

## **Connecting The Dots: Forming a Uniform Voter Identification System Through Established Law**

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### **ABSTRACT**

The 2002 Help America Vote Act requires election officials to request photo ID for first time voters who registered by mail. Some states took this a step further and required all voters to present photo ID in order to exercise the franchise. These laws have attracted a great deal of attention recently because of the belief that these laws disenfranchise voters. However, what is needed is a uniform system that allows voters access to the ballot and also protects the integrity of the ballot. This note argues that all Congress has to do is connect the dots in several federal election laws to fashion a cardless system that would allow poll workers to easily identify voters while limiting the possibility of disenfranchising voters.

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*“Requiring valid, photographic identification is a common sense step to ensure voter integrity and sound elections.”<sup>1</sup>*

*Sonny Perdue, Georgia  
Governor 2003-2011*

*“Americans are losing confidence in the fairness of elections, and while we do not face a crisis today, we need to address the problems of our electoral system”<sup>2</sup>*

*President Jimmy Carter and  
Secretary of State James A.  
Baker, III*

## I. INTRODUCTION

Imagine you arrive at your local polling location to vote in a federal election. This is your first time voting in years. You approach the poll workers excited to exercise your fundamental right. A poll worker asks for your name. You promptly respond. However, when the poll worker looks for your name, she is puzzled. It appears you have already voted. You explain that you have not voted in years, but the poll worker states she has not left her post all day. The worker requires you to cast a provisional ballot until officials confirm your identification. The bottom line is you are now a victim of in-person voter fraud.

The above scenario is not fiction, it actually happened.<sup>3</sup> Voter impersonation is just one form of voter fraud.<sup>4</sup> Although in-person

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<sup>1</sup> Press Release, Governor Sonny Perdue, Statement of Governor Sonny Perdue Regarding Voter ID Pre-clearance (Aug. 26, 2005), available at [http://sonnyperdue.georgia.gov/00/press/detail/0%2c2668%2c78006749\\_79688147\\_93275299%2c00.html](http://sonnyperdue.georgia.gov/00/press/detail/0%2c2668%2c78006749_79688147_93275299%2c00.html).

<sup>2</sup> Jimmy Carter & James A. Baker, III, *Letter From the Co-Chairs*, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at ii (2005), available at [http://www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf) [hereinafter CARTER-BAKER REPORT].

<sup>3</sup> H.R. REP. NO. 109-666, at 6, n. 11 (2006) (discussing testimony in front of the Committee on House Administration on June 22, 2006).

<sup>4</sup> Many different types of election fraud occur. See Peter Nelson & Harry Niska, *A Means to Increase Confidence in Elections*, 69-AUG BENCH & B. MINN. 17, 18

voter fraud occurs, it does not receive a lot of attention. If the voter impersonator is successful, the vote counts without anybody ever noticing.<sup>5</sup> Even when officials believe in-person voter fraud has occurred, several different factors permit the fraudulent voter to be successful. Prosecutors believe voter fraud to be a “victimless and nonviolent crime” and do not actively pursue criminal charges<sup>6</sup> often because they lack sufficient evidence to pursue voter fraud cases.<sup>7</sup> Another issue regarding fraud is the lack of properly trained election workers.<sup>8</sup> The lack of training prevents election workers from preserving evidence that prosecutors may need to prosecute voter fraud.<sup>9</sup> State registration rolls also contribute to the issue of voter fraud. Many states are having difficulty with purging their rolls, which

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(2012) (detailing the different ways in which voter fraud may occur). Most recognized is voter-targeted fraud, or commonly known as voter intimidation. See Nicholas L. Danigelis, *A Theory of Black Political Participation in the United States*, 56 Soc. Forces 31, 35–37 (1977) (discussing the physical and verbal intimidation faced by early African-American voters in the South); *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 192 (3d Cir. 1992) (discussing a long-standing consent decree to settle one national political party’s committee’s claims that the other national political party committee engaged in voter intimidation). There has also been a concern regarding rampant fraud occurring in absentee ballots. See William T. McCauley, Comment, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 625–27 (2000) (discussing the fraudulent absentee ballots of the 1997 Miami Mayoral Election); see generally Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL’Y 39, 56–64 (2010) (describing the history of absentee ballots and how these ballots are susceptible to fraud). Nevertheless, each of these forms could be a note on their own, and it is because of that reason that this Note will only focus on the in-person voter fraud.

<sup>5</sup> See, e.g., Stephen Ansolabehere & Nathaniel Persily, Essay, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1738–39 (2008).

<sup>6</sup> CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>7</sup> *Id.*

<sup>8</sup> See *infra* Part II.A.2.

<sup>9</sup> *Cf.*, David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 500–01 (2008) (discussing how prosecutors dropped three investigations into voter fraud because of a lack of evidence).

in turn has resulted in bloated registration rolls.<sup>10</sup> While lack of prosecution, improperly trained poll workers, and bloated registration rolls may not influence every election, the ability of fraudulent votes to influence close elections is readily apparent.<sup>11</sup>

The right to vote is among our most celebrated fundamental rights.<sup>12</sup> Issues with this fundamental right are not unusual for our country,<sup>13</sup> as the founders declined to enumerate the right.<sup>14</sup> While the citizens would be able to choose members of the House of Representatives,<sup>15</sup> state governments appointed Senators.<sup>16</sup> The framers gave the states the ability to decide when and where to hold elections, with Congressional oversight.<sup>17</sup> For the office of President, rather than having the popular vote dictate the winner, the framers established the Electoral College, which ultimately decides who

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<sup>10</sup> See, e.g., Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 478–79 (2008) (discussing how purging registration rolls is heavily litigated and the Bush administration’s stance on purging registration rolls).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (“No right is more precious in a free country than that of having a voice in the election . . .”) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)); Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1029 (2009) (“The notion that all citizens will be allowed to participate in the selection of our leaders lies at the heart of the concept of American democracy.”) (footnote omitted).

<sup>13</sup> All one has to do to notice this is to look at the United States Constitution and count the number of constitutional amendments that alter the way voting is administered in the country. See U.S. CONST. amends. XV (Universal Male Suffrage), XIX (Woman Suffrage), XXIII (Presidential Electors for District of Columbia), XXIV (Qualifications of Electors; Poll Tax), and XXVI (Right to Vote; Citizens Eighteen Years of Age or Older).

<sup>14</sup> Schultz, *supra* note 9, at 487 (“Nowhere in the United States Constitution is there an explicit declaration of the right to vote”). In fact, the framers discussed voting only sparingly. See U.S. CONST. art. I, § 2 cl. 1; U.S. CONST. art. I, § 4 cl. 1.

<sup>15</sup> U.S. CONST. art. I, § 2, cl. 1.

<sup>16</sup> U.S. CONST. art. I, § 3, cl. 1.

<sup>17</sup> U.S. CONST. art. I, § 4, cl. 1; *Foster v. Love*, 522 U.S. 67, 69 (1997) (“Thus it is well settled that the Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the states.”) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–33 (1995)).

becomes president.<sup>18</sup> Even though the framers valued the ideal of a democratic society, the Constitution allowed states to limit who could qualify to vote.<sup>19</sup> While certain qualifications met their death, other qualifications took their place—residency requirements, registry laws, poll taxes, alien voting, and naturalization procedures.<sup>20</sup> Some of these new restrictions would meet their death as well.<sup>21</sup>

Deficiencies in the electoral system reemerged just over a decade ago. The 2000 election was one of the closest federal elections in recent memory.<sup>22</sup> Because of the closeness of the vote tallies in Florida, Vice President Al Gore utilized Florida's election protest statute to demand a manual recount.<sup>23</sup> These factors lead to the passage of the Help America Vote Act of 2002, modernizing the country's voting system.<sup>24</sup> The Help America Vote Act required states to change various election procedures.<sup>25</sup> This act has allowed state legislatures to respond to the public's concern about voter fraud by enacting voter identification laws ("ID laws").<sup>26</sup> Because of the Supreme Court's

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<sup>18</sup> U.S. CONST. art. II, § 1, cl. 2. The Electoral College has come under severe scrutiny over the past several elections, especially. Theories that the Electoral College is an antiquated process are beyond the scope of this Note.

<sup>19</sup> See Donald W. Rogers, *Introduction: The Right to Vote in American History*, in *VOTING & THE SPIRIT OF AMERICAN DEMOCRACY* 5–6 (Donald W. Rogers ed., 1992).

<sup>20</sup> *Id.* See also Christopher Collier, *The American People As Christian White Men of Property: Suffrage and Elections, in Colonial and Early National America*, in *VOTING & THE SPIRIT OF AMERICAN DEMOCRACY* 19, 20–21 (Donald W. Rogers ed., 1992).

<sup>21</sup> See U.S. CONST. amends. XV, XIX.

<sup>22</sup> W. Glen Pierson, *The Role of Federalism in the Disputed Selection of Presidential Electors: 1916 & 2000*, 22 *QUINNIPIAC L. REV.* 283, 285 (2003) ("For those who lived through it, the presidential election of 2000 created a disconcerting uncertainty of outcome not seen in many decades, namely, since the election of 1916.").

<sup>23</sup> *Bush v. Gore*, 531 U.S. 98, 100–03 (2000); Pierson, *supra* note 22, at 285.

<sup>24</sup> Brandon Fail, Comment, *HAVA's Unintended Consequences: A Lesson for Next Time*, 116 *YALE L.J.* 493, 493 (2006).

<sup>25</sup> See *infra* Part III.A.2. However, the Help America Vote Act of 2002 is not the only time Congress has altered electoral procedures. In 1993, Congress passed the National Voter Registration Act. See *infra* Part III.A.1.

