protecting the Integrity of the Election Process*, 11 ELECTION L.J. 90, 91 (2012); Kris W. Kobach, *The Case for Voter ID*, WALL ST. J. (May 23, 2011), <https://www.wsj.com/articles/SB10001424052748704816604576333650886790480> (claiming that “[v]oter fraud is a well-documented reality in American elections”).

71. LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 8–9 (2007) (documenting some instances where people were convicted of or plead guilty to voter fraud).

72. *See* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.73131debd839](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.73131debd839).

73. *See* Christina Beeler, Comment, *Voter Photo ID Laws: A Solution in Search of a Problem*, 55 HOUS. L. REV. 479, 479 (2007); Editorial Board, *Voter ID Rules: A Solution in Search of a Problem*, WASH. POST (Mar. 12, 2012), [https://www.washingtonpost.com/opinions/voter-id-rules-a-solution-in-search-of-a-problem/2012/03/12/gIQA8m8D8R\\_story.html?noredirect=on&utm\\_term=.ce6f67245d95](https://www.washingtonpost.com/opinions/voter-id-rules-a-solution-in-search-of-a-problem/2012/03/12/gIQA8m8D8R_story.html?noredirect=on&utm_term=.ce6f67245d95); Doug Mataconis, *Voter ID Laws a Solution in Search of a Nonexistent Problem*, CHRISTIAN SCI. MONITOR (Aug. 7, 2014), <https://www.csmonitor.com/USA/Politics/Politics-Voices/2014/0807/Voter-ID-laws-a-solution-in-search-of-a-nonexistent-problem>.

74. *See* COMM’N ON FED. ELECTION REFORM, *supra* note 28, at 18 (“The problem . . . is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference.”).

lumped into a single category, making it difficult to disaggregate and weigh the various facets of voter fraud on their own terms.

Voter fraud is not a unified phenomenon, and nor should it be analyzed as such. Only when we disaggregate voter fraud into its different varieties can we gain a better understanding of the circumstances in which it may or may not be prevalent. As mentioned, most academic studies agree that there is very little evidence of in-person voter fraud.<sup>75</sup> But in 2018, a prominent case of absentee ballot voter fraud arose in North Carolina, where a political operative was caught harvesting absentee ballots for the Republican candidate for Congress.<sup>76</sup> After an investigation, the North Carolina State Board of Elections threw out the results of the 2018 congressional election, and then set a date for a new election to be contested in 2019.<sup>77</sup>

Another justification advanced for voter ID laws has to do not with preventing voter fraud itself but rather the perception or appearance that such fraud might exist. The perception that voter fraud occurs is thought to contribute to low confidence among the electorate, regardless of the magnitude of the actual harm committed. Many proponents of voter ID laws argue that preventing the perception that voter fraud exists is a compelling justification for a state to enact voter ID legislation. Indeed, this justification for voter ID laws was unanimously endorsed in *Crawford v. Marion County Election Board*,<sup>78</sup> the one voter ID case ever to reach the Supreme Court.<sup>79</sup>

---

75. *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth> (citing numerous studies of voter fraud and stating that “impersonation fraud by voters very rarely happens”).

76. Alan Blinder, *Election Fraud in North Carolina? State Board Will Hear Evidence This Week*, N.Y. TIMES (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/us/nc-election-fraud.html>.

77. Alan Blinder, *North Carolina Sets New Date for Redo Election in Congressional House Race*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/north-carolina-special-election-house-ninth.html>.

78. 553 U.S. 181 (2008).

79. In *Crawford*, the state of Indiana argued that its interests included both deterring in-person voter fraud and safeguarding voter confidence. *Id.* at 191. In other words, if voters feared that in-person voter fraud was occurring—even if it was not—they would have less confidence in their electoral system, and the government would be worse off. *Id.* at 197–98. The Court in *Crawford* acknowledged that the record before it “contains no evidence of any [voter] fraud actually occurring in Indiana at

Yet another justification advanced for voter ID laws is that most other countries tend to have them. Voter IDs are common across many developed democracies. Voters in almost 100 countries use a photo ID card to vote,<sup>80</sup> although the United Kingdom, Australia, and New Zealand happen to be three countries that do not use them.<sup>81</sup> Many European countries produce automatic ID cards for their citizens, which citizens then carry with them at all times and which double as the IDs they use for voting.<sup>82</sup> Such IDs are compulsory in Belgium, Greece, Italy, Malta, and Spain.<sup>83</sup> In Belgium, every adult is provided with notice from the state when it is time to renew her ID card.<sup>84</sup> On the other hand, governments in these countries also automatically register their citizens to vote when they turn eighteen, while U.S. states have never done this.<sup>85</sup>

It would be helpful to have more studies of the behavior of individual legislators and to know why they vote for or against voter ID laws. One study that has looked at the behavior of legislators found that support for voter ID provisions tended to reflect the composition of individual legislative districts.<sup>86</sup> Democrats from districts with large African-American populations tended to be strongly opposed to strict voter ID laws.<sup>87</sup> By contrast, legislators elected from districts where

---

any time in its history.” *Id.* at 194. Therefore, the Court relied on Indiana’s second argument—that a state has a public interest in responding to the fear of fraud in the electoral process—to uphold Indiana’s voter ID law. *See id.* at 200–04.

80. *See* COMM’N ON FED. ELECTION REFORM, *supra* note 28, at 5 (explaining how “[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights.”).

81. *See* Graeme Orr & Tracey Arklay, *Rethinking Voter Identification: Its Rationale and Impact*, 51 AUSTL. J. POL. SCI. 386, 386–87 (2016). The authors identify only a few other countries that do not require voter ID: Georgia, Samoa, Sudan, and Tuvalu. *Id.* at 386.

82. Frederic Charles Schaffer & Tova Andrea Wang, *Is Everyone Else Doing It? Indiana’s Voter Identification Card in International Perspective*, 3 HARV. L. & POL’Y REV. 397, 400 (2009).

83. *Id.*

84. *Id.* at 401.

85. *See* COMM’N ON FED. ELECTION REFORM, *supra* note 28, at 5 (explaining how voter registration in many countries is tied to being given a photo ID).

86. *See* William D. Hicks et al., *The Determinants of State Legislator Support for Restrictive Voter ID Laws*, 16 ST. POL. & POL’Y Q. 411, 411 (2016).

87. *See id.* at 411, 419.



electoral competition was very intense tended to be mostly in favor of these laws.<sup>88</sup> Another study found that legislators from congressional districts with a high percentage of foreign-born residents also tended to support voter ID laws.<sup>89</sup> These findings suggest that support for and opposition to voter ID laws on the part of lawmakers may have less to do with the lofty goals of combating voter fraud or preventing the disenfranchisement of voters, and much more to do with a legislator's own interests in winning and holding office.

#### D. Litigation

More than half of the states that have enacted voter ID laws have seen them challenged in the courts.<sup>90</sup> These challenges have been advanced on several theories. The most common has been that voter ID laws violate the equal protection guarantees of the Fourteenth Amendment of the U.S. Constitution,<sup>91</sup> Section 2 of the Voting Rights Act of 1965,<sup>92</sup> or various state constitutional law provisions.<sup>93</sup> Other theories have been advanced as well, such as the claim that voter ID laws impose a financial burden on voting and thus violate the Twenty-Fourth Amendment, which outlawed poll taxes.<sup>94</sup>

---

88. *Id.* at 411.

89. Adriano Udani, *Postponing the Day of Reckoning? Examining Contextual Effects on Public Support for Voter Identification Policies*, 98 SOC. SCI. Q. 1456, 1456 (2017).

90. KAREN SHANTON, NAT'L CONF. OF STATE LEGISLATURES, *VOTER ID IN THE COURTS: AN INTRODUCTION TO LEGAL CHALLENGES TO VOTER ID LAWS 1* (2014), [http://www.ncsl.org/documents/legismgt/elect/Voter\\_ID\\_Courts\\_May2014.pdf](http://www.ncsl.org/documents/legismgt/elect/Voter_ID_Courts_May2014.pdf).

