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Sally Harrison

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## MAY I SEE YOUR ID? HOW VOTER IDENTIFICATION LAWS DISENFRANCHISE NATIVE AMERICANS' FUNDAMENTAL RIGHT TO VOTE

*Sally Harrison\**

### *Introduction*

Voter identification (“ID”) laws played a contentious role in the recent 2012 presidential election. It is uncertain whether these laws will emerge from the courts unscathed, but it is certain that voter ID laws have a negative impact on the ability of Native Americans to vote.

The right to vote is one of the pillars upon which our democratic society rests. The Supreme Court has characterized the right to vote as too precious and fundamental to be burdened or conditioned because it preserves all other rights.<sup>1</sup> Article I of the United States Constitution expressly protects the right to vote in federal elections.<sup>2</sup> This right extends to state elections through the Fourteenth Amendment.<sup>3</sup> The Constitution expressly grants states the power to prescribe the times, places, and manner of elections for senators and representatives, but Congress retains the power to alter such regulations.<sup>4</sup> While the powers given to the states are necessary to manage elections, they can also endanger the right to vote. Congressional and state powers require careful balancing because ambiguity and confusion about their respective roles is common.

In response to the recount debacle in the 2000 presidential election, Congress passed the Help America Vote Act (“HAVA”).<sup>5</sup> One of the HAVA provisions requires voters to present ID in order to vote and lists photo ID as one of the acceptable forms. Soon after HAVA, state legislatures across the country began enacting voter ID laws, tightening American voting procedures to comply with HAVA. Proponents of HAVA cite the need to combat voter fraud, lessen administrative burdens, restore public confidence in elections, and save money as reasons for its

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\* Second-year student, University of Oklahoma College of Law. I would like to thank Professor Mary Sue Backus for her editorial input and guidance in writing this comment. I would also like to thank the American Indian Law Review editorial board for their helpful comments.

1. *Yick Wo v. Hopkins*, 118 U.S. 356, 370-71 (1886).
2. U.S. CONST. art. I, § 2, cl. 1.
3. U.S. CONST. amend. XIV, § 1.
4. U.S. CONST. art. 1, § 4, cl. 1.
5. Help America Vote Act of 2002, 42 U.S.C. §§ 15301-15545 (2006).

enactment.<sup>6</sup> Opponents see HAVA as disenfranchising voters because approximately 11% of the population does not have state-issued ID.<sup>7</sup> Opponents point out that in-person voter fraud is rare, and that HAVA makes it more difficult for eligible citizens to vote. They also argue that it disproportionately impacts low-income, elderly, and minority citizens.<sup>8</sup> For the reasons given, many Native American tribes oppose voter ID laws because they place a severe and disproportionate burden on otherwise eligible Native voters.

Part I of this comment provides an overview of state voter ID laws. Part II discusses what standards the Supreme Court has applied in interpreting the constitutionality of these voter ID laws. Part III discusses how voter ID provisions disenfranchise Native Americans. Finally, Part IV presents alternatives to (1) help Native Americans overcome these challenges, and (2) continue meeting the purposes of the state voter ID laws, while ensuring Native Americans are not denied the right to vote.

*I. State Voter ID Law Overview: Strict Photo ID, Photo ID, Strict Non-Photo ID, and Non-Strict Non-Photo ID*

Requiring voters to prove their identity before voting is not a new concept in law, nor particularly controversial. There was little reaction in 2010 when Congress passed a law requiring every voter who registered by mail to show his or her ID before voting.<sup>9</sup> In the wake of the federal law, however, states have constructed their own ID laws with restrictions on previously acceptable forms of ID, such as student IDs and Social Security cards. Under these more stringent provisions, eligible voters without a specific form of ID can only cast a provisional ballot. Counting provisional ballots can be problematic because it requires additional steps.

In 2006, Indiana was the first state to pass legislation requiring all voters to show government-issued photo ID at the polls. The Indiana law was unsuccessfully challenged as unconstitutional at the Supreme Court,<sup>10</sup> encouraging more states to pass similar legislation. Today there are thirty

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6. WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012, at 4 (2011).

7. *Id.*

8. *The Right to Vote Under Attack*, CIVIL LIBERTIES (Am. Civil Liberties Union Nat'l Newsletter, New York, N.Y.), Summer 2012, at 1, 6.

9. *See* 42 U.S.C. § 15483(b) (2006).

10. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

states with voter ID laws requiring all voters to show ID.<sup>11</sup> But acceptable forms of ID vary among states. Some states require a government-issued photo ID while others allow a bank statement.

The National Conference of State Legislatures breaks down the state laws into four categories: Strict Photo ID, Photo ID, Strict Non-Photo ID, and Non-Strict Non-Photo ID.<sup>12</sup> Out of the states that have enacted voter ID laws, eleven require a photo ID. Four of those eleven are strict photo ID states, meaning that voters without the appropriate ID are given a provisional ballot and must return to election officials with proper ID to have their provisional ballot counted.<sup>13</sup> The other seven are non-strict photo ID states that allow voters without the requisite ID the option of casting a regular ballot provided they sign an affidavit of identity or are identified and vouched for by poll workers.<sup>14</sup> The remaining nineteen states with voter ID laws do not require a photo ID and vary in what type of ID is acceptable.<sup>15</sup> Out of the nineteen non-photo ID states, Arizona, Ohio, and Virginia are strict states, requiring a voter without the proper ID to cast a provisional ballot.<sup>16</sup> These states only count provisional ballots if the voter returns to election officials with the correct ID within an allotted amount of time.<sup>17</sup> So far, only eleven out of the thirty states with voter ID laws allow any type of tribal ID.

*A. Voter ID Laws Have Many Similar Provisions Regarding the Types of Accepted Identification*

States with voter ID laws requiring voters to show government-issued IDs have similar requirements. Common documents like a valid driver's license in the voting state, U.S. Passport, or U.S. military ID are generally accepted in photo ID states. Some states, like Indiana, do not list specific forms of ID in the statute but require the ID to (1) bear the individual's name (which must match the name on the register), (2) display the individual's photo, (3) have an expiration date, and (4) be issued by the state or the United States government. Commonly accepted forms of photo ID are retirement center IDs, neighborhood association IDs, public

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11. *Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last visited Nov. 5, 2013).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

assistance IDs, a state hunting or fishing license, a state gun permit, and an FAA-issued pilot's license.