<sup>26</sup> See Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 *N.Y.U. ANN. SURV. AM. L.* 613, 613 (2008); see also Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 *IOWA L. REV.* 731, 747–51 (2008) (discussing how 42 U.S.C.

willingness to permit these state laws, our country will have fifty different voter ID laws with varying degrees of strictness.<sup>27</sup>

This Note argues that Congress should establish a uniform voter ID system for federal elections. Indeed, Congress has already laid the groundwork for such a system with the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. By connecting the dots between these two acts, Congress can fashion an ID law that will not require a card at all. This cardless solution will be discussed in Part IV of this Note, along with the segments of the National Voter Registration Act and the Help American Vote Act that need to be connected. Part II discusses voter Fraud and the different issues that have inspired voter identification laws. Part III will discuss the current voter ID laws and the various problems they have encountered.

## II. FRAUD

As referenced earlier, voter ID laws arise from the fear of voter fraud.<sup>28</sup> “[F]lagrant examples of such fraud . . . have been documented throughout this Nation’s history by respected historians and journalists. . . .”<sup>29</sup> The existence of fraud in elections is the cornerstone debate on whether identification laws are needed at the polls.<sup>30</sup> One thing is clear in this debate; the issue is divided along partisan lines. Conservatives typically say that voter fraud occurs and is a serious concern for our society.<sup>31</sup> On the hand, liberals typically rally against fraud saying that fraud does not exist, or by claiming it is insignificant.<sup>32</sup> This section will argue that voter fraud exists, and

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§ 15484 is the minimum requirement that states have to follow, which in turn allows state legislatures great discretion to implement voter identification laws as they see fit).

<sup>27</sup> As of January 24, 2013, thirty states have a form of voter identification on the books. *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 29, 2013), <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx>.

<sup>28</sup> Ansolabehere, *supra* note 26, at 614–15.

<sup>29</sup> Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 195 (2008).

<sup>30</sup> Ansolabehere, *supra* note 26, at 613; see Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 94 (2007).

<sup>31</sup> Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 187–88 (2009).

discuss criminal prosecution, training of poll workers, registration lists, and close elections. These four items each contribute to society's perception of voter fraud. Finally, this section will discuss the effects that voter fraud has on individual voters.

### A. Does Fraud Actually Exist?

Voter fraud exists.<sup>33</sup> While there is a lack of empirical data surrounding how rampant the problem is, varieties of sources indicate that voter fraud occurs.<sup>34</sup> A 2005 press release from the United States Department of Justice states that there were 180 investigations of election fraud between October 2002 and 2005.<sup>35</sup> Of the 180 investigations, charges were brought against eighty-nine people; fifty-two of these prosecutions resulted in convictions.<sup>36</sup> To some these instances may seem isolated and trivial in the totality of everything.<sup>37</sup> However, what critics fail to appreciate is that every case of voter fraud causes people to lose trust in the franchise.<sup>38</sup> Many people cite the dilution of their vote as the reason they forego exercising their fundamental right to vote.<sup>39</sup>

Both sides of the argument welcome additional data regarding the prevalence of voter fraud.<sup>40</sup> People who doubt the existence of voter fraud also dismiss evidence that a great number of instances may go

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<sup>32</sup> *Id.* at 189; Attorney General Eric Holder, Remarks at the University of Massachusetts School of Law–Dartmouth (Mar. 1, 2013) (answering a student's question on voter fraud “NO! The notion that there is wide spread voter fraud that would justify the enactment of these voter ID laws . . . those laws were passed with other intentions.”), available at [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=3105](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=3105).

<sup>33</sup> John Fund, *There is No Voter Fraud, Unless You Count . . .*, THE NATIONAL REVIEW: THE CORNER BLOG (Dec. 20, 2012, 4:49PM), <http://www.nationalreview.com/corner/336251/there-no-voter-fraud-unless-you-count-john-fund>; Luke Johnson, *Roxanne Rubin, Nevada Republican, Accepts Plea Deal After Committing Voter Fraud*, THE HUFFINGTON POST (Jan. 28, 2013), [http://www.huffingtonpost.com/2013/01/28/roxanne-rubin\\_n\\_2566297.html](http://www.huffingtonpost.com/2013/01/28/roxanne-rubin_n_2566297.html).

<sup>34</sup> Flanders, *supra* note 30, at 98–100.

<sup>35</sup> CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ii.

<sup>38</sup> *Id.* at 45.

<sup>39</sup> Flanders, *supra* note 30, at 108–115.

<sup>40</sup> *Id.*

unreported.<sup>41</sup> Furthermore, election workers may suspect some funny business, but fail to investigate because either they simply do not care enough to do so, or they lack training to recognize it. As with any other crime, the prosecutor has discretion to bring charges against anybody accused of committing voter fraud.<sup>42</sup> Cases interpreting election law targeted at preventing voter fraud have noted this as well.<sup>43</sup> In last year's Performance and Accountability Report, the Office of the Attorney General failed to divulge a plan to combat voter fraud;<sup>44</sup> however, the office mentioned their efforts to improve access to the polls.<sup>45</sup> The difference between this report and the information produced in 2005<sup>46</sup>—other than being different modes of communication—is that the issuing attorney generals hail from opposing political parties.<sup>47</sup>

### 1. Lack of Prosecution

In the 2005 Carter-Baker Report, a district attorney stated that their office failed to pursue voter fraud cases because voter fraud is a victimless and nonviolent crime.<sup>48</sup> This is troubling because the

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<sup>41</sup> CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>42</sup> *Id.*

<sup>43</sup> See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (Posner, J. plurality) (“[T]he absence of prosecutions is explained by the endemic underenforcement of minor criminal laws . . . and by the extreme difficulty of apprehending a voter impersonator.”).

<sup>44</sup> See Office of the Att’y. Gen., FY 2012 Performance and Accountability Report II-19 (2012) (stating that the office is “committed to investigating voting irregularities and monitoring voter registration requirements to ensure that the vote of every American is counted . . .”).

<sup>45</sup> Office of the Att’y. Gen., FY 2012 Performance and Accountability Report IV-26 (2012).

<sup>46</sup> See *Flanders*, *supra* note 30, at 105–07; CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>47</sup> The 2007 press release came out with Alberto Gonzales as the Attorney General, a Republican. The current Attorney General, whose office put out the 2012 report, is Eric Holder who is a Democrat.

<sup>48</sup> CARTER-BAKER REPORT, *supra* note 2, at 45. Recently, it appears that prosecutors are going after people who are casting fraudulent absentee ballots. See Sean Flynn, Comment, *One Person, One Vote, One Application: District Court Decision in Ray v. Texas Upholds Texas Absentee Voting Law That Disenfranchises Elderly and Disabled Voters*, 11 SCHOLAR 469, 491–94 (2009) (discussing Texas’s absentee voting laws and how *Crawford* was applied to the *Ray v. Texas* case); Kimball Perry, *Nun Pleads Guilty to Voter Fraud; Escapes*

officials entrusted to enforce the laws are picking and choosing which laws they will enforce. In the past, failure to prosecute violations of voting laws has resulted in the termination of a U.S. Attorney.<sup>49</sup> Esteemed justices have noted this lack of enforcement.<sup>50</sup> Judge Richard Posner stated that “the absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events). . . .”<sup>51</sup>

Critics of voter ID laws use the lack of empirical data to show that instances of voter fraud are insignificant. Spencer Overton, a commissioner of the Carter-Baker Commission and critic of photo ID laws,<sup>52</sup> criticized photo ID proponents’ defense that measuring the extent of voter fraud is challenging because of the difficulty in detecting instances of fraud.<sup>53</sup> In his article, Commissioner Overton discussed a survey of every Board of Election in the state of Ohio that found only four instances of fraud in 9,078,728 ballots cast between the 2002 and 2004 general elections.<sup>54</sup> In calling for more studies on the extent of voter fraud, Overton admits that even if prosecutors strictly adhere to election laws the number of cases that would result still would not reflect the amount of fraud that occurs.<sup>55</sup>

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*Prison*, Cincinnati.com (Apr. 16, 2013), <http://news.cincinnati.com/article/20130416/NEWS0107/304160065/Nun-pleads-guilty-voter-fraud-escapes-prison>.

<sup>49</sup> David M. Driesen, Essay, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 712–13 (2008) (discussing the firing of U.S. Attorney for New Mexico David C. Iglesias).

<sup>50</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 953–54 (7th Cir. 2007).

<sup>51</sup> *Id.* at 953.

<sup>52</sup> CARTER-BAKER REPORT, *supra* note 2, at 96; Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633 (2007).

<sup>53</sup> Overton, *supra* note 52, at 653.

<sup>54</sup> *Id.* at 654 (citing Coalition on Homelessness and Housing in Ohio & League of Women Voters in Ohio, *Let the People Vote: A Joint Report on Election Reform Activities in Ohio* (2005), available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>). This resulted in a percentage of .000044. *Id.* Overton then discussed that if you further expanded the survey to cover up to the release of the Carter-Baker Report that percentage would only raise to .000045%. *Id.* (“Examined in the context of the 196,139,871 ballots cast between October 2002 and August 2005, this represents a fraud rate of 0.000045%.”).

<sup>55</sup> *Id.* at 655 (“Even if prosecutors vigorously pursue voter fraud, however, the number of fraud cases charged probably does not capture the total amount of voter fraud.”).