91. *Id.* at 1–2; U.S. CONST., amend XIV, § 1.

92. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (originally codified as amended at 42 U.S.C. § 1973b (2012), currently codified as amended at 52 U.S.C. § 10303 (2012 & Supp. 2015)); *see also* SHANTON, *supra* note 90, at 4–5. After the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated the coverage formula of Section 4(b) of the Voting Rights Act and effectively gutted the preclearance regime that previously existed under Section 5, Section 2 of the Voting Rights Act has been used to bring cases against voter ID laws. *Id.* at 4.

93. *See* SHANTON, *supra* note 90, at 5–6.

94. *See id.* at 3.; U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President,

The Supreme Court has confronted the question of whether voter ID laws are constitutional only once, in 2008. In *Crawford v. Marion County Election Board*,<sup>95</sup> the Court upheld Indiana's photo voter ID requirement against a facial challenge brought on Fourteenth Amendment grounds.<sup>96</sup> Rather than apply strict scrutiny to Indiana's law, the Court applied the lower *Anderson/Burdick* balancing standard, which balances the burdens that a law imposes on the right to vote against the state's regulatory interests.<sup>97</sup> *Crawford* found that the plaintiffs in the case had not presented sufficient evidence that Indiana's law would impose a severe burden on voters, and the Court upheld Indiana's law, 6-3, concluding that its photo ID requirement was closely related to the state's legitimate interests in preventing voter fraud and cementing voter confidence.<sup>98</sup> The slight burdens imposed on voters, which the Court said were "neutral and nondiscriminatory," did not outweigh this interest.<sup>99</sup> The Court's decision included no true majority opinion. It consisted of a leading opinion by Justice John Paul Stevens,<sup>100</sup> and a concurring opinion by Justice Antonin Scalia.<sup>101</sup> Justices

---

for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

95. 553 U.S. 181 (2008).

96. *Id.* at 204.

97. *Id.* at 190–93. The Supreme Court has declined to apply strict scrutiny to all election regulations that place a burden on the ability of a voter to cast her ballot, given that some of these restrictions might turn out to be minor. *See id.* at 204–05 (Scalia, J., concurring). Instead, beginning with *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and continuing with *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court has held that election regulations that do not impose a "severe" burden on the right to vote are subject to a lower standard of review. *Id.* at 190. According to this standard, a court must balance the burden on the voter against the state's regulatory interest and justifications for imposing its voting regulation. *See id.* at 205 (Scalia, J., concurring). This lower level of scrutiny led to a balancing test that eventually came to be known as the *Anderson/Burdick* test. *See, e.g., id.* (Scalia, J., concurring) (discussing the combined balancing framework that the Court employs from *Anderson* and *Burdick*).

98. *Crawford*, 553 U.S. at 203–04.

99. *Id.* at 196–97.

100. *Id.* at 184–85.

101. *Id.* at 204 (Scalia, J., concurring).

David Souter and Stephen Breyer each wrote dissenting opinions,<sup>102</sup> with Justice Ruth Bader Ginsburg joining Justice Souter's dissent.<sup>103</sup>

Years after writing his leading opinion in *Crawford*, Justice Stevens questioned the wisdom of his decision in the case.<sup>104</sup> Stevens explained that his opinion was based on the record then before the Court, which failed to prove that Indiana's voter ID law had discriminated against voters.<sup>105</sup> However, he called *Crawford* an "unfortunate decision,"<sup>106</sup> saying that voter ID laws are not necessary or a good idea.<sup>107</sup> Justice Stevens "regretted" writing his decision.<sup>108</sup> Judge Richard A. Posner, who wrote the 2-1 majority opinion in *Crawford* for the Seventh Circuit, upholding Indiana's law before the case got to the Supreme Court, has also recanted.<sup>109</sup> In a book published in 2013, Judge Posner "plead guilty" to having written the majority opinion upholding Indiana's voter ID law, which he referred to as "a type of law now widely regarded as a means of voter suppression rather than of fraud prevention."<sup>110</sup> There was not "much activity in the way of voter identification" in 2007, Posner explained, and judges "weren't really given strong indications that requiring additional voter identification would actually disenfranchise people entitled to vote."<sup>111</sup>

---

102. *Id.* at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

103. *Id.* at 209 (Souter, J., dissenting).

104. See Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, but Maybe Not Right*, WASH. POST (May 15, 2016), [https://www.washingtonpost.com/politics/courts\\_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62\\_story.html](https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html); Jess Bravin, *Voter-ID Laws Worry Jurist*, WALL ST. J. (Oct. 18, 2013), <https://www.wsj.com/articles/no-headline-available-1382038576>

105. FORA.tv, *John Paul Stevens Regrets Marijuana & Voter IDs Rulings*, YOUTUBE (May 2, 2014), <https://www.youtube.com/watch?v=fPfApKU7KbY> (at 1:30-minute mark).

106. *Id.* (at 1:39-minute mark).

107. *Id.* (at 1:52-minute mark).

108. *Id.* (at 2:18-minute mark).

109. See John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>.

110. RICHARD A. POSNER, REFLECTIONS ON JUDGING 84–85 (2013).

111. Schwartz, *supra* note 109. Upon further reflection, Posner conceded that Judge Terence T. Evans, who dissented on the three-judge Seventh Circuit panel, "was right" in arguing that Indiana's law should not stand. *Id.* Still, to be fair to Posner, he later took back his recantation and tried to give his views more nuance, though whether

Since *Crawford*, we have seen extensive litigation over voter ID laws. Most federal courts have followed the Supreme Court's lead when challenges to voter ID laws have been advanced on equal protection grounds.<sup>112</sup> Many of these courts have applied the *Anderson/Burdick* balancing test to sustain these laws.<sup>113</sup> Given the difficulty of succeeding with a facial equal protection challenge, plaintiffs have brought as-applied challenges under Section 2 of the Voting Rights Act, which permits the federal government and individuals to sue a state to prevent a standard, practice, or procedure that "results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color."<sup>114</sup> Litigation brought under Section 2 has had mixed success. In Texas, the U.S. Court of the Appeals for the Fifth Circuit at first enjoined Texas's restrictive voter ID law after it was found to be racially discriminatory against African-American and Hispanic voters.<sup>115</sup> But the legislature amended the law, and the Fifth Circuit, after more litigation, later allowed it to stand.<sup>116</sup> In North Carolina, a law that included a voter ID requirement was challenged in federal court, and that challenge eventually wound up in the U.S. Court of Appeals for the Fourth Circuit.<sup>117</sup> The Fourth Circuit found that North Caro-

---

he succeeded in doing so is not clear. Posner wrote: "I did not say that my decision, and the Supreme Court's decision affirming it [was] wrong, only that, in common with many other judges, I could not be confident that it was right, since I am one of the judges who doesn't understand the electoral process sufficiently well. . . ." Richard A. Posner, *I Did Not 'Recant' on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), <https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

112. SHANTON, *supra* note 90, at 2.

113. *See, e.g., Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352–55 (11th Cir. 2009) (using *Anderson/Burdick* balancing to uphold a Georgia photo ID law that came with a requirement that the state issue free photo ID cards to any registered voter).

114. *See* 52 U.S.C. §10301(a) (2012 & Supp. 2015).

115. *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015).

116. *Veasey v. Abbott*, 830 F.3d 216, 264–265, 269–272 (5th Cir. 2016) (en banc); *see also* Manny Fernandez, *Texas' Voter ID Law Does Not Discriminate and Can Stand, Appeals Panel Rules*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/us/texas-voter-id.html>.

117. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

lina's law targeted African-Americans "with almost surgical precision."<sup>118</sup> The Fourth Circuit also found that North Carolina's legislature passed its voter ID law with discriminatory intent, and it struck down its challenged provisions for violating the Voting Rights Act.<sup>119</sup>

Many challenges to voter ID laws have also proceeded in state courts, often under state constitutional law. In almost all of the U.S. states, the state constitution guarantees the right to vote.<sup>120</sup> Opponents of voter ID laws have argued that ID requirements violate these provisions and, thus, the franchise.<sup>121</sup> Missouri saw a voter ID law get struck down under the provisions of its state constitution,<sup>122</sup> as did Pennsylvania.<sup>123</sup> On the other hand, some state courts have decided to uphold these laws. In Wisconsin, the litigation concerning that state's voter ID laws has been particularly extensive, and it has spilled over from state to federal court.<sup>124</sup> As of the beginning of 2019, voter ID laws continued to be litigated around the country, with cases pending in Alabama before the Eleventh Circuit,<sup>125</sup> in Iowa before the state supreme

---

118. *Id.* at 214.

119. *Id.* at 214–15, 242. After North Carolina's voter ID law was struck down, the state's Republican-controlled legislature tried to add the requirement as an amendment to the state's constitution. See Gary D. Robertson, *Judge Strikes Down North Carolina Voter ID OK'd by Voters*, U.S. NEWS & WORLD REP. (Feb. 22, 2019), <https://www.usnews.com/news/best-states/north-carolina/articles/2019-02-22/judge-strikes-down-north-carolina-voter-id-okd-by-voters>. That amendment was struck down by a state court, which reasoned that the illegally gerrymandered North Carolina General Assembly did not have the authority to place constitutional amendments on the ballot because it did not act with the full will of the people of North Carolina. *Id.*; N.C. State Conference of the NAACP v. Moore, No. 18 CVS 9806 (Sup. Ct. Wake Cty. N.C. Feb. 22, 2019).

120. See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

121. SHANTON, *supra* note 90, at 5.

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

123. Applewhite v. Commonwealth, No. 330-M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

124. See, e.g., Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 786 F.3d 744 (7th Cir. 2014); Milwaukee Branch of the NAACP v. Walker, 851 N.W. 2d 262 (Wis. 2014).

125. Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), *appeal docketed*, No. 18-10151 (11th Cir. Jan. 12, 2018).

court,<sup>126</sup> in Missouri before that state's trial and appellate courts,<sup>127</sup> in North Dakota before the federal courts,<sup>128</sup> and in Wisconsin before the Seventh Circuit.<sup>129</sup>

### E. Effects

The literature on voter ID laws paints a mixed picture of the effects that these laws have in the real world. Research regarding the impact of voter ID laws on electoral turnout was initially scarce, but a growing community of scholars soon began to take an interest in how these laws affected voting behavior. The early evidence seemed to paint an incomplete picture. It consisted of some qualified claims that strict voter ID laws negatively affected turnout, although only marginally.<sup>130</sup> On the other hand, other studies found that these effects were “too small to be of practical concern.”<sup>131</sup>

Opponents of voter ID laws tend to argue that voter fraud is vanishingly rare, but believe that because, on the other hand, many Americans do not possess a photo ID, voter ID laws likely reduce turnout.<sup>132</sup> According to some estimates, such as that provided by the Government Accountability Office (“GAO”), the turnout effect could be as much as

---

126. League of United Latin Am. Citizens of Iowa v. Pate, No. CVCV056403 (Iowa Dist. Ct. July 24, 2018), *aff'd in part*, No. 18-1276, 2018 WL 3946147 (Iowa Aug. 10, 2018).

127. Missouri NAACP v. Missouri, No. WD81484 (Mo. Ct. App. Oct. 30, 2018); Priorities USA v. State of Missouri, No. 18AC-CC00226 (Cole Cty. Cir. Ct. Mo. Oct. 9, 2018).

128. Brakebill v. Jaeger, No. 1:16-CV-008, 2018 WL 1612190 (D.N.D. Apr. 3, 2018), *appeal docketed*, No. 18-1725 (8th Cir. Oct. 11, 2018); Spirit Lake Tribe v. Jaeger, No. 1:18-CV-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).

129. Frank v. Walker, 196 F. Supp. 3d 893 (E.D. Wis. 2016), *appeal docketed*, No. 16-3003 (7th Cir. July 22, 2016); One Wisconsin Inst., Inc. v. Nichol, 310 F.R.D. 394 (W.D. Wis. 2015).

130. Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 121 (2009).

131. *Id.* at 121.

132. See Timothy Smith, *How Voter Suppression Threatens Our Democracy*, WASH. POST (Sept. 20, 2018), [https://www.washingtonpost.com/outlook/how-voter-suppression-threatens-our-democracy/2018/09/20/c1dd3b8a-aad3-11e8-b1da-ff7faa680710\\_story.html](https://www.washingtonpost.com/outlook/how-voter-suppression-threatens-our-democracy/2018/09/20/c1dd3b8a-aad3-11e8-b1da-ff7faa680710_story.html).

2%–3% in some jurisdictions.<sup>133</sup> The Brennan Center for Justice has estimated that 21 million citizens, or 11% of the total voting population, lack a government-issued photo ID.<sup>134</sup> Many of these people happen to be poor, minority, elderly, women, or disabled voters, and some studies have suggested that voter ID laws discourage participation among these groups.<sup>135</sup> Yet other studies claim that sociodemographic factors are more likely than voter ID laws to determine whether members of these groups will vote.<sup>136</sup>

Several targeted state studies have looked at differences in minority voter turnout in individual states directly before and after a voter

---

133. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 48 (2014), <https://www.gao.gov/assets/670/665966.pdf>. The GAO conducted a study of turnout in six states, two of which, Kansas and Tennessee, had adopted voter ID requirements. *Id.* Between 2008 and 2012, turnout declined in all six states, but it declined by an estimated 3% more in Kansas and 2.7% more in Tennessee. *Id.*

134. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf). According to the Brennan Center for Justice, 18% of citizens age 65 and older do not have a government-issued photo ID. *Id.* The same is true of 25% of voting-age African American citizens (compared to 8% of white voting-age citizens) and 15% of voting-aged citizens earning less than \$35,000 a year. *Id.* The results were based on survey data from 2006. *See id.* at 1; *see also Oppose Voter ID Legislation—Fact Sheet*, AM. CIV. LIBERTIES UNION (May 2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet>.

135. *See, e.g.*, Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2017); Zoltan Hajnal et al., *We All Agree: Strict Voter ID Laws Disproportionally Burden Minorities*, 80 J. POL. 1052, 1052 (2018); Richard Sobel & Robert Ellis Smith, *Voter ID Laws Discourage Participation, Particularly Among Minorities, and Trigger a Constitutional Remedy in Lost Representation*, 42 PS: POL. SCI. & POL. 107, 107 (2009). *But see, e.g.*, Justin Grimmer et al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045, 1046 (2018) (arguing that the findings of Hajnal et al. are based on survey data, are empirically unsupported, and that different models produce highly variable turnout results); Ben Pryor et al., *Voter ID Laws: The Disenfranchisement of Minority Voters?*, 134 POL. SCI. Q. 63, 81 (2019) (disputing the findings of Hajnal et al. and finding that strict voter ID laws do not disproportionately disadvantage particular minority groups).

136. *See, e.g.*, Mycoff et al., *supra* note 130, at 121. Indeed, these authors argue that individual-level motivations such as interest in politics, type of election, and social issues tend to mediate any impacts related to ID laws when it comes to turnout, and whatever burdens voter ID impose are small in comparison. *Id.* at 125.