The states that have voter ID requirements, but do not require photo ID, accept a wide variety of ID. These states would accept those ID forms previously listed but also accept non-photo ID or a combination of both.

There are many examples of generally accepted non-photo IDs, including, but not limited to, a voter registration card, current utility bill, or bank statement. Non-photo ID states also have provisions in their statutes providing additional options for voters who do not have the appropriate ID.

The three strict ID states require provisional ballots. The remaining sixteen states take varied approaches to deal with voters lacking proper ID. Some of these varied approaches include: use of a vouching<sup>18</sup> or attestation<sup>19</sup> system, requiring voters without ID to sign an affidavit<sup>20</sup> or a written oath attesting to their identity;<sup>21</sup> voter verification;<sup>22</sup> expiration date requirements;<sup>23</sup> and signature provisions.<sup>24</sup>

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18. In Alaska, an election official may waive the ID requirement if the election official knows the identity of the voter. ALASKA STAT. ANN. § 15.15.225(b) (West 2013). If they do not, a citizen may vote a questioned ballot. § 15.15.225(c). Voters sign the questioned-ballot register and place it inside a questioned-ballot envelope before placing it in the ballot box. The information provided on the outside of the envelope is used to determine what parts of the ballot will be counted. Before opening the envelope, a review board determines whether to count the ballot. It is unclear what standard they use to determine if the ballot is counted or not).

19. MO. ANN. STAT. § 115.427 (West 2013), *amended by* Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (in Missouri, a voter can still cast a ballot if two supervising election judges, one from each major political party, attest they know the person).

20. DEL. CODE ANN. tit. 15, § 4937(a) (West 2013) (Delaware voters without ID can still cast a regular ballot if they sign an affidavit).

21. CONN. GEN. STAT. ANN. § 9-261(a) (West 2013); KY. REV. STAT. ANN. § 117.245 (West 2013).

22. Colorado allows eligible voters who are unable to produce ID to cast a provisional ballot, but a designated election official will attempt to complete preliminary verification of the voter's eligibility before counting the ballot, as opposed to the strict states that require additional action by the voter. COLO. REV. STAT. ANN. § 1-8.5-105(1) (West 2013). Utah uses provisional ballots for voters without ID. However, it is unclear how the county clerk verifies the ballot because the statute fails to provide specific means of verification. UTAH CODE ANN. § 20A-3-105.5(3)-(4) (West 2013). Washington allows voters to either provide identification or sign a ballot declaration, which election officers use to compare to the signature on the voter's registration card. WASH. REV. CODE ANN. § 29A.40.160(7) (West 2013). Oklahoma also uses a similar provisional ballot method that an election official verifies but requires voters to sign a statement under oath swearing they are the person identified on the precinct registry. But effective November 1, 2013, the voter's name, residence address, date of birth, and driver's license number or last four digits of his/her

*B. Voter ID Laws Are Criticized as an Unconstitutional Poll Tax Because of the Cost for the Underlying Documents Needed to Obtain the ID*

Procuring the required ID to vote under these different provisions may be expensive. Opponents of voter ID laws have argued that the requirements impose an unconstitutional poll tax on voters. Congress passed the Twenty-Fourth Amendment to the Constitution in 1964, abolishing the use of poll taxes in federal elections.<sup>25</sup> In *Harper v. Virginia Board of Elections*, the United States Supreme Court extended the prohibition of poll taxes to state elections, finding that such taxes violated the Equal Protection Clause of the

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social security number as listed on the affidavit must also conform to information available in the voter registration database. 2013 Okla. Sess. Law Serv. ch. 34, sec. 2 (West) (amending OKLA. STAT. ANN. tit. 26, § 7-114 (West 2013)). Montana uses signature verification to make sure the voter's signature on the provisional ballot matches the signature in the registration record before the ballot is counted. MONT. CODE ANN. § 13-15-107(2) (2013). Rhode Island also uses signature verification to make sure the voter's signature on the provisional ballot matches the signature in the registration record before the ballot is counted. R.I. GEN. LAWS ANN. § 17-19-24.3(b) (West 2013).

23. Indiana's voter ID statute requires the ID to have an expiration date, and if the ID is expired, it must have an expiration date after the most recent general election. IND. CODE ANN. § 3-5-2-40.5(a)(3) (West 2013). Kansas does not require ID to have an expiration date on the document, but if the document has an expiration date, that date cannot be expired unless the bearer is sixty-five or older. KAN. STAT. ANN. § 25-2908(h)(1) (West 2013). Pennsylvania contested voter ID statute requires a voter's photo ID to include the expiration date. There are two caveats: the statute makes an exception for (1) military IDs and (2) a Pennsylvania driver's license or non-driver card that is not more than twelve months past the expiration date. 25 PA. CONS. STAT. ANN. § 2602(z.5)(2) (West 2013). Georgia, a strict photo ID state, allows voters to use a Georgia driver's license even if expired. GA. CODE ANN. § 21-2-417(a)(1) (West 2013). New Hampshire, a photo ID state, allows voters to use a driver's license from New Hampshire or any other state, even if expired, as long as the license has not been expired for more than five years. Note that the five-year limitation only applies to those voters under sixty-five. Voters sixty-five years of age or older may use otherwise qualified IDs regardless of the expiration date. N.H. REV. STAT. § 659:13(II)(a) (2013).

24. Florida, a photo ID state, includes a signature provision in its voter ID statute, stating that voters must present valid photo ID with a signature; if the picture ID does not contain the voter's signature, an additional ID including the voter's signature is required. If a voter in Florida does not show the required ID, they are given a provisional ballot to sign, and if that signature matches the signature in the voter registration record, the ballot is counted. FLA. STAT. ANN. § 101.043(1)(b), (2) (West 2013). The voter ID statute in Hawaii, a photo ID state, also includes a signature provision, stating that voters must sign their names in the poll book. The statute also provides that persons applying to vote may be required to provide ID upon request by a precinct official. HAW. REV. STAT. § 11-136 (West 2013).