## 2. Lack of Properly Trained Poll Workers

An essential part of administering an election is the poll worker. They are front line workers who directly interact with voters more than the actual candidates do.<sup>56</sup> The question remains whether the poll workers are capable enough to be in charge of such an important task. The job of poll worker is often under attack and considered a thankless job.<sup>57</sup> These perceptions have resulted in the securing of poll workers being one of the biggest challenges to overcome in administering an election.<sup>58</sup>

Normally, a poll worker's job consists of at least one day a year and during normal business hours.<sup>59</sup> These positions often offer less than minimum wage and require the individual to forgo their regular job responsibilities.<sup>60</sup> This results in a workforce that is composed of students and senior citizens.<sup>61</sup>

If acquiring a workforce to work the polls was not challenging enough, the workers need proper training as well.<sup>62</sup> Article I, Section 4

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<sup>56</sup> Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 273 (2008) (“Poll workers serve in the front lines of Election day.”).

<sup>57</sup> See Brittany Wallman and Buddy Nevins, *Poll Workers Point Finger at Oliphant*, South Florida Sun Sentinel (Sept. 12, 2012), [http://articles.sun-sentinel.com/2002-09-12/news/0209120161\\_1\\_poll-workers-elections-miriam-oliphant-oliphant-s-office](http://articles.sun-sentinel.com/2002-09-12/news/0209120161_1_poll-workers-elections-miriam-oliphant-oliphant-s-office) (“Working the precincts is a thankless job.”); but see Press Release, California Secretary of State Debra Bowen, California’s Longest-Serving Poll Worker Honored in San Francisco (Nov. 6, 2012), available at <http://www.sos.ca.gov/admin/press-releases/2012/db12-109.pdf>.

<sup>58</sup> Note, *Toward A Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2324 (2005) (“In planning for elections, the two biggest challenges are securing polling sites and securing workers.”) (footnote omitted).

<sup>59</sup> *Id.* at 2332.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See Benson, *supra* note 56, at 273–76; Gilda R. Daniels, *Outsourcing Democracy: Redefining Public-Private Partnerships in Election Administration*, 88 DENV. U. L. REV. 237, 268 (2010) (“Proper poll worker training can serve as the difference between a smooth election and a troubled one.”). See generally Note, *supra* note 58; Douglas M. Spencer and Zachary S. Markovits, *Long Lines at Polling Stations? Observations from an Election Day Field Study*, 9 ELECTION L.J. 3 (2010); and Susan A. MacManus, *Voter Education: The Key to Election Reform Success Lessons from Florida*, 36 U. MICH. J.L. REFORM 517 (2003).

of the Constitution allows state governments to control the administration of elections with some oversight.<sup>63</sup> This allows the state to either regulate the manner of the training or delegate it to a municipality level of government.<sup>64</sup> The training itself can be challenging to comprehend for the workers.<sup>65</sup> Training for poll workers can last anywhere from under twenty minutes to several hours.<sup>66</sup>

First, senior citizens are not familiar with computerized systems that collide with the attempt to modernize voting equipment.<sup>67</sup> Devoting extra time to ensure seniors are familiar with the equipment does not ensure they are properly trained for the malfunction of the equipment.<sup>68</sup> Second, reports of disgruntled or caustic poll workers are regularly reported in every election.<sup>69</sup> Sensitivity training has been suggested to be included in the training process, which in light of the reports is not an unreasonable request.<sup>70</sup> Lastly, it can be said that poll

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<sup>63</sup> U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”); Benson, *supra* note 56, at 272.

<sup>64</sup> See Note, *supra* note 58, at 2323–27 (discussing the lack of uniformity of election administration throughout the different regions of the United States).

<sup>65</sup> Benson, *supra* note 56, at 276 (quoting a Washington Post article from 2006, “[many poll workers] are well into their retirement years, and the technology changes can be daunting for some of those who didn’t grow up using computers.”).

<sup>66</sup> *Id.* (citing Project Vote, Plight of the Poll Worker 4 (2006)) (“A recent report noted that in Philadelphia in 2006, training for poll workers lasted only 17 minutes, while only 7 minutes were spent on explaining the set up and operation of voting machines.”); see also Bruce McPherson, CALIFORNIA DEPARTMENT OF STATE, POLL WORKER TRAINING GUIDELINES 23 (2006) (describing the amount of time dedicated to training poll workers).

<sup>67</sup> See Benson, *supra* note 56 at 276.

<sup>68</sup> *Id.* at 275–76 (detailing the extent of technology related problems that could arise and the steep learning curve facing many poll workers).

<sup>69</sup> See, e.g., John Tanner, *Effective Monitoring of Polling Places*, 61 BAYLOR L. REV. 50, 57–59 (2009) (detailing the hostility Hispanic voter received when attempting to communicate with poll workers).

<sup>70</sup> See Benson, *supra* note 56, at 274–75; U.S. ELECTION ASSISTANCE COMMISSION, SUCCESSFUL PRACTICES FOR POLL WORKER RECRUITMENT, TRAINING, AND RETENTION 127 (2007), available at <http://www.eac.gov/assets/1/Page/Section%2020-%20Training.pdf>.

workers are not properly trained to deal with a diverse voting populace.<sup>71</sup> While poll workers are not required to be bilingual, polling locations are required “to provide limited-English speaking American citizens with a full and meaningful opportunity to cast ballots.”<sup>72</sup>

Lack of training presents an opportunity for people to engage in voter fraud. The Carter-Baker Report noted that society has grown to the point that we cannot expect poll workers to recognize everybody that comes before them to vote.<sup>73</sup> Due to this fact, reform of the way poll workers are trained for elections needs to take place.<sup>74</sup> With the current training, we cannot expect the poll workers to be able to spot voting fraud when it occurs.<sup>75</sup> Without the poll workers noticing fraudulent activity, evidence is not preserved. In turn, without evidence, prosecutors cannot easily bring criminal charges against alleged fraudulent voters.

### 3. Bloated Registration Lists

New technology is not the cause of bloated voter registration lists. Bloated registration lists and their manipulation was noted in popular culture before the Help America Vote Act made changes to registration lists.<sup>76</sup> These lists can become bloated through the failure of election officials to maintain the lists.<sup>77</sup>

<sup>71</sup> See, e.g., Tanner, *supra* note 69 at 57–59.

<sup>72</sup> See James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195, 199 (2006–2007).

<sup>73</sup> CARTER-BAKER REPORT, *supra* note 2, at 18.

<sup>74</sup> *Id.* at 50 (discussing how inadequate training can result in irregularities at the polls); James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 265–66 (2011) (discussing voter intimidation and how poll workers are not properly trained to identify it); see Tanner, *supra* note 69, at 55 (calling for changes in the way poll monitors operate).

<sup>75</sup> *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007).

He enters the polling place, gives a name that is not his own, votes, and leaves. If later it is discovered that the name he gave is of a dead person, no one at the polling place will remember the face of the person who gave that name, and if someone did remember it, what would he do with the information?

*Id.*

<sup>76</sup> See *Black Sheep*, Paramount Pictures (1996).

<sup>77</sup> See Overton, *supra* note 52, at 649.

Registration rolls become bloated because election officials fail to remove dead voters, voters that have moved out of the area, or convicted felons.<sup>78</sup> Fraudulent voters target the names that election officials fail to remove.<sup>79</sup> While most choose not to believe that people would engage in this type of activity, it does happen.<sup>80</sup> Different scenarios play out for the different situations. Normally, when a person dies, notice will be given to all appropriate agencies.<sup>81</sup> In some states when a person is convicted of a felony he is stripped of his right to vote.<sup>82</sup> In the case of election rolls, the names remain on registration rolls until an election official removes them.<sup>83</sup> Voters who move also

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<sup>78</sup> Brian C. Crook, Note, *Crawford v. Marion County Election Board: A Picture is Worth a Thousand Words and Exactly One Vote*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 373, 383 (2009) (“To support this proposition, the Court referred to a newspaper article that described Indiana’s bloated voter rolls; the article stated that the rolls include names of persons ‘who had either moved, died or were not eligible to vote because they had been convicted of felonies.’”) (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008)).

<sup>79</sup> See, e.g. Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 744 (2008).

With the limits . . . the lists have become bloated with the names of people who have moved, died, committed felonies, or never existed in the first place, thus making the lists ‘virtually unusable’ as means of deterring fraud. This development has increased the pressure on polling places as the front lines in the effort to prevent ‘the unscrupulous’ from taking advantage of the ‘opportunities to vote in the name of someone whom they can safely predict will not show up at the polls to challenge them.’

*Id.* (footnotes omitted).

<sup>80</sup> John Wasik, *Voter Fraud: A Massive, Anti-Democratic Deception*, Forbes.com (Nov. 26, 2012), <http://www.forbes.com/sites/johnwasik/2012/11/06/voter-fraud-a-massive-anti-democratic-deception/> (“Believe me, I know plenty about voting fraud. I’m from Chicago, where countless voters were registered in graveyards and perhaps aided in the election of John F. Kennedy in 1960 thanks to Richard J. Daley’s political machine.”); Perry, *supra* note 48; and Steve Schultze and Bruce Vielmetti, *Milwaukee County Prosecutors Charge 10 with Voter Fraud*, Milwaukee-Wisconsin Journal Sentinel (Mar. 21, 2013), <http://www.jsonline.com/news/milwaukee/prosecutors-charge-10-with-voter-fraud-4t98ni8-199446341.html>.