ID law went into effect.<sup>137</sup> The GAO found that voter ID laws decreased turnout in Kansas and Tennessee after those states adopted strict voter ID laws.<sup>138</sup> Another study found that Indiana's voter ID law decreased turnout in that state as well.<sup>139</sup> However, not all of the state studies have found a decrease in turnout. Georgia implemented a new strict photo ID law in 2007.<sup>140</sup> From the 2006 mid-term elections in Georgia, when there was no photo ID requirement, to the 2010 mid-term elections, where there was a photo ID requirement, the voting rate for African-Americans actually *rose* by 44%.<sup>141</sup> African-Americans voted at historic rates for Barack Obama in 2008.<sup>142</sup> But Obama was not on the ballot in either 2006 or 2010. In these two elections, the voting rate also rose by 67% for Hispanics in Georgia, in comparison to only 12% for whites.<sup>143</sup> Some have put forth a psychological reason to explain such higher turnout rates under voter ID laws: anger caused by the laws helps mobilize Democratic voters, who then vote in higher numbers.<sup>144</sup> Paradoxically, this might mean that the enactment of a

---

137. See, e.g., U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 133, at 46–48 (looking at Kansas and Tennessee, which adopted voter ID laws, and comparing these states to Alabama, Arkansas, Delaware, and Maine, which did not adopt voter ID laws).

138. See *id.*

139. See Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 111 (2009).

140. Shannon McCaffrey, *Despite Voter ID Law, Minority Turnout Up in Georgia*, ATLANTA J.-CONST. (Sept. 3, 2012), <https://www.ajc.com/news/despite-voter-law-minority-turnout-georgia/3wOfD2SkXmTgRwbySd2ZiK>.

141. *Id.*

142. Rachel Weiner, *Black Voters Turned Out at Higher Rate than White Voters in 2012 and 2008*, WASH. POST (Apr. 29, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/04/29/black-turnout-was-higher-than-white-turnout-in-2012-and-2008/?utm\\_term=.713f99fec7f0](https://www.washingtonpost.com/news/the-fix/wp/2013/04/29/black-turnout-was-higher-than-white-turnout-in-2012-and-2008/?utm_term=.713f99fec7f0).

143. McCaffrey, *supra* note 140.

144. See Jacob R. Neiheisel & Rich Homer, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs of Turning Out When Voting Is Made More Difficult*, 17 ELECTION L.J. (forthcoming 2019) (examining the democratic mobilization hypothesis and suggesting that because of Democratic efforts to combat the perceived effects of voter ID laws, turnout may be greater under these laws); Nicholas A. Valentino & Fabian G. Neuner, *Why the Sky Didn't Fall: Mobilizing Anger in Reaction to Voter ID Laws*, 38 POL. PSYCHOL. 331, 331 (2017) (explaining that empirical evidence for the significant decrease in turnout, either in



new voter ID requirement might provide a greater benefit for Democrats than it does for Republicans.

Of course, comparing turnout rates in different states after the enactment of new voter ID laws does not amount to an apples-to-apples comparison. There are significant variations in the populations under investigation, different time periods tend to be examined in the different states, and there are differences in the statistical methods used in these various studies, which probably best explains their inconsistent results, as a number of researchers have pointed out.<sup>145</sup>

Unlike the literature that focuses on individual states, the literature that looks at the effects of voter ID laws more broadly concludes that such laws do not have a major impact on voter turnout when the data is examined at the aggregate level.<sup>146</sup> A recent study sponsored by the National Bureau of Economic Research (“NBER”) that relied on more than 1.3 billion observations of voting between 2008 and 2016 concluded that strict voter ID laws have “no significant negative effects on registration or turnout, overall or for any subgroup defined by race, gender, age, or party affiliation.”<sup>147</sup> The NBER study also found that these laws did not decrease the participation of ethnic minority groups in comparison to white voters.<sup>148</sup> These results were consistent across mid-term elections and presidential elections, and they were consistent

---

the aggregate or among Democrats specifically, has thus far failed to materialize and hypothesizing that strong emotional reactions to the public debate about these laws may be mobilizing Democrats and counterbalancing any disenfranchising effect of the laws); see also Anthony J. Gaughan, *Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield*, 19 TEX. J. C.L. & C.R. 109, 130–34 (2013) (arguing that minority turnout in the South in the years since the implementation of voter ID laws has actually gone up, rather than down).

145. See Mycoff et al., *supra* note 130, at 121; see also Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 150, 163 (2017) (arguing “there is little convincing evidence that voter [ID] laws influence turnout substantially” and that more data is needed to conduct further studies on the effects of strict voter ID laws specifically).

146. See Enrico Cantoni & Vincent Pons, *Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008–2016*, at 3–4 (Nat’l Bureau of Econ. Research, Working Paper No. 25522, 2019), <https://www.nber.org/papers/w25522>.

147. See *id.* at 2.

148. *Id.*

regardless of whether a photo ID was requested of the voter.<sup>149</sup> Significantly, the NBER study also found that voter ID laws had no effect on fraud, either actual or perceived.<sup>150</sup> Other scholars have reported similar findings.<sup>151</sup>

Overall, these results suggest that efforts to reform voter ID laws may not have much impact on elections, or perhaps may have a different impact than we believe.<sup>152</sup> Perhaps the best way to think about the problem is that offered by Michael Gilbert, who explains that voter ID laws simply may have unintended consequences that we do not understand.<sup>153</sup> Under some scenarios, voter ID laws may indeed depress turnout, but in doing so they may also exacerbate fraud.<sup>154</sup> Gilbert asks us to imagine a very close election in which, as a result of a voter ID requirement, both the level of turnout and the amount of voter fraud decreases.<sup>155</sup> In a normal election without a voter ID requirement, *A* would receive 13 lawful votes while *B* would receive 10 lawful votes and 2 fraudulent votes.<sup>156</sup> Here, *A* wins, 13-12. But when a voter ID law is put in place, *A* receives 9 lawful votes because of depressed turnout, while *B* receives 9 lawful votes plus 1 fraudulent vote.<sup>157</sup> Both the level of turnout and the level of fraud have decreased, but now *B* wins

---

149. *Id.*

150. *Id.* at 1, 13; *see also* Mycoff et al., *supra* note 130, at 121 (arguing that voter ID laws “have little to no effect on aggregate or individual-level turnout, particularly after considering political motivations for voting”).

151. *See, e.g.*, ISSACHAROFF ET AL., *supra* note 24, at 125 (explaining how there is “little empirical evidence to date of a significant impact of these laws on either turnout or on the partisan impact they have,” and adding: “In part this is a result of methodological difficulties in isolating the new laws from the compounding impact of the complicated political environment in which they operate.”).

152. Daniel J. Hopkins et al., *Voting but for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 82 (2017) (finding higher turnout among active registered voters in Virginia who lacked a photo ID, in part due to targeted mailings by the state aimed at educating voters, “suggesting that the initial impact of voter ID laws may hinge on efforts to notify voters likely to be affected”).

153. *See* Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 759 (2015).

154. *Id.* at 759–61.

155. *Id.* at 742, 760.

156. *Id.*

157. *Id.* at 742, 760.

the election, 10-9. In this way, Gilbert and others have shown how the effects of these laws can be highly uncertain.<sup>158</sup>

From a cost-benefit perspective, determining the value of voter ID laws requires us to weigh their benefits in preventing fraud against the burdens they impose by suppressing voter turnout. But we do not have a satisfactory way to make this calculation. Since the effects of these laws are indeterminate, it is not clear whether we should be for or against them. Part of the problem is that numerous factors play a role in determining what drives turnout in a given election.<sup>159</sup> Given that the literature measuring the effects of voter ID remains inconclusive, perhaps there is another way that we ought to think about these laws? After all, litigation aimed at eradicating voter ID laws has been extensive, and it has also been very expensive, but it has not softened these laws.<sup>160</sup> This litigation has also not brought the factions on opposite sides of the voter ID debates any closer together. To make progress, some scholars have recently championed proposals for how voter ID laws might be incorporated into other election-related reforms.<sup>161</sup> These proposals are worthy of our attention.

### III. RETHINKING THE VOTER ID DEBATES

#### A. Registration

We can compare today's partisan fights over voter ID laws to the fights over voter registration laws that took place in the United States in the late nineteenth century.<sup>162</sup> Derek Muller points out the many similarities between voter registration laws and voter ID laws.<sup>163</sup>

---

158. *Id.* at 764–65.