25. U.S. CONST. amend. XXIV, § 1.

Fourteenth Amendment.<sup>26</sup> In response, some states began providing free voter ID cards. However, allowing free ID does not lessen the cost of documents many voters need to obtain a photo ID, most notably birth certificates.<sup>27</sup>

*C. Some States Have Recognized the Need for Exceptions to the Photo ID Requirement for Specific Circumstances and Defined Groups*

States have recognized that their voter ID laws should include exceptions. Still, these exceptions only apply to narrowly defined groups. In the Indiana statute, a resident at a nursing home is not required to show ID.<sup>28</sup> Kansas makes three exceptions to its photo ID requirement. First, persons with permanent physical disabilities are exempted if it is impractical for them to obtain voting ID, and they have qualified for permanent advance voting status.<sup>29</sup> Second, the statute exempts merchant marines and uniformed service members who are on active duty and absent from the county on election day, as well as their spouses and dependents.<sup>30</sup> Finally, voter ID exemptions extend to any voter whose religious beliefs prohibit photo ID.<sup>31</sup>

With the divergent procedures encompassed in the voter ID laws across the states, voters turned to the courts for help. Rather than providing a clear cut rule for voter ID laws, the Supreme Court left lower courts and the voting populous unsure of the constitutionality and implementation of these laws.

*II. The Supreme Court's Voter Regulation Law Jurisprudence: Perplexing Opinions with Myriad Interpretations*

Courts constantly struggle with election law issues because the Supreme Court's jurisprudence is ambiguous. Forty-six years ago, in *Harper v. Virginia State Board of Elections*, the Supreme Court held a Virginia poll tax was unconstitutional. The Court stated that making voter affluence an electoral standard for exercising the right to vote was invidiously

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26. 383 U.S. 663, 666 (1966).

27. *Birth Certificates*, OKLA. STATE DEP'T OF HEALTH, [http://www.ok.gov/health/Birth\\_and\\_Death\\_Certificates/Birth\\_Certificates/index.html#Birth%20Cert%20Cost](http://www.ok.gov/health/Birth_and_Death_Certificates/Birth_Certificates/index.html#Birth%20Cert%20Cost) (last visited Feb. 10, 2013) (explaining that obtaining a certified copy of a birth certificate in Oklahoma can cost from \$15-\$40).

28. IND. CODE ANN. § 3-10-1-7.2(e) (West 2013).

29. KAN. STAT. ANN. § 25-2908(i)(1) (West 2013).

30. *Id.* § 25-2908(i)(2)-(4).

31. *Id.* § 25-2908(i)(5).

discriminatory.<sup>32</sup> Without expressly stating its level of review, the Court implied a strict scrutiny standard by saying, “[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”<sup>33</sup> The Court found the poll tax in *Harper* invidious because it made the voter’s ability to pay a fee a qualification to vote.<sup>34</sup> The Court recognized voting as a fundamental right protected by the Equal Protection Clause, and saw no compelling interest for the state to justify its policy of a poll tax.

Seventeen years after the *Harper* decision, the Court decided *Anderson v. Celebrezze*. In *Anderson*, the Court recognized the need to provide a more workable standard for balancing the right to vote with a state’s power to regulate. At issue in *Anderson* was whether Ohio’s early registration deadline for an independent candidate “placed an unconstitutional burden on the voting and associational rights of [the candidate’s] supporters.”<sup>35</sup> The Court held that it did and set forth the applicable analysis.<sup>36</sup>

[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.<sup>37</sup>

The Court used a balancing approach to find that the state’s interest in imposing an early registration deadline was outweighed by the particular burden it placed on independent voters.<sup>38</sup> The test set forth in *Anderson* is ambiguous and has led to three interpretations: a balancing test, a strict standard of review, and a sliding scale approach.

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32. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

33. *Id.* at 670.

34. *Id.*

35. *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983).

36. *Id.* at 789.

37. *Id.*

38. *Id.* at 806.



Nine years after the *Anderson* decision, the Supreme Court decided *Burdick v. Takushi*. In *Burdick*, the Court began moving away from the strict scrutiny test<sup>39</sup> and reaffirmed the more flexible standard applied in *Anderson*. The Court seemed to use a sliding scale approach in *Burdick* to determine whether Hawaii's ban on write-in voting was unconstitutional. The Court held that it "must weigh 'the character and magnitude of the asserted injury [with] the rights protected by the [Constitution].'"<sup>40</sup> The rigorousness of the Court's inquiry into the propriety of the challenged election law depends on the extent to which the challenged regulation burdens the right to vote.<sup>41</sup>

In applying this sliding scale test, the Court concluded that the Hawaii write-in vote regulation was "only a limited burden" on the right to vote.<sup>42</sup> Because this was a limited burden, the state did not have to establish a "compelling interest to tip the constitutional scales in its direction."<sup>43</sup> Therefore, the Court held that the state's interests outweighed the slight burden on the right to vote. *Burdick's* sliding scale approach remains in place today. But lower courts have had difficulty determining which test to implement from the *Burdick* and *Anderson* decisions.

The inconsistent voter ID jurisprudence created by lower courts exposed the ambiguity of the Supreme Court's rulings on state voting regulations. Five courts ruled on the constitutionality of photo ID laws before the Court reviewed the issue again in *Crawford v. Marion County Election Board*.<sup>44</sup> Three courts upheld the challenged voter ID laws, while two struck them down.<sup>45</sup> With the split in lower court decisions and the national prominence

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39. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

40. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789).

41. *Burdick*, 504 U.S. at 434.

42. *Id.* at 439.

43. *Id.*

44. 553 U.S. 181, 204 (2008).

45. Compare *ACLU v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008) (New Mexico requirement that non-absentee voters present a photo ID in municipal elections did not violate equal protection or impose a substantial burden on the right to vote.), and *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (upholding Arizona law requiring first-time Arizona voters to submit evidence of U.S. citizenship with their voter registration forms), and *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W. 2d 444 (Mich. 2007) (Court held Michigan statute requiring either photo ID or affidavit to vote was not unconstitutional.); with *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (Missouri statute requiring voters to present photo ID held unconstitutional under the Missouri Constitution's equal protection clause); and *Common Cause/Georgia v. Billips*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (Federal district court granted a preliminary

of voter ID laws, the scene was set for the Supreme Court to make a final decision on the constitutionality of voter ID laws. Unfortunately, the *Crawford* plurality decision left the status of voter ID laws unclear.