<sup>81</sup> CARTER-BAKER REPORT, *supra* note 2, at 22 (“Death records, for example, sometimes are not provided to election officials for three or four months. . .”).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 22–23.

bloat registration rolls. These voters remain on the registration rolls until election officials receive information that they have moved.<sup>84</sup>

A common trend throughout these three classes is that notice has to be given to the election officials responsible for maintaining the registration rolls, and the current laws complicate the purging of the lists.<sup>85</sup> Most purging laws require the election official to contact the voter that they are attempting to remove in order to properly notify the voter that they are about to be removed from the registration rolls.<sup>86</sup> The most common tactic used by election officials is the United States Postal Service.<sup>87</sup> In some jurisdictions, even if election officials do not receive a response, or the voter confirms that they are no longer eligible to vote, the laws still make it difficult to remove the names from the registration lists.<sup>88</sup>

The courts have recognized that bloated registration lists contain the potential for fraudulent votes. In *Crawford v. Marion County Election Board*, Justice Stevens pointed to Indiana's bloated registration lists as a justifiable reason to have a voter ID law.<sup>89</sup> Bloated lists create the potential for a fraudulent voter to assume a

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; Tim Humphries, *How the Chad Changed the National Image of the State of Florida, and What It Means to Voters*, 37 SUM. ARK. LAW. 16, 18 (2002) ("In 1993, Congress passed the National Voter Registration Act, or 'Motor Voter,' to make voter registration more accessible and to make it more difficult to purge voters from the rolls."); Frank Askin, *A View From the Trenches: Telling it to the Judge on Election Day*, 253 AUG. N.J. LAW. 44, 46 (2008); Tokaji, *supra* note 10, at 469.

<sup>86</sup> See Gregory C. Schaecher, *Pennsylvania's Nonvoting Purge Law and Section 2 of the Voting Rights Act of 1965: Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 28 CREIGHTON L. REV. 1337, 1341 (1995) (discussing the constitutional challenge to Pennsylvania's purging law); Askin, *supra* note 85, at 18.

<sup>87</sup> Steve Barber, et. al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 500 (1988).

<sup>88</sup> Humphries, *supra* note 85, at 17 ("In 1993, Congress passed the National Voter Registration Act, or 'Motor Voter,' to make voter registration more accessible and to make it more difficult to purge voters from the rolls."); Askin, *supra* note 85, at 46.

<sup>89</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196–97 (2008) ("Even though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification.").

person's identify in order to sway an election. Further, legal voters can potentially cast double ballots, one in their legal polling place and one in their former. Additionally, felons can attempt to exercise their former right, which in the vast majority of states violates the law.<sup>90</sup>

While it may not be intentional, our electoral system is in fact encouraging voter fraud. Prosecutors fail to pursue alleged cases of voter fraud for several reasons. One of the reasons is for a lack of evidence. Evidence is necessary to prosecute a case; election workers are not trained to identify voter fraud, nor to preserve the vital evidence needed for prosecution. If election officials properly maintained registration lists in order to prevent them from becoming bloated with ineligible voters, then fraudulent voters would have a harder time attempting to cast fraudulent ballots.

### **B. Why Stop Voter Fraud?**

This section will discuss three reasons why we should stop voter fraud: to prevent vote dilution, to maintain ballot integrity, and to ensure citizen involvement.

#### **1. Vote Dilution**

The Supreme Court has solidified the standard of one person, one vote.<sup>91</sup> The occurrence of voter fraud nullifies a person's one vote. While it is noted that a legitimate vote against ones candidate acts in the same manner—the difference is that a fraudulent vote causes vote dilution that would not have occurred but for the fraudulent vote.<sup>92</sup> This principle developed in two reapportionment cases.<sup>93</sup>

*Baker v. Carr* challenged the way an amendment to the Tennessee Constitution reapportioned legislative districts.<sup>94</sup> Voters from various counties in Tennessee brought suit alleging that the 1901 amendment caused the debasement (dilution) of their votes, which violated the

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<sup>90</sup> Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 1, 1 (2008) (“almost every state in the Union—forty-eight out of fifty—forbids felons from voting in various degrees”) (footnote omitted).

<sup>91</sup> *Reynolds v. Sims*, 377 U.S. 533, 557 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963)).

<sup>92</sup> Flanders, *supra* note 30, at 112–15.

<sup>93</sup> *Reynolds*, 377 U.S. at 536–37; *Baker v. Carr*, 369 U.S. 186, 187 (1962).

<sup>94</sup> *Carr*, 369 U.S. at 187.

Equal Protection Clause of the Fourteenth Amendment.<sup>95</sup> The District Court originally dismissed the case for lack of jurisdiction and because the plaintiffs failed to state a claim for which relief could be granted.<sup>96</sup> In reviewing the facts, the Supreme Court noted the state failed to pass any bill dealing with reapportionment of the districts since the 1901 amendment.<sup>97</sup> The complaint alleged that the amendment made apportionment arbitrary and went against any “constitutional formula” for apportionment.<sup>98</sup> The plaintiffs then sought to have the district court invalidate the amendment and formulate an appropriate reapportionment system until the state created a new system.<sup>99</sup> Justice Brennan, writing for the majority, held that the district court did in fact have jurisdiction and dismissal was in error.<sup>100</sup> The court acknowledged that a voter has a justiciable issue, which federal courts can adjudicate, when the apportionment standards debase or dilute a person’s right to vote.<sup>101</sup>

In *Reynolds v. Sims*, the Supreme Court once again faced an Equal Protection Clause claim based on a state’s reapportionment plan.<sup>102</sup> The original plaintiffs in this class action hailed from Jefferson County, Alabama.<sup>103</sup> At the turn of the Twentieth Century, Alabama’s Constitution allowed for 105 seats in its House of Representatives.<sup>104</sup> In 1903, the State created a new county and amended its constitution to create an additional seat.<sup>105</sup> Further, the amendment allowed each new county, going forward, one additional representative to the house.<sup>106</sup> The plaintiffs alleged that from 1911 until they filed suit, the State failed to reapportion the districts every ten years after the census, as required by the State Constitution.<sup>107</sup> This resulted in discrimination

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<sup>95</sup> *Id.* at 187–88.

<sup>96</sup> *Id.* at 188.

<sup>97</sup> *Id.* at 192–93.

<sup>98</sup> *Id.* at 192.

<sup>99</sup> *Id.* at 195.

<sup>100</sup> *Id.* at 188.

<sup>101</sup> *Id.* at 234.

<sup>102</sup> *Reynolds v. Sims*, 377 U.S. 533, 540 (1964).

<sup>103</sup> *Id.* at 537.

<sup>104</sup> *Id.* at 539.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 540.

against residents of counties like Jefferson.<sup>108</sup> Complicating the matter was the fact that until this case, the state court had indicated it would refuse to interfere with the legislature's reapportionment policy.<sup>109</sup>

The United States Supreme Court held that the Equal Protection Clause required the state to apportion its state legislature on a population basis.<sup>110</sup> To drive home the point, Chief Justice Warren stated, "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."<sup>111</sup> Chief Justice Warren then discussed that the district court was correct in holding that anything other than a population basis for reapportionment was unconstitutional.<sup>112</sup> However, Chief Justice Warren disagreed with the District Court's statement on the constitutionality of the Alabama Senate's plan for reapportionment.<sup>113</sup> In concluding his opinion, Chief Justice Warren approved the District Court's temporary fashioning of two proposed plans— which were invalid if considered separately—to serve as the reapportionment plan for the 1962 elections.<sup>114</sup> Chief Justice Warren also noted the District Court correctly avoided interfering further with the Legislature's plans for valid reapportionment for the 1966 elections, unless Alabama failed to reapportion again.<sup>115</sup>

Even though these two cases explore apportionment, they each drive home one key point—there will be no toleration of intentional

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 541.

<sup>110</sup> *Id.* at 583–84.

<sup>111</sup> *Id.* at 568.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 569

[W]e conclude that the deviations from a strict population basis are too egregious to permit us to find that that body, under this proposed plan . . . Although about 43% of the State's total population would be required to comprise districts which could elect a majority in that body, only 39 of 106 House seats were actually to be distributed on a population basis, as each of Alabama's 67 counties was given at least one representative, and population-variance ratios of close to 5-to-1 would have existed.

*Id.*

<sup>114</sup> *Id.* at 586–87.

<sup>115</sup> *Id.* at 587.

dilution of votes. Voter fraud causes dilution, which in turn disenfranchises voters. When this occurs, less people are willing to take the time out of their busy day in order to cast ballots in a system they distrust. The dilution that fraud causes results in voters abandoning their belief that their vote matters and creates a serious problem for our democratic society. If this were not true then why would Chief Justice Warren focus heavily on the five to one ratio in Reynolds?<sup>116</sup>

## 2. Ballot Integrity

Integrity is a hard enough characteristic to define in a person, and when it comes to elections it boils down to one element that everybody requires, trust. As a whole, American society has become less trusting of everything. This includes our electoral system.<sup>117</sup> When voters suspect that fraud played a role in an election, they lose trust in the system.<sup>118</sup> As the Carter-Baker Report stated, “[f]raud in any degree and in circumstance is subversive to the electoral process.”<sup>119</sup> The responses states have taken since the 2000 election and the Help America Vote Act demonstrate the desire to combat voter fraud.<sup>120</sup>

What does this mean? To put it simply, every voter wants to make sure that they participate in a system that is trustworthy.<sup>121</sup> “[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”<sup>122</sup> More often than not, if a state uses integrity as a defense to a voting regulation, the court will uphold the regulation.<sup>123</sup>

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<sup>116</sup> *Id.* at 569; Flanders, *supra* note 30, at 115.

<sup>117</sup> *See* CARTER-BAKER REPORT, *supra* note 2, at iii.