159. *See What Affects Voter Turnout Rates*, FAIRVOTE, [https://www.fairvote.org/what\\_affects\\_voter\\_turnout\\_rates](https://www.fairvote.org/what_affects_voter_turnout_rates) (last visited Apr. 12, 2019).

160. *See* Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 101 (arguing that “[i]n theory, softening of voter identification laws through litigation is a positive development . . . [i]n practice, however, softening may do less to alleviate the actual burdens of voter identification laws than to make judges feel better about their Solomonic rulings.”).

161. *See infra* Part III.

162. *See* Muller, *supra* note 4, at 116–19.

163. *Id.* Early in the nation's history, voters cast ballots without any registration requirements. *See* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection*

First, both kinds of laws were enacted in response to concerns about voter fraud.<sup>164</sup> Second, both were initially enacted by Republican legislators but challenged by Democrats when they came to power.<sup>165</sup> Third, both voter ID laws and voter registration laws have been criticized for diminishing voting by certain groups of people, including immigrants, African-Americans, migrants, and the poor.<sup>166</sup> Yet voter registration laws eventually came to be accepted.<sup>167</sup> Today, although we still dispute the mechanics of voter registration, we recognize the need to have a voter registration system of some kind. In doing so, we also acknowledge that voter registration often acts as a dual-edged sword: while it may alleviate voter fraud, voter registration also imposes an increased burden on voters and lowers the rate of turnout in American elections.

---

*on the History of Voter Registration in the United States*, 9 *YALE L. & POL'Y REV.* 370, 373 (1991). Registering voters was not necessary, given their small number. *Id.* However, as the franchise was broadened, Americans witnessed machine politics and, with it, voter fraud. *Id.* at 373–74. Reformers in many states responded by passing voter registration laws. *Id.* In the North, these laws were ushered in by reformers hoping to clean up elections. *Id.* at 380–85. In the South, they were enacted with the goal of disenfranchising African-Americans. *Id.* at 374–80. The new voter registration requirements varied significantly from state to state. Some states kept rolls of permanently registered voters. *See* ALAN REITMAN & ROBERT B. DAVIDSON, *THE ELECTION PROCESS: LAW OF PUBLIC ELECTIONS AND ELECTION CAMPAIGNS* 20 (2d ed. 1980). Others required voters to re-register periodically; otherwise, their ability to cast their vote would lapse. *Id.* Still other states permitted residents to vote without registering at all. *Id.* at 21.

164. Muller, *supra* note 4, at 110; *see also* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 128–29 (rev. ed. 2009).

165. *See* KEYSSAR, *supra* note 164, at 123–28.

166. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 *WM. & MARY BILL RTS. J.* 453, 456–61 (2008).

167. Today, forty-nine of fifty states have voter registration laws, with North Dakota being the one exception. *Voter Registration Rules*, *VOTE.ORG* (Mar. 31, 2017), <https://www.vote.org/voter-registration-rules/> (summarizing each state's voter registration rules). Voter registration laws came to be accepted when their opponents began to learn how to use them to advance their goals. *See* Muller, *supra* note 4, at 113. Democratic partisans, union bosses, and voting rights advocates eventually figured out how to register mass numbers of voters by perfecting voter registration drives that targeted certain populations of people. *Id.* Over time, the divisive voter registration laws of the nineteenth century came to be accepted as normal. *See id.* at 112–15.

In an effort to bring Democrats and Republicans together and to give each side something it wants, scholars have proposed linking efforts to reform the voter registration system to a reasonable voter ID requirement. For example, Daniel Tokaji's interesting proposal—which he refers to as the “Grand Election Bargain”<sup>168</sup>—calls on lawmakers to combine voter registration reform with the implementation of a voter ID requirement for all federal elections.<sup>169</sup> Tokaji argues that if Congress were to mandate this combined requirement for federal elections, it would not only be constitutional,<sup>170</sup> but it could also provide a bipartisan victory in an era of hyper-polarization.<sup>171</sup>

---

168. Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL. REV. 71, 73 (2014).

169. *Id.* While the specifics of Tokaji's proposal are slightly beyond our purposes here, it is worth noting that he does not advocate just any voter ID requirement be imposed. Rather, he proposes a voter ID law like the one enacted in South Carolina, which was precleared by a three-judge district court in 2012 (prior to the decision in *Shelby County*). *Id.* at 74 (citing *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012)). That voter ID law allowed a voter who arrived to vote but did not have his photo ID with him to sign an affidavit in which he explained his reason for not having a photo ID. *See South Carolina*, 898 F. Supp. 2d at 32; *see also* Tokaji, *supra* note 168, at 81, 104 (explaining South Carolina's law and calling for South Carolina's example to be used as a model for Tokaji's proposed plan).

170. Tokaji, *supra* note 168, at 105–07. The proposal would be constitutional under the Elections Clause. *Id.* at 105 (citing U.S. CONST. art. I, § 4); *see also* Daniel P. Tokaji, *A Grand Election Bargain That Everyone Should Support*, TAKE CARE BLOG (Nov. 20, 2018), <https://takecareblog.com/blog/a-grand-election-bargain-that-everyone-should-support>. Congressional authority to regulate federal elections would also preempt state law. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 1 (2013). There has recently been a great deal of scholarship in election law on the nature of the Elections Clause and Congress's powers under it. *See, e.g.*, Michael T. Morley, *The Intratextual Independent 'Legislature' and the Elections Clause*, 109 NW. L. REV. ONLINE 131 (2015); Michael T. Morley, *The New Elections Clause*, 91 N.D. L. REV. ONLINE 79 (2016); Franita Tolson, *Congressional Authority to Protect Voting Rights after Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322 (2014).

171. Tokaji, *supra* note 168, at 73 (explaining how “[b]oth parties will have to swallow something they don't like, to achieve their most urgent priorities. And they should think big, since major reforms aren't necessarily more difficult to enact than modest ones.”). America's political polarization has been the subject of a great deal of recent scholarly literature. *See, e.g.*, Michael J. Barber & Nolan McCarty, *Causes and Consequence of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15 (Nathaniel Persily ed. 2015); SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE

The voter registration system in the United States accounts for the low turnout rate exhibited by American voters. In 2006, only 68% of the American voting age population was registered to vote.<sup>172</sup> The comparable figures were 100% in Argentina, 97% in Britain, 95% in Mexico, and 93% in Canada.<sup>173</sup> Gaps in registration rates between different groups also exist in the United States. For instance, while the gap between whites and African-Americans has narrowed, Hispanic and Asian-American voters still exhibit much lower registration rates.<sup>174</sup> Registration rates also lag for citizens with lower incomes and lower education levels.<sup>175</sup> As a result, these groups are much less likely to vote. Liberalizing voter registration has long been a major goal of scholars and activists who seek to broaden the franchise.

Tokaji proposes that government offices begin to play a greater role in registering voters by extending the opportunities for registration already available at state motor vehicle offices.<sup>176</sup> This could be done

---

LEGISLATURES (2009); NOLAN McCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2006); Barry Burden et al., *Sore Loser Laws and Political Polarization*, 39 LEGIS. STUD. Q. 299 (2014); Paul Frymer, *Debating the Causes of Party Polarization in America*, 99 CAL. L. REV. 335 (2011); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011).

172. See JENNIFER S. ROSENBERG & MARGARET CHEN, BRENNAN CTR. FOR JUSTICE, EXPANDING DEMOCRACY: VOTER REGISTRATION AROUND THE WORLD 3 (2009).

173. *Id.*

174. Tokaji, *supra* note 168, at 85 & tbl.2.

175. *Id.* at 87–89. The data Tokaji presents is from the presidential election years of 2008 and 2012. *Id.* at 85. However, the data did not change much in 2016, other than that voting rates for African-Americans decreased slightly. See Thom File, *Voting in America: A Look at the 2016 Presidential Election*, U.S. CENSUS BUREAU (May 10, 2017), [https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting\\_in\\_america.html](https://www.census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html); see also *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>.