*A. The Supreme Court's First Look at Voter Identification Laws: Crawford v. Marion County Election Board*

In 2005, Indiana enacted Senate Enrolled Act No. 483 (“SEA 483”).<sup>46</sup> This voter ID law is one of the strictest in the nation and requires citizens voting in person to present a government-issued photo ID in both primary and general elections.<sup>47</sup> The statute allows for provisional ballots cast by voters who were unable to present ID on election day, indigent voters, or voters with religious objections to being photographed.<sup>48</sup> The provisional ballot is only counted if an appropriate affidavit is executed before the circuit court clerk within ten days following the election.<sup>49</sup> The ID requirement does not apply to absentee ballots submitted by mail, and the statute provides an exception for persons living and voting in a state-licensed facility.<sup>50</sup> The state offers free photo ID to qualified voters able to establish their residence and identity through the Bureau of Motor Vehicles.<sup>51</sup>

In a plurality opinion, the Supreme Court held Indiana’s statute imposed only a limited burden on voter’s rights.<sup>52</sup> Therefore, the state interests advanced by the statute were sufficient to defeat the facial challenge.<sup>53</sup> Justice Stevens started his analysis by reconstructing the evolution of the standard of review for voting regulation cases. He began with the *Harper* analysis, that “rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”<sup>54</sup> Second, he moved to the *Anderson* test stating,

[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and...[r]ather than

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injunction against the application of Georgia’s photo ID law for in-person voting finding a “substantial likelihood” that the law violated the Equal Protection Clause.).

46. See IND. CODE ANN. §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (West 2013).

47. *Id.* §§ 3-5-2-40.5, 3-11-8-25.1(a).

48. *Id.* § 3-11.7-5-2.5.

49. *Id.*

50. *Id.* § 3-11-8-25.1(e).

51. *Id.* § 9-24-16-10.

52. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

53. *Id.* at 204.

54. *Id.* at 189.

applying any “litmus test” that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the “hard judgment” that our adversary system demands.<sup>55</sup>

And, finally back to *Harper*, Justice Stevens stated that “[h]owever slight [the] burden may appear...it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”<sup>56</sup>

The majority held that because the petitioners opposing the voter ID laws brought a facial attack, they were subject to a heavy burden of persuading the Court.<sup>57</sup> The Court held the petitioners lacked sufficient evidence to prove the magnitude of the burden on the voting rights of those opposing the law.<sup>58</sup> This lack of evidence led the Court to use a low standard of review to conclude the voter ID statutes imposed only a limited burden on voter’s rights.<sup>59</sup> Furthermore, the Court found the state had legitimate interests in modernizing election procedures, combating voter fraud, addressing the consequences of the state’s bloated voter rolls, and protecting public confidence in the integrity of the electoral process.<sup>60</sup> The Court also found the burden on eligible voters to get a voter ID card was not barred by the Court’s poll tax ruling in *Harper* because the photo ID cards were free.<sup>61</sup> Therefore, the Court found the interests used by the state to justify SEA 483 satisfied the constitutional test.<sup>62</sup>

Justices Thomas and Alito joined Justice Scalia in his concurring opinion. Justice Scalia agreed with the majority, but interpreted the decision in *Burdick* as a two-part approach.<sup>63</sup> He used a “deferential...standard for non-severe, nondiscriminatory restrictions, [and] reserve[ed] strict scrutiny for laws that severely restrict the right to vote.”<sup>64</sup> Using this approach, Scalia first looked at whether the “challenged law severely burdens the

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55. *Id.* at 189-90 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)) (internal quotation marks omitted).

56. *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

57. *Id.* at 189.

58. *Id.* at 204.

59. *Id.* at 202.

60. *Id.* at 191.

61. *Id.* at 198-200.

62. *Id.* at 204.

63. *Id.* at 205.

64. *Id.* at 204.

right to vote.”<sup>65</sup> Scalia never expressly defined a severe burden but did state, “Burdens are severe if they go beyond the merely inconvenient.”<sup>66</sup> Scalia also found that the law impacted all voters and that the Court’s “precedents refute the view that individual impacts are relevant to determining the severity of the burden.”<sup>67</sup> In sum, Scalia said, requiring electors to show photo ID was not a severe burden on the right to vote and the state’s interests were sufficient to justify the minimal burden the statute placed on voters.<sup>68</sup>

Justice Souter, whom Justice Ginsburg joined in the dissent, stated the statute was unconstitutional using the balancing standard of *Anderson* as applied in *Burdick*.<sup>69</sup> “[A] state may not burden the right to vote merely by invoking abstract interests, be they legitimate...or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed.”<sup>70</sup> The dissenting justices first found that the travel costs and fees associated with obtaining a required photo ID was a burden on the right to vote.<sup>71</sup> The dissent also determined the state lacked evidence to prove that in-person voter fraud was prevalent anywhere, least of all in the state, and that the burden on the elderly and poor was too large without this evidence.<sup>72</sup> Therefore, the dissent concluded that the voter ID law was unconstitutional because the state’s interest did not outweigh the unreasonable burden placed on the right to vote.<sup>73</sup>

Justice Breyer wrote a separate dissenting opinion in which he agreed with Justice Souter’s dissent that the Indiana statute placed a disproportionate burden on voters lacking the required form of ID.<sup>74</sup> Furthermore, Justice Breyer mentioned the burdens placed on non-drivers in Indiana because of the lack of a public transportation system and the costs associated with the underlying documents required before one can obtain the requisite photo ID.<sup>75</sup> Justice Breyer cited the efforts taken by Florida and Georgia to inform electors of both the new photo ID requirements and detailing the procedure in which voters can obtain free

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65. *Id.* at 205.

66. *Id.*

67. *Id.*

68. *Id.* at 209.

69. *Id.*

70. *Id.*

71. *Id.* at 211.

72. *Id.* at 235-36.

73. *Id.* at 237.