<sup>118</sup> *See id.* at ii; Flanders, *supra* note 30, at 110–15.

<sup>119</sup> CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>120</sup> *See infra* Part III.A.2.

<sup>121</sup> *See* CARTER-BAKER REPORT, *supra* note 2, at 18 (discussing how potential fraud causes a decrease in people’s confidence in the electoral system).

<sup>122</sup> *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (citing *Anderson v. Celebrezze* 460 U.S. 780, 788 (1983)).

<sup>123</sup> Rebecca L. Covert, Casenote, *Burdick v. Takushi: Yes to Equal Voice in Voting, No to a Fundamental Right to Vote for any Particular Candidate*, 14 U. HAW. L. REV. 715, 742 (1992).

The integrity defense was upheld when it allowed different but equitable routes to the ballot box, established waiting periods

Unfortunately, the integrity of our electoral system has become a political argument.<sup>124</sup> “[I]ntegrity of the ballot is a hallmark of democracy.”<sup>125</sup> Ensuring the ballot’s integrity is as simple as enforcing the laws in place concerning voter fraud;<sup>126</sup> however, as already discussed there appears to be an issue with doing that.<sup>127</sup> As the Carter-Baker Commission stated, “[t]he best way to maintain ballot integrity is to investigate all credible allegations of election fraud and otherwise prevent fraud before it can affect an election.”<sup>128</sup>

Voter fraud exposes the deficiency in our electoral system. Our prosecutors are reluctant to bring charges at all, despite whether or not they have the evidence to do so. Further, our poll workers are ill prepared to identify or even preserve the evidence associated with a case of voter fraud. Election officials have not helped prosecutors or poll workers by allowing the registration rolls to become bloated. This in turn has resulted in the dilution of legitimate votes calling into question the integrity of the system. Due to this interplay, states have taken it upon themselves to ensure the integrity of the ballot by implementing voter ID laws. The next two sections will discuss the various state voter ID laws, and show that a cardless option is the better solution to prevent voter fraud.

### III. THE RISE OF PHOTO ID LAWS

The requirement of showing identification as a prerequisite to do almost anything is commonplace in today’s society.<sup>129</sup> Nobody gives a

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before voters themselves could switch party affiliation to vote in another party’s primary, and prohibited a ballot position to an independent candidate previously affiliated in a given period of time with a political party.

*Id.* (footnotes omitted).

<sup>124</sup> CARTER-BAKER REPORT, *supra* note 2, at 2.

<sup>125</sup> *Id.* at 45.

<sup>126</sup> *Id.* (“it is imperative that election officials guarantee eligible voters the opportunity to vote, but only once”).

<sup>127</sup> *See supra* Part II.A.1.

<sup>128</sup> CARTER-BAKER REPORT, *supra* note 2, at 45.

<sup>129</sup> Michael J. Kasper, *Where Are Your Papers? Photo Identification as a Prerequisite to Voting*, 3 FLA. A & M U. L. REV. 1, 2 (2008) (discussing how in the aftermath of September 11, 2001, Americans have become accustomed to presenting identification at various locations).

second thought to showing identification to purchase alcohol or even to board a plane. Some states extended these identification requirement to voting. This part will discuss the current law that enabled states to enact strict voter ID laws. Further, this part will discuss the standard of review that the Supreme Court has determined appropriate in reviewing state voter ID laws. This part finishes with discussing the cases involving the Indiana, Georgia, and Arizona voting ID laws.

### A. Current Law

Two Congressional acts have had an indirect influence in assisting states in enacting voter ID laws, the National Voter Registration Act of 1993,<sup>130</sup> and the Help America Vote Act.<sup>131</sup>

#### 1. National Voter Registration Act of 1993

In an effort to enhance voter participation in federal elections, Congress passed the National Voter Registration Act of 1993 (“NVRA”), which President Bill Clinton signed into law on May 20, 1993.<sup>132</sup> Congress wanted all levels of government to implement the Act to enhance eligible voter participation, protect the integrity of the electoral process, and ensure the accuracy of current registration rolls.<sup>133</sup> Part Four of NVRA detailed the new national standard for voter registration.<sup>134</sup> Congress required states to establish procedures to accept various methods of registration.<sup>135</sup> Of importance is Part Three, which details the requirements associated with the simultaneous applications for voter registration and a driver’s license.<sup>136</sup>

Additionally, Part Three established that any change of address form filed in accordance with the law will serve a dual purpose—notice of a change of address for the department of motor vehicles and for voter registration.<sup>137</sup> NVRA requires the state to designate a

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<sup>130</sup> National Voter Registration Act of 1993, 42 U.S.C. § 1973gg (2006).

<sup>131</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 42 U.S.C.).

<sup>132</sup> 42 U.S.C. § 1973gg; Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 46–47 (1996).

<sup>133</sup> § 1973gg(b).

<sup>134</sup> § 1973gg-4.

<sup>135</sup> § 1973gg-2(a).

<sup>136</sup> § 1973gg-3.

<sup>137</sup> § 1973gg-3(a)(1).

portion of the driver's license application to serve as a voter registration form, which must comply with specific requirements detailed within the act.<sup>138</sup> These provisions include requiring proof of eligibility,<sup>139</sup> a signature under the penalty of perjury,<sup>140</sup> and statements regarding registration.<sup>141</sup> Part Three also requires that the motor vehicle authority transmit the accepted registration form within ten days.<sup>142</sup>

## 2. Help America Vote Act of 2002

The 2000 Presidential Election caused voters to question our electoral system.<sup>143</sup> Congress responded by passing the Help America Vote Act (“HAVA”) of 2002, which required a number of changes to federal elections.<sup>144</sup> One provision that took hold was the requirement of photo ID for first time in-person voters, in certain circumstances.<sup>145</sup> This section will detail that provision.<sup>146</sup>

HAVA was a bipartisan effort that attempted to play into each political party's concerns—access to the ballot for Democrats and protecting the integrity of the electoral process for Republicans.<sup>147</sup> One

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<sup>138</sup> § 1973gg-3(c).

<sup>139</sup> § 1973gg-3(c)(2)(C)(i).

<sup>140</sup> § 1973gg-3(c)(2)(C)(iii).

<sup>141</sup> § 1973gg-3(c)(2)(D)(iii).

<sup>142</sup> § 1973gg-3(e)(1).

<sup>143</sup> *See supra* Part I.

<sup>144</sup> Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 42 U.S.C.).

<sup>145</sup> 42 U.S.C. § 15483(b). Voters who have not voted in a jurisdiction for Federal office must present either a valid form of photo identification, or a “current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” *Id.* at (b)(2)(A).

<sup>146</sup> While HAVA mandates states to require first time voters who registered via mail to provide photo IDs, Congress allowed some states to opt out of that provision. *See* § 15483(a)(2)(D).

(D) Special rule for certain States in the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5 U.S.C. § 552a note), the provisions of this paragraph shall be optional.

*Id.*

<sup>147</sup> Ansolabehere, *supra* note 26, at 613.

of the key parts to the act was allowing voters to register by mail.<sup>148</sup> However, when these registrants appeared at the polls for the first time, they would have to present a valid form of photo ID, or a government document, utility bill, bank statement, or paycheck that showed their name and address in order to vote.<sup>149</sup> If they did not have appropriate identification, they were allowed to cast a provisional ballot.<sup>150</sup> That ballot would be counted if the voter presented valid identification at the appropriate location within the allotted time.<sup>151</sup> While requiring identification for first time voters registering via mail was expressly in the act, some states took it upon themselves to move forward and begin instituting photographic voter ID laws for every voter appearing at the polls.<sup>152</sup>

### **B. Photo ID Cards as a Voting Requirement**

States have required varying degrees of identification in order to vote.<sup>153</sup> The Supreme Court has adopted a sliding scale of scrutiny to determine the constitutionality of the states' voter ID laws.<sup>154</sup> This

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<sup>148</sup> 42 U.S.C. § 15483(b).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at § 15483 (b)(2)(B).

<sup>151</sup> § 15482 (a).

<sup>152</sup> Voter Identification Requirements, *infra* Part III.B.2.

<sup>153</sup> Of the thirty states that require identification, four have a strict photo ID law in effect: Georgia, Indiana, Kansas, and Tennessee. *Voter Identification Requirements*, *supra* note 28. Several states have attempted to implement strict photo ID laws but for one reason or another are not being enforced: Mississippi is awaiting pre-clearance under Section 5 of the Voting Rights Act; Wisconsin's strict photo ID law was found to be unconstitutional; Virginia's legislature has passed and the governor has signed a new strict photo ID law which will go in effect July 1 of 2014; Arkansas has a strict photo ID law that their state senate recently overrode the governor's veto. *Id.* Seven states have less strict photo ID laws in effect: Florida, Hawaii, Idaho, Michigan, Louisiana, New Hampshire, and South Dakota. *Id.* Nineteen states have a non-photo ID law in place: Alabama, Alaska, Arizona, Arkansas, Connecticut, Colorado, Delaware, Kentucky, Missouri, Montana, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Washington. *Id.* The current formula for evaluating preclearance claims was struck down in *Shelby Cnty. v. Holder*. *Shelby Cnty. v. Holder*, 570 U.S. \_\_\_\_, No. 12-96, slip op. at \*24 (2013), available at [http://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf).

<sup>154</sup> Bryan P. Jensen, Note, *Crawford v. Marion County Election Board: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of Burdick*, 86 DENV. U. L. REV. 535, 535-36 (2009).

section will discuss the *Burdick* Test that is used to determine the constitutionality of voting laws and several state laws that courts have upheld.