176. Tokaji, *supra* note 168, at 92–93. Indeed, registration forms submitted at motor vehicle offices surpass all other avenues of voter registration. *Id.* Right now, about one-fourth of Americans register to vote at state motor vehicle offices around the country. *Id.*

by mandating voter registration at state universities, state unemployment bureaus, state corrections facilities, and other such venues.<sup>177</sup> Tokaji also calls for the creation of an online voter registration system that would allow new voters to register more easily and would grant existing voters the ability to check their registrations and update their contact information.<sup>178</sup> Finally, he proposes that Congress mandate same-day voter registration—what Tokaji calls “the gold-standard” for increasing turnout<sup>179</sup>—for all federal elections.<sup>180</sup>

Tokaji is not the only scholar to have recently suggested that reforms to voter registration might be offered in tandem with stronger voter ID requirements, as a way to improve both turnout and the security of elections. Richard Hasen has advocated a similar proposal, urging Congress to adopt “universal voter registration and government-issued identification cards with biometric information.”<sup>181</sup> Like Tokaji, Hasen has suggested that these reforms might come as part of a package.<sup>182</sup> As is evident, the idea of linking a voter ID requirement to some other election reform has been proposed by a number of election law scholars. The question is how this link should be made to work in practice.

There is very little chance that Tokaji’s or Hasen’s proposals could pass muster in the Senate today, where Republicans would surely oppose them. After Democrats captured the House of Representatives in the mid-term elections of 2018, the first legislative bill advanced in the House was an effort to expand voting rights in key respects that many election law scholars have championed. This new bill, known as H.R. 1, introduced several key reforms that have long been sought by voting rights advocates.<sup>183</sup> The question is how such a bill could ever

---

177. *Id.* at 100.

178. *Id.* at 100–01.

179. *Id.* at 92, 95.

180. *Id.* at 101.

181. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 964 (2005).

182. *Id.*

183. For the People Act of 2019, H.R. 1, 116th Cong. (2019). The bill included provisions for online voter registration, use of the Internet to update voter registrations, and provisions allowing voters to receive registration information by email. *Id.*

become federal law. Senator Mitch McConnell, the Republican Senate majority leader, has denounced legislation intended to increase voter turnout as a “power grab” by Democrats.<sup>184</sup> He has been especially opposed to H.R. 1.<sup>185</sup> As long as Senator McConnell controls the Senate’s calendar, H.R. 1 will not come up for a vote in a Republican-dominated Senate.

But there are greater problems with such a bill. One is that, even if it were to become law, it would only be aimed at federal elections. State officials could choose to do their own thing when it comes to state elections. Generally, voter registration occurs on a state-by-state basis and is not something that the federal government can easily manage.<sup>186</sup> For this reason, it may be wiser to champion a proposal that is not aimed at the federal government, but rather would incentivize the states to carry out reforms of their own.

---

§ 1001-03. Beyond that, it called on state election officials to register voters automatically each time voters interact with certain agencies. *Id.* § 1013. H.R. 1 would also allow same-day voter registration for federal elections, make access to voting easier for people with disabilities, establish a pilot program that would allow people with disabilities to vote at their residences, and prevent vote caging and voter intimidation. *Id.* §§ 1101–04, 1201–02, 1301–04. The bill also requires states to allow early voting and voting by mail in federal elections, among many other voting reforms. *Id.* §§ 1611, 1621.

184. See Matthew Haag, *Mitch McConnell Calls Push to Make Election Day a Holiday a Democratic ‘Power Grab’*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/us/politics/election-day-holiday-mcconnell.html>; Mitch McConnell, *Behold the Democratic Politician Protection Act*, WASH. POST (Jan. 17, 2019), [https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081\\_story.html?utm\\_term=.d2b129949661](https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html?utm_term=.d2b129949661).

185. In particular, McConnell has been opposed to H.R. 1’s proposal to make Election Day a national holiday, which some scholars believe would increase the number of people voting by several percentage points. See Haag, *supra* note 184.

186. See *Election Administration at State and Local Levels*, NAT’L CONF. ST. LEGISLATURES (June 15, 2016), <http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx>. To the extent the federal government imposes any requirements on the process, they are limited. For example, the NVRA requires that states provide voter registration materials to citizens at certain government agencies, including state motor vehicle agencies. See 52 U.S.C. §§ 20504 & 20506 (2012 & Supp. 2015).



The best reform that the states could adopt is automatic voter registration. In many other democracies, the government takes proactive steps to register its own voters.<sup>187</sup> In France, for instance, every individual who signs up for the mandatory military draft has his age and address forwarded to the relevant election authorities at the same time.<sup>188</sup> Many democracies also maintain national voter registries that are continually updated when voters move, become disenfranchised, or pass away.<sup>189</sup> In the United States, by contrast, voter registries were historically maintained by more than 10,000 local jurisdictions throughout the individual states,<sup>190</sup> and the voter registration system was based on having individual eligible voters add themselves to these voter registries. An eligible voter was not able to vote unless he took the time to figure out when, where, and how to register.

Although the burden of registering to vote continues to be placed entirely on individual voters in most states in the United States today, it is not far-fetched to imagine a system where an individual state takes on the burden of registering new voters automatically—and offers a voter ID card to its newly registered voters at the same time. Oregon became the first state to begin registering voters automatically in March of 2015.<sup>191</sup> As of February 2019, a total of seventeen states and the District of Columbia have authorized various automatic voter registration policies.<sup>192</sup> For the most part, these automatic state registration systems work by registering eligible voters when they interact

---

187. ROSENBERG & CHEN, *supra* note 172, at 2.

188. *Id.* at 3, 10.

189. *See id.* at 16–19.

190. *Election Administration at State and Local Levels*, *supra* note 186. Indeed, one of HAVA's goals was to have these registries become state-managed, thus allowing state-wide databases that already hold information about driver's licenses and social service provisions to be better coordinated with voter registration lists. *See* Thad E. Hall, *US Voter Registration Reform*, 32 ELECTORAL STUD. 589, 590 (2013).

191. *See* Daniel Diorio, *Registering Voters Automatically*, NAT'L CONF. ST. LEGISLATURES: LEGISBRIEF, Dec. 2015, at 1, 2; *see also* Amber Phillips, *How to Argue About Automatic Voter Registration, As Oregon Gets the Ball Rolling*, WASH. POST (Feb. 13, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/13/how-to-argue-about-automatic-voter-registration-as-oregon-gets-the-ball-rolling/?utm\\_term=.c06565687edc](https://www.washingtonpost.com/news/the-fix/wp/2016/02/13/how-to-argue-about-automatic-voter-registration-as-oregon-gets-the-ball-rolling/?utm_term=.c06565687edc).