74. *Id.*

75. *Id.* at 238-39.

photo ID cards.<sup>76</sup> He also mentioned the fact that Florida and Georgia do not require electors to make an additional trip to sign an indigence affidavit, and that there is no “convincing reason why Indiana’s photo ID requirement must impose greater burdens [on its voters] than those of other States.”<sup>77</sup>

The Court’s splintered analysis failed to resolve voter ID issues in many states. One of the problems with the *Crawford* decision was the hurdle the petitioners had to overcome in order to argue a facial challenge and the lack of evidence demonstrating a burden on voters. The Court left the door open for an as-applied challenge. This approach could shift the scale to heightened scrutiny, requiring the state’s interest to be more legitimized and easing the barrier of a facial challenge to a showing of an individualized burden.

The confusion in the Court’s voter regulation jurisprudence was again at the forefront of debate as lower courts began to determine the constitutionality of Arizona’s voter ID law. Arizona is home to twenty-two Native American tribes,<sup>78</sup> and has a far greater population of Native Americans than Indiana. Therefore, the impact of Arizona’s voter ID law has a far greater impact on Native Americans<sup>79</sup> than Indiana’s voter ID law. While the voter ID laws are similar, the Arizona voter ID law will have a much larger effect on Native Americans.

*B. Voter Identification Laws Back in the Litigation Spotlight: Gonzalez v. Arizona*

In 2004, Arizona enacted Proposition 200 (“Prop. 200”), which imposed new restrictions on voter registration and polling place ID.<sup>80</sup> The statute’s registration provision required one of six forms of ID to prove citizenship: (1) a state issued driver’s license; (2) a U.S. birth certificate; (3) a U.S. passport; (4) a U.S. naturalization document; (5) another immigration document that proves citizenship; or, (6) a Bureau of Indian Affairs (“BIA”) card number, tribal treaty card number or tribal enrollment number.<sup>81</sup> None of these forms of ID were provided for free by the state.

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76. *Id.* at 240.

77. *Id.*

78. *Arizona Tribal Leadership List*, ARIZ. COMM’N OF INDIAN AFFAIRS, [http://azcia.gov/tribes\\_of\\_arizona.asp](http://azcia.gov/tribes_of_arizona.asp) (last visited Feb. 10, 2013).

79. For detailed information on tribal election laws and resolving tribal election disputes, see generally Derek H. Ross, *Protecting the Democratic Process in Indian Country Through Election Monitoring: A Solution to Tribal Election Disputes*, 36 AM. INDIAN L. REV. 423 (2011-2012).

80. ARIZ. REV. STAT. ANN. §§ 16-166(F), 16-579(A) (West 2012).

81. *Id.*

Furthermore, Prop. 200 required those voting in person to provide ID with their name, address, and photograph or two forms of ID with their name and address to receive a ballot.<sup>82</sup>

Prop. 200 was challenged as violating section 2 of the Voting Rights Act of 1965 (“VRA”), as unconstitutional under the Fourteenth or Twenty-fourth Amendments, and void as inconsistent with the National Voter Registration Act of 1993 (“NRVA”).<sup>83</sup> The Ninth Circuit sitting *en banc* upheld Prop. 200’s requirement that registered voters show ID to vote at the polls but overturned the requirement that prospective voters must provide proof of U.S. citizenship in order to register to vote. The court stated that the registration provision was superseded by the NVRA.<sup>84</sup>

Broadly speaking, Congress passed the NVRA to make voting registration in federal elections easier. It “prescribes three methods for registering voters for federal elections...: (1) ‘by application made simultaneously with an application for a...driver’s license,’” commonly referred to as the motor voter act, “(2) ‘by mail application’ using the Federal Form prescribed by the Election Assistance Commission (EAC), and (3) ‘by application in person’ at sites designated” by the state.<sup>85</sup> The states were allowed to create their own form for voter registration, so long as the form met the NVRA criteria; but “the NVRA still require[d] every state to accept and use the Federal Form developed by the EAC.”<sup>86</sup> Because Prop. 200 requires proof of citizenship for registration, it is at odds with the Federal Form, which does not require proof of citizenship. Therefore, the Arizona county recorder did not accept the Federal Form without the requisite proof of citizenship.

Article I of the Constitution establishes a unique relationship between the state and federal governments. To determine “whether federal enactments under the Election Clause displace a state’s procedures,” the court “consider[s] the state and federal laws as if they comprise a single system of federal election procedures.”<sup>87</sup> “If the state law complements the congressional procedural scheme,” the state law is treated as adopted by Congress.<sup>88</sup> However, if they both address the same subject, the two laws

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82. *Id.* § 16-579(A).

83. *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012).

84. *Id.*

85. *Id.* at 394 (quoting 42 U.S.C. § 1973gg-5 (2006)) (internal citations omitted).

86. *Id.* at 396-97.

87. *Id.* at 394 (citing *Ex parte Siebold*, 100 U.S. 371, 384 (1879)).

88. *Id.*

are read naturally to see if “the federal act has superseded the state act.”<sup>89</sup> If it has, the federal act is viewed “as if it were a subsequent enactment by the same legislature.”<sup>90</sup> If the state and federal acts “do not operate harmoniously...then Congress has exercised its power to ‘alter’ the state’s” act, thereby superseding the regulation.<sup>91</sup>

The Ninth Circuit held that the NRVA and Prop. 200’s registration provision did not operate harmoniously as a single provision. It did not do so because the procedure for registering to vote by mail in federal election using the federal form was in conflict with the state’s registration form.<sup>92</sup> The NVRA “requires a county recorder to accept and use the Federal Form to register voters for federal elections, whereas the registration provision requires the same county recorder to reject the Federal Form as insufficient for voter registration if the form does not include proof of U.S. citizenship.”<sup>93</sup> Therefore, the court found Prop. 200 was unconstitutional under Congress’s expansive Article I power.<sup>94</sup>

Opponents challenged Prop. 200’s polling place provision, requiring voters to present ID to receive a ballot, under the theories that it was “prohibited...under section 2 of the VRA,” was “an unconstitutional poll tax under the Twenty-fourth Amendment,” and was “a violation of the Fourteenth Amendment’s Equal Protection Clause.”<sup>95</sup>

To prevail on section 2 claims, claimants must show that “based on the totality of the circumstances, ... the challenged voting practice results in discrimination on account of race.”<sup>96</sup> “[A]pplying the totality of the circumstances test, ‘a court must assess the impact of the contested structure or practice on minority electoral opportunities’” based on objective factors.<sup>97</sup> “In [*Thornburg v. Gingles*, the Supreme Court cited a non-exhaustive list of nine factors,” usually referred to as the “Senate Factors,” “that courts should consider in making [a] totality of the circumstances assessment.”<sup>98</sup> The relevant factors the Court considered in *Gingles* were,

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 398.