1. Standard of Review: A Sliding Scale of Scrutiny: The *Burdick* Test

The Supreme Court held and reaffirmed that the appropriate standard is a sliding scale of scrutiny.<sup>155</sup> The standard, commonly known as the *Burdick* Test, has been criticized for not focusing on the fundamental right of voting,<sup>156</sup> but focusing on the balance between voters' interest in voting and the governmental interests in preventing fraud.<sup>157</sup>

The *Burdick* Test initially surfaced in a case about a candidate's access to the ballot.<sup>158</sup> In *Anderson v. Celebrezze*, Anderson was an independent candidate for President of the United States.<sup>159</sup> Anderson's supporters acquired the necessary signatures and documents for Anderson to appear on the ballot for the 1980 Presidential Election.<sup>160</sup> However, when he announced his candidacy,<sup>161</sup> Ohio's independent candidate filing deadline of March 20<sup>th</sup> had already passed.<sup>162</sup> In fact, Anderson's supporters did not file the appropriate paperwork until May 16.<sup>163</sup> Celebrezze, Ohio's Secretary of State, refused to accept the nomination petition because the deadline had passed.<sup>164</sup> Anderson subsequently filed suit challenging the constitutionality of Ohio's early filing deadline.<sup>165</sup>

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<sup>155</sup> See *infra* Part III.B.2.

<sup>156</sup> Ellis, *supra* note 12, at 1050.

<sup>157</sup> *Id.* ("The Court . . . articulated a standard that required the balancing of the interests of the voter in voting with the interests of the government in administering fair elections.").

<sup>158</sup> *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983); Ellis, *supra* note 12, at 1051.

<sup>159</sup> *Anderson*, 460 U.S. at 782.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 783.

The United States District Court for the Southern District of Ohio agreed with Anderson and ordered his name placed on the ballot.<sup>166</sup> The reasoning: first, the early filing deadline placed an unreasonable burden on Anderson and his supporters' First Amendment rights;<sup>167</sup> and second, the Court stated that this denial diluted his supporters' value of votes in other states.<sup>168</sup> By allowing a different filing deadline for candidates from different political parties, the early deadline violated Anderson's equal protection rights under the Fourteenth Amendment.<sup>169</sup> Celebrezze appealed the ruling to the Court of Appeals for the Sixth Circuit, which reversed the District Court's decision.<sup>170</sup> The Sixth Circuit reasoned that the deadline "ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign."<sup>171</sup> The Supreme Court granted certiorari<sup>172</sup> in order to address a growing conflict amongst the circuit courts.<sup>173</sup>

Writing for the majority, Justice Stevens stated, "in approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."<sup>174</sup> Quoting *Williams v. Rhodes*, Justice Stevens noted that "the right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'"<sup>175</sup> However, Justice Stevens noted that states have an interest in conducting "fair and honest" elections in conformance with our "democratic process."<sup>176</sup> Challenges to states' election laws could not be solved by a "litmus-paper test."<sup>177</sup> Justice Stevens then articulated the beginning of the *Burdick* Test by stating one must "first

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 784.

<sup>171</sup> *Anderson v. Celebrezze*, 664 F.2d 554, 563 (6th Cir. 1981).

<sup>172</sup> *Anderson v. Celebrezze*, 456 U.S. 960, 960 (1982).

<sup>173</sup> *Anderson*, 460 U.S. at 786.

<sup>174</sup> *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

<sup>175</sup> *Id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

<sup>176</sup> *Id.* at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

<sup>177</sup> *Id.* at 789 (quoting *Storer*, 415 U.S. at 730 (1974)).

consider the character and magnitude of the asserted injury to the rights protected . . . then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule.”<sup>178</sup>

Using this balancing standard the majority reversed the Sixth Circuit Court of Appeals ruling.<sup>179</sup> First, in looking at the burden imposed, the majority pointed out that the early filing deadline caused independent candidates to be at a competitive disadvantage with major political parties.<sup>180</sup> Second, the majority pointed out that not only did the early filing deadline burden the candidate, but also the deadline burdened voters’ right to associate their votes with others.<sup>181</sup>

The Court then analyzed the three interests that Ohio brought forth to justify the early deadline.<sup>182</sup> Ohio first brought up the interest of voter education to justify the regulation.<sup>183</sup> The Court noted that educated voters are a legitimate interest for the state and a principle reason why the framers of the Constitution established the Electoral College.<sup>184</sup> However, advances in society have diluted voter education as a legitimate state interest.<sup>185</sup> Next, Ohio articulated the state’s interest in equal treatment.<sup>186</sup> The Court dismissed this argument due to the differences between an independent candidate and major parties candidates.<sup>187</sup> Finally, Ohio discussed the state’s need for political stability as a justification for the law.<sup>188</sup> The Court dismissed this for being both too narrow and too broad.<sup>189</sup> Justice Stevens then concluded that the burden on voters outweighed Ohio’s justifications for the law.<sup>190</sup>

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<sup>178</sup> *Id.* at 789.

<sup>179</sup> *Id.* at 786.

<sup>180</sup> *Id.* at 790.

<sup>181</sup> *Id.* at 793–95.

<sup>182</sup> *Id.* at 796–805.

<sup>183</sup> *Id.* at 796–98.

<sup>184</sup> *Id.* at 796.

<sup>185</sup> *Id.* at 796–97.

<sup>186</sup> *Id.* at 799–801.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 801–05.

<sup>189</sup> *Id.* at 805.

<sup>190</sup> *Id.* at 806.

The second case that established the standard is the namesake of the test, *Burdick v. Takushi*.<sup>191</sup> *Burdick* focused on Hawaii's restrictions on write-in ballots.<sup>192</sup> *Burdick*, a voter, challenged Hawaii's state law that lacked a write-in provision.<sup>193</sup> The District Court for the District of Hawaii invalidated the state law as unconstitutional.<sup>194</sup> The Ninth Circuit Court of Appeals stated that the burden was justified by the state's interests in regulating elections and reversed the District Court's decision.<sup>195</sup> The Supreme Court granted certiorari to resolve the matter.<sup>196</sup>

Justice White wrote the opinion for the majority and held the law constitutional.<sup>197</sup> The majority first noted that *Burdick* incorrectly argued that any restriction on the right to vote was subject to strict scrutiny.<sup>198</sup> Further, Justice White noted, "[e]lection laws will invariably impose some burden upon individual voters."<sup>199</sup> Justice White reaffirmed the standard used in *Anderson*, but added that the claimed violations of First and Fourteenth Amendment rights needed to be analyzed prior to any balancing of voter rights and governmental interests.<sup>200</sup> Before analyzing the state law, the Court pointed out that a state's justification for the law will be sufficient if they are "reasonable, nondiscriminatory restrictions."<sup>201</sup> Using this "sliding scale" the Court first noted three ways in which Hawaii allowed a candidate to appear on the ballot.<sup>202</sup> Further, the Court noted its willingness to consider ballot access and voting rights claims

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<sup>191</sup> 504 U.S. 428 (1992).

<sup>192</sup> See Ellis, *supra* note 12, at 1052.

<sup>193</sup> *Burdick*, 504 U.S. at 430 (1992).

<sup>194</sup> *Id.* at 430–31.

<sup>195</sup> *Id.* at 432.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 440.

<sup>198</sup> *Id.* at 432.

<sup>199</sup> *Id.* at 433.

<sup>200</sup> *Id.* at 434; Ellis, *supra* note 12, at 1052.

<sup>201</sup> *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983)).

<sup>202</sup> *Id.* at 435–36 (filing a petition 150 days before an election, through the established party route, and designated nonpartisan ballot).

similarly.<sup>203</sup> In analyzing the burdens imposed by the state law, the Court concluded they were minimal on the voter.<sup>204</sup>

Because of the minimal burden, Justice White expressed that Hawaii only had to show a legitimate interest in burdening voters.<sup>205</sup> Hawaii easily met this burden by bringing forth two arguments.<sup>206</sup> First, that the law prevents “sore-loser” candidacies.<sup>207</sup> Second, Hawaii stated that the prohibition on write-ins prevented candidates from shopping parties in order to manipulate the outcome of the election.<sup>208</sup> The Court concluded that the prohibition on write-ins did not burden voters enough to make the provision unconstitutional.<sup>209</sup>

## 2. State Law Cases

In recent years, three states have attracted the most attention to regarding their photographic voter ID laws.<sup>210</sup>

### a. Indiana

In 2005, the State of Indiana enacted SEA 483, which established the state’s voter ID law.<sup>211</sup> Subsequent to its enactment, the Indiana State Democratic Party and Marion County Democrats filed suit seeking to enjoin the enforcement of the law.<sup>212</sup> The district court rejected the Democrats argument and a divided panel of the Court of Appeals affirmed.<sup>213</sup> The majority rejected the Democrats’ argument

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<sup>203</sup> *Id.* at 438.

<sup>204</sup> *Id.* at 439–40.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 440.

<sup>210</sup> These states include Georgia and Arizona. See Jeremy Redmon, *Georgia Voter Registration Law Partly Blocked*, AJC.com (June 20, 2013), <http://www.ajc.com/news/news/national-govt-politics/georgia-voter-id-law-blocked/nYP9p/>. The following states have a form of photo identification laws in effect as of 2012: Florida, Hawaii, Idaho, Kansas, Louisiana, Michigan, New Hampshire, South Dakota, and Tennessee. See *Voter Identification Requirements*, *supra* note 28. Pennsylvania has passed a voter identification law; however, that law was subject to an injunction with a ruling as to its constitutionality expected in 2013. See *id.*

<sup>211</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–86 (2008).