192. *See Automatic Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Feb. 6, 2019), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

with a state government agency, such as a motor vehicle office.<sup>193</sup> In each case, the state sets automatic registration as the default option, but it also gives its citizens the choice of opting out of the registration system.<sup>194</sup> In most of these states, citizens are given the opportunity to opt out of automatic voter registration when they are at the government agency, although some states also allow voters to opt out later by signing and mailing back a postcard.<sup>195</sup>

A study published by the Brennan Center in 2019 found that the use of automatic voter registration had a significant effect on increasing the voter registration rates in several states.<sup>196</sup> These increases occurred in both big and small states, as well as in states with very different partisan compositions.<sup>197</sup> The rates of increase ranged from 9.4% in the District of Columbia to 93.7% in Georgia.<sup>198</sup> It has also helped that state motor vehicle offices are now able to transfer voter registration information to election officials digitally, instead of using paper-based forms, which ensures the voter rolls are up-to-date.<sup>199</sup>

This system is not equivalent to the universal registration systems used throughout many countries in Europe and elsewhere in the world, where the state automatically registers its citizens to vote when they turn 18, graduate from high school, or fill out the paperwork for military service.<sup>200</sup> But it is an improvement over the current system most states have. Instead of eligible citizens having to take affirmative steps to register, they are registered by a state after their eligibility is

---

193. *Id.* However, note that in Alaska, the automatic voter registration system is run through a citizen's application to participate in the state's Permanent Fund Dividend (PDF), which consists of a portion of the state's oil revenue that is paid out to Alaskans each year by the state's government. *Id.*

194. *Id.*

195. For example, Oregon takes this tactic, perhaps because it also uses a universal Vote By Mail (VBM) system for its elections. In Oregon, an individual is assigned the status of "pending registrant" for 21 days, during which he is sent a voter registration card. At this point, the person can opt out of registering to vote by mailing back the voter registration card and checking off the opt out option. *Id.*

196. See KEVIN MORRIS & PETER DUNPHY, BRENNAN CTR. FOR JUSTICE, AVR IMPACT ON STATE VOTER REGISTRATION 1-2 (2019), [https://www.brennan-center.org/sites/default/files/publications/2019\\_04\\_AVR\\_Report\\_Final\\_0.pdf](https://www.brennan-center.org/sites/default/files/publications/2019_04_AVR_Report_Final_0.pdf).

197. *Id.* at 1.

198. *Id.* at 2.

199. *Id.* at 1, 3.

200. See, e.g., Schaffer & Wang, *supra* note 82.

confirmed from data already collected by state agencies—that is, if they do not opt out of the registration system when they are presented with the choice to do so.<sup>201</sup> And at the same time as they are automatically registered to vote, the state should also provide its citizens with a free voter ID. This conceptual innovation at the state level is the contribution to the literature advanced by this Article.

### B. Distribution

If a state requires its citizens to have a voter ID to cast a ballot, the burden of ensuring that the voter has this ID should be shouldered by the state itself. One way to accomplish this goal successfully is to link the process of obtaining such an ID to a citizen's voter registration. Currently, the process of obtaining the necessary identification to vote takes place separately from the process of registering to vote. In the future, these two steps must be linked. In this way, voter ID laws can be used not only to ensure electoral integrity, but also to enlarge a state's electorate and bring the franchise to more people.

One idea for how voter IDs might be distributed belongs to Sean Radomski.<sup>202</sup> Radomski argues that states should be required to bear the burden of providing voter IDs to their citizens and bear the costs of producing and *distributing* voter IDs to all registered voters.<sup>203</sup> States would be required to pay for and mail a “non-photo” ID card to all voters at the time they register to vote<sup>204</sup>—or at the time they are automatically registered, in our proposed scheme here. This non-photo ID card would be used for voting in all elections.<sup>205</sup> Each non-photo ID

---

201. See LIZ KENNEDY ET AL., AUTOMATIC VOTER REGISTRATION: FINDING AMERICA'S MISSING VOTERS 21–30 (2015) (providing a review of what a successful automatic voter registration program would look like, including by providing important policy design considerations); see also Heather K. Gerken, *Make It Easy: The Case for Automatic Registration*, 28 DEMOCRACY (2013), <http://www.democracyjournal.org/28/make-it-easy-the-case-for-automatic-registration.php> (arguing that “a universal, voter-registration list would be a relatively simple matter”).

202. See Sean Radomski, *A Common-Sense Voter Identification Proposal*, 22 TEX. REV. L. & POL. 11, 11 (2017).

203. *Id.* at 14 (explaining that “rather than placing the burden on voters to procure a voter ID, states should prescribe an acceptable form of non-photo ID, bear the costs of producing those IDs, and then distribute them to all registered voters”).

204. *Id.* at 40.

205. *Id.* at 14.

card would list a voter's name, address, and provide a unique ID number to be used only for the purpose of voting.<sup>206</sup>

Most courts have found voter ID laws to be permissible when three factors have been present: first, when the voter IDs are freely available and accessible to all segments of the population; second, when the costs associated with obtaining IDs are very low or non-existent; and third, when the state offers an adequate safety net for those citizens who could not reasonably obtain an ID or who fail to bring it with them when voting.<sup>207</sup> For the program proposed here to have any chance of succeeding, the first two of the above criteria must initially be satisfied. The best way to do that is to require a state mandating a voter ID to make it available to everyone automatically when the person registers—or is registered—to vote, and also to make the IDs *free* and their distribution *free*.<sup>208</sup> Making the required ID free would ensure that it is population-neutral, meaning the requirement does not discriminate against any particular group.<sup>209</sup> The best way for the state to distribute its free voter ID would be to mail it to the voter as soon as he registers, or is automatically registered, to vote.

### C. *Implementation*

The key to any voter ID requirement is figuring out how it would work in practice. Radomski's proposal, on which we are trying to improve here, suggests that when voters show up to vote, they should have three ways to prove their identification. First, those with a valid photo ID could use that document to establish their identity.<sup>210</sup> This will be the vast majority of voters, who already possess a valid photo ID in the form of a driver's license, and so forth. Second, those without a photo ID in their possession would be asked to show the state-issued non-photo voter ID card that the state provided to them after they were registered to vote, together with another document that could corroborate their identity, such as a utility bill, bank statement, and so forth.<sup>211</sup> Fi-

---

206. *Id.* at 41.

207. *See id.* at 11, 29.

208. *See id.* at 44.

209. *See id.* at 43–44.

210. *Id.* at 41.

211. *Id.*

nally, voters who do not have their state-issued ID card would be allowed to vote by provisional ballot, but they would have to return to the election office within a set period of time to prove their identify for their vote to be counted.<sup>212</sup> The continued use of provisional ballots in this way is important, and it is meant to provide a safety net to those who lost or forgot their IDs.

Radomski's proposal also extends to absentee ballots, where voting fraud has recently been proven.<sup>213</sup> He calls for a requirement that would allow voters casting absentee ballots to prove their identities in one of two ways. First, if the voter possesses a photo ID, he would be required to mail a copy of it in with his absentee ballot.<sup>214</sup> If the voter lacks a photo ID or the ability to make a copy of it, he could simply write in his identification number from the state-issued non-photo ID card and mail that in, together with a secondary form of identification, such as an old utility bill, bank statement, or paystub, as corroborating evidence of identity.<sup>215</sup> The above proposal is not perfect. For example, a host of privacy issues would be implicated if people voting by absentee ballot suddenly had to share their bank statements and paystubs with the government, not by showing them but by having to mail them in. But the proposal at least provides a starting point, an idea on which others can improve and build.

To make sure non-photo voter IDs are absolutely available, the state would also have to implement a system to provide IDs for voters who are already registered, which would be a large majority of voters in the state.<sup>216</sup> One way this could be done is by offering a registered voter a printable and returnable form that he could mail in listing his name, date of birth, and address, and then an ID card would be sent to him in the same way it would be sent to a new registrant.<sup>217</sup> In addition, the state would have to have a system in place to provide a non-photo voter ID to any person who lost his or her ID.<sup>218</sup> Again, this could be

---

212. *Id.*

213. *See id.* at 41–42.

214. *Id.* at 42.

215. *Id.*

216. *See, e.g., id.* at 45.

217. *See id.* at 41–42.