93. *Id.*

94. *Id.* at 403.

95. *Id.* at 405.

96. *Id.* (alteration in original) (quoting *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003)) (internal quotation marks omitted).

97. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)).

98. *Id.* (citing *Gingles*, 478 U.S. at 44-45).

[whether there was a] history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.<sup>99</sup>

The *Gonzalez* court upheld the district court's finding that Prop. 200 did not "have a statistically significant disparate impact on Latino voters."<sup>100</sup> It also upheld the lower court's finding "that Latinos had suffered a history of discrimination in Arizona...hinder[ing] their ability to participate in the political process fully," and that the economic disparities existing between Caucasians and Latinos had the effect of "racially polariz[ing] voting."<sup>101</sup> And finally, the court upheld the district court's decision that nevertheless the "claim failed because there was no proof of a causal relationship between [Prop.] 200 and any alleged discriminatory impact on Latinos."<sup>102</sup>

The Twenty-Fourth Amendment claim failed because the court held that the potential cost of documents necessary to get the required ID were not a poll tax under *Harper*, and therefore did not violate the Twenty-Fourth Amendment.

The Fourteenth Amendment's Equal Protection Clause claim also failed. The court held that "[r]equiring voters to provide documents proving their identity was not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents" under the *Harper* and *Crawford* analysis.<sup>103</sup> The court cited the balancing test from *Crawford*, and likened the case to *Crawford* because the same results occurred, requiring ID was a slight burden on voters, and that the state's interest in assessing the eligibility and qualification of voters was legitimate.<sup>104</sup>

The United States Supreme Court granted certiorari in the *Gonzalez* case in October 2012 and issued its opinion on June 17, 2013.<sup>105</sup> The Court granted certiorari on the issues of: (1) whether the Ninth Circuit erred in

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99. *Id.* at 405-06 (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 36-37).

100. *Id.* at 406.

101. *Id.*

102. *Id.*

103. *Id.* at 409.

104. *Id.* at 410.

105. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).



creating a new, heightened preemption test under Article I that is contrary to the Supreme Court's authority and conflicts with other circuit court decisions; and (2) whether the Ninth Circuit erred in holding that under that test, the NVRA preempts an Arizona law that requires persons who are registering to vote to show evidence that they are eligible to vote. Interestingly, the composition of the Court has changed since its 2008 plurality decision in *Crawford*, upholding Indiana's voter ID law. Justice Elena Kagan replaced Justice Stevens who wrote the opinion of the Court and Justice Sonia Sotomayor replaced Justice Souter who authored the dissent. Justice Scalia wrote the majority opinion, which was joined by Chief Justice Roberts, Justice Ginsberg, Justice Breyer, Justice Sotomayor, and Justice Kagan, as well as Justice Kennedy in part. Justice Kennedy and Justice Alito dissented. Justice Scalia framed the issue as "whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States 'accept and use' the Federal Form."<sup>106</sup> Scalia affirmed the Ninth Circuit holding that NVRA preempts Arizona's "state-imposed requirement of evidence of citizenship."<sup>107</sup>

*C. Lower Courts Continue to Struggle over the Constitutionality of Voter Identification and the Correct Test to Apply*

Voter ID opponents have taken the issue of voter ID to courts around the country. Pre-clearance issues have been in the forefront of voter ID cases in Texas and South Carolina. Section 5 of the VRA requires the United States Attorney General or the United States District Court for the District of Columbia to "pre-clear" the adoption or implementation of new or altered voting qualifications in certain jurisdictions.<sup>108</sup> The VRA ensures "that no voting qualification or prerequisites to voting...abridge the right...to vote."<sup>109</sup> In *Texas v. Holder*, a federal district court in Washington, D.C. denied Texas pre-clearance.<sup>110</sup> However, the same court granted pre-clearance to South Carolina's voter ID law in *South Carolina v. United States*, but delayed its implementation until 2013.<sup>111</sup> Furthermore, a state judge halted enforcement of Pennsylvania's ID law, which would have

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106. *Id.* at 2251.

107. *Id.* at 2257.

108. 42 U.S.C. § 1973c (2006).

109. 25 AM. JUR. 2D *Elections* § 112 (2013).

110. *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.C. Cir. 2012), *vacated*, 133 S. Ct. 2886 (2013).

111. *South Carolina v. United States*, 898 F. Supp. 2d 30, 52 (D.C. Cir. 2012).

required voters to show a photo ID at the polls, and prevented the law from going into effect just before the November 2012 election. The same state judge presided over a non-jury trial on the constitutionality of the law in July 2013 and ultimately blocked its enforcement again through the November 2013 election cycle.<sup>112</sup> The ban is in place “until the court renders a final verdict.”<sup>113</sup>

To further complicate things, the U.S. Supreme Court struck down Section 4(b) of the VRA on June 25, 2013 in *Shelby County, Alabama v. Holder*.<sup>114</sup> Section 4(b) of the VRA provides the “coverage formula” for determining which jurisdictions must seek federal pre-clearance under Section 5.<sup>115</sup> The formula’s factors originally helped indicate a jurisdiction’s history of racial discrimination in voting. The Court pointed out that this portion of the Act was meant to be temporary and is now out of date, saying its an unconstitutional infringement on States’ “broad autonomy” under the Tenth Amendment “in structuring their governments and pursuing legislative objectives,” including the right to enact their own election laws without prior review by the federal government.<sup>116</sup> The effects of *Shelby County* are not yet fully known, but it “may mean that voter ID laws in [states]...that have not been pre-cleared[] go into effect soon.”<sup>117</sup>