<sup>212</sup> See *id.* at 186–87.

<sup>213</sup> See *id.* at 187–88.

that strict scrutiny applied to the case because the law constituted a poll tax.<sup>214</sup> The Supreme Court granted certiorari.<sup>215</sup>

Justice Stevens wrote the plurality decision that affirmed the lower court's holding.<sup>216</sup> The proper standard for right to vote cases is a sliding scale of scrutiny, commonly referred to as the *Burdick* Test.<sup>217</sup> Justice Stevens acknowledged that even though there had never been a case of fraud in Indiana's history, "[t]here is no question about the legitimacy or importance of the state's interest in counting only the votes of eligible voters."<sup>218</sup> The Court next turned to the potential burden that the law put on voters.<sup>219</sup> Stevens noted that the law burdened several classes;<sup>220</sup> by providing a free identification card as well as the ability to cast a provisional ballot, Indiana was able to mitigate the burden.<sup>221</sup> The plurality concluded that, "the application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'"<sup>222</sup>

#### b. Georgia

Georgia was ahead of its time, and in 1997 had a photographic voter ID law in effect.<sup>223</sup> The State amended the law in 2005, creating a stricter law that required all voters to present valid photo ID before voting; however, if a voter lacked the identification they could obtain one for a fee.<sup>224</sup> Several organizations, including the NAACP, along with two voters challenged the law alleging the amendment violated the Twenty-Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>225</sup> The District Court granted a preliminary

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<sup>214</sup> *See id.* at 188.

<sup>215</sup> *See id.*

<sup>216</sup> *See id.* at 219.

<sup>217</sup> *See id.* at 188–91.

<sup>218</sup> *See id.* at 196.

<sup>219</sup> *See id.* at 197–200.

<sup>220</sup> *See id.* at 198–99.

<sup>221</sup> *See id.* at 199.

<sup>222</sup> *See id.* at 204 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9 (1983)).

<sup>223</sup> *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345–46 (11th Cir. 2009).

<sup>224</sup> *See id.* at 1346.

<sup>225</sup> *See id.*

injunction barring enactment of the statute, and Georgia subsequently appealed the decision.<sup>226</sup> The Georgia Legislature amended the statute before the appeal was heard.<sup>227</sup> This statute followed the same premise as the one repealed except it instituted a free identification card and a provisional ballot system.<sup>228</sup>

In February 2006, the Plaintiffs amended their original complaint and challenged the new statute.<sup>229</sup> The District Court granted a temporary injunction because the State failed to educate voters in time for that year's elections.<sup>230</sup> Georgia then instituted a voter education program that called for three separate levels of voter education.<sup>231</sup> Subsequently, Georgia was able to remove the voters as a party to the litigation by challenging standing.<sup>232</sup> The case went to trial and the District Court dismissed the case for lack of standing, but did address the merits of the case in its decision on dismissal.<sup>233</sup>

On Appeal, Circuit Judge Pryor wrote the opinion, holding that the District Court incorrectly dismissed the case for lack of standing, but correctly decided that a permanent injunction was not warranted.<sup>234</sup> After discussing why the organization and the voters had standing, Judge Pryor turned his attention to the State statute.<sup>235</sup> The NAACP and the voters argued that Georgia's interests in the statute were not "relevant and legitimate state interests 'sufficiently weighty to justify the limitation' imposed by the photo identification requirement."<sup>236</sup> Judge Pryor dismissed this argument stating that the state has all along designed the statute to prevent voting fraud.<sup>237</sup> Basing its ruling on the holding in *Crawford*, the Court explained that the District Court correctly found the burden on voters lacking IDs to be minimal.<sup>238</sup>

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<sup>226</sup> *See id.*

<sup>227</sup> *See id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.* at 1347.

<sup>230</sup> *See id.*

<sup>231</sup> *See id.* at 1347–48.

<sup>232</sup> *See id.* at 1348.

<sup>233</sup> *See id.*

<sup>234</sup> *See id.* at 1345.

<sup>235</sup> *See id.* at 1349–52.

<sup>236</sup> *See id.* at 1352–53.

<sup>237</sup> *See id.* at 1353.

<sup>238</sup> *See id.* at 1354.

Because the burden was minimal, the district court did not abuse its discretion denying the permanent injunction.<sup>239</sup>

c. Arizona

Arizona's election law has garnered the most attention in recent years.<sup>240</sup> The Supreme Court elected to hear Arizona's proof of citizenship registration law in the October 2012 term.<sup>241</sup> However, the appeal did not include the Court of Appeals decision on the state's photo ID law.<sup>242</sup>

In 2004, the citizens of Arizona passed Proposition 200, which requires registered voters to present identification in order to vote.<sup>243</sup> The initial challenge to the law occurred in 2006, which the plaintiff sought an emergency injunction.<sup>244</sup> Ultimately, the Supreme Court revoked the emergency injunction and remanded for a trial on the merits.<sup>245</sup> On remand, the district court found the identification law not to be a poll tax in violation of the Twenty-Fourth Amendment.<sup>246</sup> Gonzalez appealed and a three-judge panel affirmed the District Court's ruling.<sup>247</sup> The Court granted an en banc hearing to Gonzalez.<sup>248</sup>

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<sup>239</sup> See *id.* at 1354–55.

<sup>240</sup> See Emily Deruy, *Supreme Court Strikes Down Arizona Voter ID Law*, ABC NEWS (June 17, 2014), [http://abcnews.go.com/ABC\\_Univision/News/supreme-court-strikes-arizona-voter-id-law/story?id=19420230#.UcoSe-tQ078](http://abcnews.go.com/ABC_Univision/News/supreme-court-strikes-arizona-voter-id-law/story?id=19420230#.UcoSe-tQ078) (referencing ARIZ. REV. STAT. ANN. §§ 16-152, 16-166, 16-579 (2004)).

<sup>241</sup> The Supreme Court held oral arguments on the Arizona law case on Monday, March 18, 2013. Sup. Ct. of the U.S.: Oct. Term 2012: For the Sess. Beginning Mar. 18, 2013, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_calendars.aspx](http://www.supremecourt.gov/oral_arguments/argument_calendars.aspx). On June 17, 2013, the Supreme Court held that the NVRA preempted Arizona's law requiring residents to include additional citizenship information in order to register to vote. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. \_\_\_\_ (2013), No. 12–71, slip op. at \*18 (2013), available at [http://www.supremecourt.gov/opinions/12pdf/12-71\\_7148.pdf](http://www.supremecourt.gov/opinions/12pdf/12-71_7148.pdf).

<sup>242</sup> See *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *cert. denied sub nom.*, *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 476 (2012).

<sup>243</sup> See *Gonzalez*, 677 F.3d at 388.

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 388–89.

<sup>247</sup> See *id.* at 389.

<sup>248</sup> See *id.* at 390.

Circuit Judge Ikuta wrote the opinion for the Ninth Circuit.<sup>249</sup> The Court held that it was obvious that the district court did not err in their judgment.<sup>250</sup> According to Judge Ikuta, Gonzalez failed to establish that the state discriminated against Latinos by instituting the requirement.<sup>251</sup> Based on the District Court's findings, Ikuta stated that "Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes . . . resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice."<sup>252</sup> The lack of evidence proved critical to the Court's analysis.<sup>253</sup> In addressing whether the law constituted a poll tax, the Court said the law fell outside the poll tax realm.<sup>254</sup> Arizona's restriction was clearly within the State's power to affix voter qualifications.<sup>255</sup> Ikuta wrapped up his discussion on the ID law by stating that "any payment associated with obtaining the documents required under Proposition 200's polling place provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters . . . ."<sup>256</sup>

As all these cases show, the lack of a uniform voter identification system for has caused states to act blindly. Individual states could avoid these lawsuits if they had more direction, time, and money. A uniform system is not as farfetched as one may think; Part IV details a proposal for such a system.

#### IV. A CARDLESS SOLUTION

The Carter-Baker Report's suggestion that Congress allow states to require voters to present the REAL ID card as identification to gain access to the polls does have merit.<sup>257</sup> However, there is a better solution. While it is true that a national system that provides a voter

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<sup>249</sup> *See id.* at 387.

<sup>250</sup> *See id.* at 407.

<sup>251</sup> *See id.* at 406–07.

<sup>252</sup> *See id.* at 407.

<sup>253</sup> *See id.*

<sup>254</sup> *See id.* at 407–08.

<sup>255</sup> *See id.* at 408–10.

<sup>256</sup> *See id.* at 410.

<sup>257</sup> *See* H.R. REP. NO. 109-666, at 5–10 (2006).

identification card would be costly to maintain,<sup>258</sup> there are parts of other laws that will assist in creating a new cardless system. This part of the note will discuss a cardless solution that Congress should enact. All Congress has to do is connect the dots to previously established laws in order to fashion a workable, constitutional solution to voter fraud.

#### A. A Uniform System for the Future

States have benefited from uniform laws in different areas.<sup>259</sup> Creating a uniform system for voter ID laws will create a constitutional system that would eliminate the need to present an ID card at the polls. This cardless system has been mentioned before,<sup>260</sup> however, it was never fully developed. While the proposal called for a picture at the time of registration, or the capture of some biometric to be used to ID the voter, it would in fact restrict the number of people registering to vote. The cardless solution this Note proposes would not restrict the number of people registering.