218. *See, e.g., id.* at 41 (explaining that under the proposal “voters who forget their photo ID or two forms of non-photo ID will be allowed to vote by provisional

done through a mail-in form. The system would have to be population-neutral, and as such, it would not be able to treat new voting registrants differently from those seeking an ID who are already registered to vote but who may have lost their IDs.<sup>219</sup>

#### D. Marketing

The best way for a state to launch the above reforms is to begin a multi-year marketing and public relations campaign to educate citizens about the new requirement before implementing it. During this period, the state should delay the implementation of its voter ID requirements perhaps for as long as five years. Such a delay will be key to the program's ultimate success because compliance with the new voter ID requirement mandates prior knowledge and preparation on the part of voters, and it takes time to educate voters and to conduct proper public outreach. As voters become more familiar with the new ID requirements, less education and outreach will be required.<sup>220</sup> There is research to suggest that voters tend to adapt to new voting requirements over several election cycles, so the cost of voter education will eventually taper off.<sup>221</sup> This research reveals that even minority voters, when faced with a learning curve and a new ID requirement, learn how to obtain voter IDs, and that they then are able to register in numbers that may even surpass their pre-ID rates.<sup>222</sup>

Like all new legislation, implementing a universal voter ID requirement that may be tied to voter registration comes with costs. Costs are one of the main factors that lawmakers consider when evaluating legislative proposals.<sup>223</sup> Marketing the new voter ID requirement is just

---

ballot . . . [if] they [] return to an election office within ten days and present the proper proof of identification”).

219. *See id.* at 43–44.

220. KAREN SHANTON & WENDY UNDERHILL, NAT'L CONF. ST. LEGISLATURES, COSTS OF VOTER IDENTIFICATION 4 (2014), [http://www.ncsl.org/documents/legismgt/elect/Voter\\_ID\\_Costs\\_June2014.pdf](http://www.ncsl.org/documents/legismgt/elect/Voter_ID_Costs_June2014.pdf).

221. *See id.*

222. *See* Timothy Vercellotti & David Andersen, *Voter-Identification Requirements and the Learning Curve*, 42 PS: POL. SCI. & POL. 117, 119–20 (2009); *see also* Jack Citrin et al., *The Effects Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L.J. 228, 238 (2014) (finding that receiving prior notifications about new voter identification requirements may increase turnout).

223. SHANTON & UNDERHILL, *supra* note 220, at 1.

one of the many costs that a state should expect to incur. Another cost that a state will have is that of providing free ID cards to its citizens.<sup>224</sup> This involves the expense of their production and distribution.<sup>225</sup> According to NCSL, Indiana estimated it would spend \$13 on each free ID card it produced in 2011.<sup>226</sup> This amounted to \$2–\$3 million per year in spending.<sup>227</sup> Between 2007 and 2010, the state spent roughly \$10 million on voter IDs.<sup>228</sup> These are not the only costs for implementing such a program. Another important set of costs would come from revising and reissuing election materials to reflect a change in the law.<sup>229</sup> States may also see an increase in the number of individuals who must use provisional ballots to vote, resulting in more of those having to be printed.<sup>230</sup> Most importantly, money in state budgets will also have to be allocated for expanded poll worker training and education.<sup>231</sup>

There is no question that marketing will cost the state money. But the costs of marketing a new voter ID requirement will be smaller than the costs of the litigation that the states have incurred to defend their voter ID laws in court when such laws have been challenged. Most states have budgeted hundreds of thousands of dollars for voter ID laws in their fiscal impact statements, but certainly not millions of dollars.<sup>232</sup> By contrast, the costs associated with litigating photo ID laws have been in the millions. In 2013, before the decision in *Shelby County v. Holder*, South Carolina spent \$3.5 million in litigation fees challenging the Department of Justice's decision not to preclear its voter ID law.<sup>233</sup> After the Court decided *Shelby County*, voter ID laws

---

224. *Id.* at 2.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 2–3.

232. See *Fiscal Notes for Voter ID Legislation*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/cost-of-voter-id-fiscal-notes-2012.aspx> (last visited Apr. 12, 2019).

233. See Janel Davis, *Costs Associated with Voting Act Can Vary by Case*, POLITIFACT (Apr. 3, 2013), <https://www.politifact.com/georgia/statements/2013/apr/03/john-lewis/costs-associated-voting-rights-act-can-vary-case/> (providing the \$3.5 million figure); see also Renee Dudley, *State's Lawsuit Over Voter*

proliferated, and at that point, Texas spent \$3.5 million on litigation fees to defend its voter ID law.<sup>234</sup> Meanwhile, North Carolina spent even more than that—as much as \$4.9 million—defending its law.<sup>235</sup> It is thus much less costly for the states to provide free voter IDs to their citizens, delay their implementation for several years, and spend the money instead on public outreach and educating voters.

### *E. Participation*

A state's ultimate goal in implementing a voter ID requirement in the way outlined here should be to expand participation in the democratic process among its citizens. The proposals offered—having the state provide non-photo voter IDs to each citizen at the time he or she registers (or is registered) to vote, having the state itself distribute these non-photo IDs while making their costs and distribution free, and finally delaying the implementation of the new voter ID requirement for five years until the state has had a chance to engage in a robust marketing campaign to educate its citizens—are all measures meant to achieve more robust participation in the democratic process.

Since the state's goal is ultimately to expand participation, it would have to make sure that all voters have the opportunity to cast a ballot. In that vein, as part of its outreach efforts, state election boards would have to make efforts to contact people whose names appear in state databases—of state motor vehicle agencies, state universities,

---

*ID Could Cost More than \$1 Million*, POST & COURIER (Jan. 28, 2012), [https://www.postandcourier.com/politics/state\\_politics/state-s-lawsuit-over-voter-id-could-cost-more-than/article\\_59e12670-7f01-5003-bc33-037881275436.html](https://www.postandcourier.com/politics/state_politics/state-s-lawsuit-over-voter-id-could-cost-more-than/article_59e12670-7f01-5003-bc33-037881275436.html) (explaining that South Carolina was paying lawyers \$520 an hour to defend its voter ID law); Meg Kinnard, *S.C. Voter ID Lawsuit Cost More than \$3.5M*, POST & COURIER (Jan. 8, 2013), [https://www.postandcourier.com/news/s-c-voter-id-lawsuit-cost-more-than-m/article\\_61cffb16-8f31-582e-941c-e1dc25552d7f.html](https://www.postandcourier.com/news/s-c-voter-id-lawsuit-cost-more-than-m/article_61cffb16-8f31-582e-941c-e1dc25552d7f.html).

234. Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, TEX. TRIB. (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.

235. See Jim Morrill & Michael Gordon, *After Passing Laws, NC Republicans Spent Millions Defending Them*, CHARLOTTE OBSERVER (Nov. 25, 2016), <https://www.charlotteobserver.com/news/politics-government/article116795138.html>.



state unemployment bureaus, state tax departments, and state corrections facilities—to figure out which citizens' names appear in these databases who are eligible to vote but are not registered to do so.

A state can use its savings from not having to engage in litigation over a voter ID requirement to reach and register additional voters. Indeed, requiring an ID for voting by a state's government should be deemed acceptable if the state also takes affirmative steps to ensure that all of its citizens are properly registered to vote and are easily able to obtain the necessary voter ID to do so. As part of making voting easier, the state's safety net, importantly, will have to offer those who may have misplaced their IDs a way to cast their ballot, too. To ensure increased participation, the state must have a safety net in place to make sure voters who lost or forgot their IDs still have a way to cast a ballot if they can prove their identity in some other way. There are a number of ways such a safety net could work. One is that voters could be offered a provisional ballot, which would count if the voter returned later to provide his unique voter ID number.<sup>236</sup>

#### IV. CONCLUSION

Whether voter ID laws belong in our society is no longer the question we should be debating. Voter ID laws already exist in many states, and despite their perhaps often flawed logic, they are here to stay. Through litigation, some of our voter ID requirements have been watered down, but this litigation is time-consuming and expensive. Rather than spend money on litigation, the states should instead spend their money on broadening the franchise. In theory at least, there might be nothing wrong with asking a state's citizens to present an ID card before they vote—that is, if the state also ensures that all eligible voters can always easily obtain such an ID. That ID must be given out free of charge at the same time that the voter registers to vote and it must also be population-neutral. Thus, my solution is not to get rid of voter ID laws but to combine them with efforts to get more people registered to vote. In an ideal world, states should be able to use voter IDs to ensure the integrity of their elections *and* to broaden the franchise at the same time.

---

236. See *Voter Identification Requirements*, *supra* note 2 (discussing each state that employs an affidavit safety net).