Opponents challenged the constitutionality of Indiana’s voter ID law as unconstitutional under Indiana’s state constitution in *League of Women Voters of Indiana, Inc. v. Rokita*. The voter ID law prevailed again, this time in the Supreme Court of Indiana, when the court granted a motion to dismiss the claim against the statute.<sup>118</sup>

Similar to *Crawford* and *Gonzalez*, opponents challenged the Georgia voter ID law under the Twenty-Fourth Amendment, section 2 of the VRA, the Civil Rights Act of 1964, the Equal Protection Clause, and the state constitution.<sup>119</sup> A federal district court blocked the law as a poll tax, leading

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112. Sophia Pearson, *Pennsylvania Judge Bars Voter-ID Law for Next Election*, BLOOMBERG (Aug. 16, 2013, 3:28 PM), <http://www.bloomberg.com/news/2013-08-16/pennsylvania-judge-bars-voter-id-law-for-next-election.html>.

113. *Id.*

114. 133 S. Ct. 2612 (2013).

115. *Id.* at 2618, 2620.

116. *See id.* at 2623-25.

117. *Voter Identification Requirements*, *supra* note 11.

118. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 772-73 (Ind. 2010).

119. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

the Georgia legislature to amend the law to provide free ID.<sup>120</sup> The amended voter ID law was challenged and dismissed in federal court for lack of standing, and the court denied the request for a permanent injunction.<sup>121</sup> The United States Court of Appeals for the Eleventh Circuit held that the district court erred in its ruling on standing.<sup>122</sup> However, considering *Crawford's* balancing test, the court found that the voter ID law advanced Georgia's legitimate interest in preventing voter fraud, and that the state did not have to show specific instances of voter fraud.<sup>123</sup> When considering the burden the voter ID law placed on voters, the court held that the burden was lacking or had minute effects if any; and therefore, the court upheld the voter ID law.<sup>124</sup>

The Tenth Circuit upheld an Albuquerque voter ID law that required non-absentee voters to show a valid photo ID for all municipal elections.<sup>125</sup> The Tenth Circuit also applied the *Crawford* balancing test and found that the law did not violate the Equal Protection Clause,<sup>126</sup> did not impose a substantial burden on a person's right to vote,<sup>127</sup> and was not unconstitutionally vague.<sup>128</sup> The court stated that the prevention of both voter fraud and voting impersonation were "sufficient justifications" for the law.<sup>129</sup>

Voter ID opponents were successful in challenging a provision of Ohio's election statute that allowed poll workers to question if a voter was a naturalized citizen or not. Under the challenged procedure, a poll worker could require a naturalized citizen to present proof of his or her naturalization.<sup>130</sup> If the naturalized citizen was not able to present the requisite ID, the statute allowed the voter to cast a provisional ballot.<sup>131</sup> The court found that the law was subject to strict scrutiny because it

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120. *Id.*

121. *Id.* at 1346-48.

122. *Id.* at 1351.

123. *Id.* at 1355.

124. *Id.* at 1357.

125. *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1316 (10th Cir. 2008).

126. *Id.* at 1320.

127. *Id.* at 1323.

128. *Id.* at 1324-25.

129. *Id.* at 1323.

130. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 823-24 (N.D. Ohio 2006).

131. *Id.* at 824 (explaining that a voter without the naturalization documentation could cast a provisional ballot, but would then have to visit the Board of Elections with the required documentation within ten days of the election).

discriminated against naturalized citizens.<sup>132</sup> The court found that the provision violated the Fourteenth Amendment because it placed an undue burden on the right to vote,<sup>133</sup> and that the state's interest in preventing voter fraud was not sufficiently compelling to outweigh the burden.<sup>134</sup> This case is particularly instructive because it is the first time a voter ID law was subject to strict scrutiny. This should indicate to opponents that if voter ID laws get the heightened level of review, states face a difficult task in proving a compelling interest.

These lower court opinions have varied in applying the tests from *Crawford*, leaving the legality of voter ID laws unresolved. With lower courts diverging on the constitutionality of voter ID laws, and the Supreme Court recently deciding the preemption issue in the *Gonzalez* case this year in favor of preemption, tribes must continue the legal battles over the constitutionality of voter ID laws. Native American tribes may have to mount the next wave of legal challenges to these restrictive provisions in order to preserve their right to vote.

### *III. Voter Identification Laws Raise Unique Challenges for Native Americans*

The right to vote is a fundamental right deeply embedded in our country's democratic society. The right to vote is protected by the Fifteenth Amendment and the VRA of 1954. After Congress passed legislation in 1924 granting Native American citizenship, states still interfered with their right to vote. Although protecting the election process from fraudulent behavior is an important interest, it is essential to achieve this goal while still ensuring that American citizens have a voice in elections. Native American voter turnout is already lower than the national average.<sup>135</sup> Approximately "two out of five eligible Native Americans and Alaska Natives are not registered to vote,"<sup>136</sup> and even among those that are registered to vote, "the turnout rate is [five] to [fourteen] percentage points lower than...other racial and ethnic groups."<sup>137</sup>

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132. *Id.* at 825.

133. *Id.* at 827.

134. *Id.* at 826.

135. TOVA WANG, DEMOS, ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES: NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 3 (2012), available at <http://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf>.

136. *Id.* at 6.

137. *Id.*

Voter ID laws present another challenge in increasing Native American participation in elections. Legislatures should pay special attention to protecting the voting process, especially for those citizens whose participation was discriminated against in the past. Ensuring the fairness of this process strengthens our country's electoral system. It is time for the federal government to send a strong message to Native Americans that their vote is important.

Voter ID laws place a disproportionate burden on Native American voters because many do not have photo ID, nor do they have the resources to obtain the underlying documents necessary to obtain the required photo ID. In addition, the long distance tribal members must travel to obtain the ID or to have their provisional ballot counted creates another burden on tribal members. Grouped together, these unique challenges disproportionately disenfranchise tribal members.

One in five eligible Native American voters do not have a photo ID issued by the state or federal government that meets the requirements for ID in strict-photo ID states.<sup>138</sup> To that end, many states do not allow tribal photo IDs at the polls because a state or federal government did not issue them.