As referenced earlier in the note, the National Voter Registration Act and Help America Vote Act changed election law by allowing a greater number of people access to register to vote. These laws have provisions within them that if connected would create a cardless system able to identify voters at the polls. The National Voter Registration Act enables citizens to register to vote at their local department of motor vehicles; to issue a driver's license, state ID card or other form of identification, the agency takes the applicant's picture. The National Voter Registration Act requires local agencies to transmit voter registration information to the appropriate election officials so that the registration rolls can be updated. In order to move to a cardless system, the local agency need only include the photographs associated with the applicant's registration information.

The National Voter Registration Act cannot do this on its own. The Help America Vote Act requires states to computerize their voter registration rolls. This would enable the system to accept the

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<sup>258</sup> See *id.* at 2–3, 22.

<sup>259</sup> One need look no further than the Uniform Commercial Code to see these benefits. See Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 949 (1995).

<sup>260</sup> See, e.g., Overton, *supra* note 52, at 678–80 (discussing alternatives to a card system such as the government collecting a picture or some form of biometrics at the time of registration).

photographs from the local agency with registration information. Once received, the local election officials can associate a picture with a name on the registration list. The new system would assist poll workers in identifying potentially fraudulent voters. This would allow poll workers to recognize voter fraud as it is occurring.

### **B. Burdenless**

Critics of voter ID laws focus on the burden that such laws put on potential voters.<sup>261</sup> This proposed cardless system is essentially burdenless. Roughly 88% of voting age citizens possess a suitable form of identification.<sup>262</sup> The vast majority of these IDs are issued by the local department of motor vehicles.<sup>263</sup> This means that the vast majority of voters already have a picture on file at the local agency where the majority of young voters register to vote.<sup>264</sup> Furthermore, this system will serve as a safe guard on bloated registration lists because the local election officials will not only be notified when somebody moves, but they will be guaranteed notice when a voter dies.

This new cardless system is also less burdensome for indigent voters. Technology has advanced to the point where one can take a picture and instantly upload it onto the internet.<sup>265</sup> In fact, within a day somebody could have a formal event and have their pictures ready the next day. This cardless system permits people unable to afford state or federally issued photo IDs to enter polling places and have their pictures taken. The logistics of this would have to be worked out from polling place to polling place in order to ensure that voter anonymity is preserved and that no ballot is ever recorded in a photograph. The

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<sup>261</sup> See generally, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012); Kasper, *supra* note 128; Neil P. Kelly, Note, *Lessening Cumulative Burdens on the Right to Vote: A Legislative Response to Crawford v. Marion County Election Board*, 19 CORNELL J.L. & PUB. POL'Y 243 (2009).

<sup>262</sup> See H.R. REP. NO. 109-666, at 4 (2006) (citing CARTER-BAKER REPORT, *supra* note 2, at 19 n.22).

<sup>263</sup> See CARTER-BAKER REPORT, *supra* note 2, at 19 n.22 (comparing driver's license records and census data reports).

<sup>264</sup> See H.R. REP. NO. 109-666, at 4.

<sup>265</sup> Such capabilities are currently available through social networking program such as Facebook, Twitter, and Instagram, through which users can upload a new picture to the Internet directly from a cell phone or digital camera.

easiest way to do this would be to designate a room for potential voters lacking a photo on record with the local election officials. A properly trained election official could capture a picture of the voter and instantly upload it onto the electronic voter registration list. At this point, the voter's picture will be in the system and poll workers can easily identify the voter to prevent fraud.

Another common problem for photographic voter ID laws is the voter who for religious or other reasons refuses to be photographed. The common thread among the state voter ID laws is the ability for voters to cast provisional ballots.<sup>266</sup> These individuals can have their ballots counted as soon as they present proper identifying materials.<sup>267</sup> This accommodation would be mandatory because otherwise the system may be declared unconstitutional for discriminating against voters of a certain religion.

### C. Passes *Burdick*

The most important feature of this new cardless system is the fact that it passes the *Burdick* Test. First, the system must be a neutral, nondiscriminatory voting regulation. As detailed above, this law will affect everybody who votes. No group is treated differently from any other. In fact, there is the ability to cast a provisional ballot for those whom it is against their religion to have their picture taken. Additionally, the cardless system allows indigent voters to have their picture taken at the polling place so their picture will be on file for the next election. For every other voter, the system requires the local motor vehicle agency to transmit pictures to election officials so that these pictures can be matched with voter registration information. The new cardless system does not single out any group; courts would consider this system neutral and nondiscriminatory.

The next prong of the *Burdick* Test is the burden the state puts on the individual voters. As established earlier, this system is essentially less burdensome for voters.<sup>268</sup> The biggest burden would be on the people that do not have a valid state or federal picture ID and this burden is only slight. These individuals would have to have their picture taken at the polling place so election officials can upload it into

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<sup>266</sup> See, e.g., GA. CODE ANN. § 21-2-417(a) (West 2006); IND. CODE § 3-11.7-5-2.5 (2011).

<sup>267</sup> This provision is similar to the Georgia and Indiana statutes. See § 21-2-417; § 3-11.7-5-2.5.

<sup>268</sup> See *supra* Part IV.B.

the system. This system accommodates individuals who cannot have a picture take for religious reason. While casting a provisional ballot does impose a slight burden, the Supreme Court has found that this burden is too slight to hold the entire voting regulation unconstitutional.<sup>269</sup> Voters casting provisional ballots can validate their address by reporting to their local election officials within an allotted time—state laws vary between two days and a week and a half,<sup>270</sup> which the Supreme Court has already held to be constitutional.<sup>271</sup>

The last prong of the *Burdick* Test questions the legitimacy of the state interest in the law. As detailed in Part II, voter fraud has great implications on elections.<sup>272</sup> In fact, the courts have found that voter fraud is a legitimate governmental interest sufficient to satisfy *Burdick*. This Note argues for the enactment of a cardless system in federal elections because it is important that the elections for our highest elected officials are free from any color of fraud.<sup>273</sup> This system would help alleviate all the concerns previously stated in this Note. First, poll workers will be able to identify fraudulent voters because they will

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<sup>269</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199–200 (2008).

<sup>270</sup> See *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009) (discussing how section 21-2-417 of the Georgia Code allows a voter casting a provisional ballot forty-eight hours to provide identification after voting); IND. CODE §3-11.7-5-2.5 (2011) (allowing voters who cast a provisional ballot and who were unable or declined to provide identification ten days to provide identification with the circuit court clerk or the county election board).

<sup>271</sup> See *Crawford*, 553 U.S. at 199–200 (holding that the requirement of voters who cast provisional ballots without photo identification to provide identification within a certain period of time is not a sufficient burden to grant relief).

<sup>272</sup> See *supra* Part II.

<sup>273</sup> There have been instances where the presidential election has been called into question because of suspicious voting. See Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 853 (2002) (“Presidential election controversies are nothing new. They have plagued our republic since 1801, when the fourth election for the office ended in a muddle that nearly deprived the rightful winner of the presidency.”); Ryan Joyce, *ACORN and the 2008 Presidential Election Campaign: Perspectives on Alleged Third-Party Voter-Registration Fraud*, 71 U. PITT. L. REV. 313, 319–26 (2009) (focusing on the controversy surrounding ACORN’s third-party voter-registration activities during the 2008 presidential election); Jonathan K. Van Patten, *Making Sense of Bush v. Gore*, 47 S.D. L. REV. 32, 35 (2002) (“[T]here were ‘thousands’ of illegal votes cast on November 7 by unregistered voters, voters who voted twice, and ineligible felons.”) (quoting MARTIN MERZER ET AL., *THE MIAMI HERALD REPORT: DEMOCRACY HELD HOSTAGE* 97 (2001)).

already have the person's picture in front of them. This will allow workers to either contact authorities or preserve any evidence that would help in prosecuting the fraudulent voter. Second, prosecutors will have the evidence and people they need to prosecute fraudulent voters because poll workers are able to identify potential fraudulent activity. Finally, this system will allow easier access to purge data. When somebody moves out of district the local motor vehicle agency can transfer that information to election officials and the person's name can be purged from registration rolls immediately. With this cardless system in place, fraudulent votes will not have the opportunity to dilute legitimate votes and will in turn protect the integrity of the ballot.

The cardless ID system passes the *Burdick* Test because it is neutral, nondiscriminatory, and would assist officials with identifying fraudulent voters. Being nondiscriminatory, it does not trigger strict scrutiny and would have to pass the sliding scale of scrutiny required by *Burdick*. The burden on voters is slight. While some voters would have to do nothing, others would have to be photographed at the polls or cast a provisional ballot. The Court would likely determine that either of these methods does not pose a severe burden on voters. Additionally, the Court has already declared that regulations aimed at preventing voter fraud and securing the integrity of the ballot are tailored to a legitimate government interest. Because the cardless ID system is aimed at eliminating voter fraud, it would serve a legitimate government interest. Therefore, the cardless ID system proposed by this Note passes the *Burdick* Test.

## V. CONCLUSION

As long as our electoral system is under attack by people who wish to hijack our democratic process by impersonating voters at the polls, there will be a need for regulations to ensure the integrity of our ballot. While more and more states are turning to a strict card based ID system, this Note has proposed an alternative system. This system is cardless and would be less burdensome on the voter. The cardless ID system proposed is nondiscriminatory and allows greater access to the ballot than most of the strict card based ID laws that are in place in the states. While the proposed system may not address fraudulent absentee ballots, this Note was aimed at addressing only in-person voter fraud and establishing a system that Congress should implement for federal elections in order to prevent in-person voter fraud. Congress does not have a lot of work to do to implement this system; all it has to do is

connect the dots between current Federal and state laws to develop a constitutional voter ID system that will prevent in-person voter fraud.