Many Native Americans live in rural and remote communities where they continue to live in traditional ways. As such, they have never needed a photo ID, because in these small communities tribal members have relied on tribal and federal services that do not require ID.<sup>139</sup> Moreover, many Native Americans lack the underlying documentation needed to obtain a photo ID issued by either the state or federal government. This places a severe burden on them to obtain the photo ID cards issued by the state or federal government.<sup>140</sup>

Furthermore, the financial cost associated with these underlying documents creates another hindrance on Native Americans, and in some cases makes "voting infeasible."<sup>141</sup> The geographic location of many tribal members also creates a unique challenge because many live on the reservations and must travel significant distances to get to a location where state or federal issued ID is available.<sup>142</sup> A tribe's geographic isolation from

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138. Brief for National Congress of American Indians et al. as Amici Curiae Supporting Petitioners, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3440943, at \*3 [hereinafter Brief for the Petitioners].

139. *Id.* at \*9.

140. *Id.* at \*8-9.

141. *Id.* at \*9.

142. *Id.* at \*15.

polling places creates a further encumbrance on tribal members with regard to the provisional ballots called for by many voter ID laws.

*A. Voter Identification Laws Uniquely Challenge Native Americans Because They Lack Access to the Underlying Documents*

Reservation life is different from that of many American communities. For example, “[m]any Native Americans were born at home and do not [have]...birth certificate[s].”<sup>143</sup> “[T]he Indian Health Service [“IHS”] did not start issuing birth certificates until the 1960’s.”<sup>144</sup> For a while, IHS “simply entered ‘Indian Boy’ or ‘Indian Girl,’” terms that do not serve the requisite ID purposes.<sup>145</sup> Birth certificates are one of the underlying documents required in the process of obtaining a state or federally issued voter ID. An *Amicus* NCAI survey “reported that 20% of the reservation population does not have a birth certificate.”<sup>146</sup> Obtaining a birth certificate produces a unique challenge to Native Americans.

Some voter ID laws require voters to provide current proof of residence. Native Americans, especially those living on rural reservations, may not be able to provide proof of residence because many tribal communities do not have street addresses due to poor road conditions.<sup>147</sup> The lack of street addresses also poses a problem for voter ID laws requiring proof of residence by a current utility bill or bank statement.<sup>148</sup> Because of the lack of street addresses, the U.S. Postal Service does not service many roads. As a result, many tribal members receive their mail at P.O. boxes or other locations.<sup>149</sup> The number of Native Americans who have electricity, phone lines, or bank accounts to provide the requisite documentation is much less on average than the overall U.S. average. These are challenges unique to tribal members and could potentially disenfranchise them.

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143. *Id.* at \*10.

144. *Id.* at \*10-11.

145. *Id.* at \*11.

146. *Id.*

147. *Id.* at \*12.

148. *Id.*

149. *Id.*

*B. The Cost of Obtaining the Required Voter ID and/or the Underlying Documentation to Get the Required ID Creates an Additional Challenge for Native Americans*

The cost associated with obtaining the required form of ID in some states hinders many Native Americans living below the poverty line. The additional cost makes it infeasible for some to obtain the requisite ID, and thereby serves to disenfranchise them.

According to the U.S. Census Bureau, Native Americans earn a median annual income of \$35,062, with one in every four Native Americans living in poverty.<sup>150</sup> Native Americans have persistently remained among some of the most impoverished people in our country. While some states provide free voter ID cards, the costs associated with obtaining the underlying documents creates an expense which may be prohibitive to those living in severe poverty.

*C. Native Americans Geographical Location Creates a Unique Challenge for Tribal Members to Obtain the Proper Voter Identification*

Reservations are typically located outside of metropolitan areas; therefore, many Native Americans living on reservations must travel significant distances to obtain a state-issued ID. Because Native Americans live in remote locations, they would have to drive several hours to obtain the state issued ID. This creates another barrier for Native Americans attempting to get the proper ID.

Native Americans are less likely to have a car than the general population.<sup>151</sup> Even if they do have a car, the expense of buying gasoline could prevent them from being able to travel the long distance to obtain ID.<sup>152</sup> Moreover, “only . . . 6 % of tribes have a public transportation system,”<sup>153</sup> making traveling significant distances infeasible for some tribal members. Because of the long distance tribal members must travel, they are probably not able to acquire voter ID before work, after work, or during a lunch break. Instead, many Native Americans must take off work to travel a long distance to obtain the voter ID. This is prohibitive to those who cannot afford that loss of income.

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150. U.S. CENSUS BUREAU, [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb11-ff22.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html) (last visited May 25, 2013)

151. Brief for the Petitioners, *supra* note 138, at \*15.

152. *Id.*

153. *Id.* at \*16.

The provisional vote that some voter ID laws allow creates another long trip for voters to make. Native American voters unable to show the required ID on election day are given provisional ballots kept separate from regular ballots until the voter returns to the election officials and presents an acceptable ID. Individuals given provisional ballots are generally allowed a few days to return to election officials with the proper ID. If they are unable to return within the allotted time period, their vote will not be counted. Therefore, the “mitigating” factor that some states have built into their voter ID laws actually does little to preserve Native Americans’ voting rights.

Because of their poverty and geographic isolation, Native Americans face unique challenges when acquiring photo ID. Unfortunately, these burdens leave many tribal members without a voice in elections because they are not able to meet the requirements of their state’s voter ID law.

*D. Native American Tribal Identification Cards Are Not Accepted Forms of Identification in Many State Voter ID Laws*

Currently, only the voter ID statutes in Georgia, Idaho, Michigan, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Washington allow tribal ID to serve as voting ID.<sup>154</sup>

Arizona’s voter ID law allowed for the use of a tribal enrollment card or other form of tribal ID,<sup>155</sup> but the law was recently preempted by the Supreme Court’s opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.*<sup>156</sup> Wisconsin’s voter ID law allowed for the use of an ID card issued by a federally recognized tribe, but a state judge found Wisconsin’s voter ID law unconstitutional.<sup>157</sup> Alabama’s new voter ID law, set to take effect for the 2014 primary election, also includes tribal ID as an allowed form of ID.<sup>158</sup>

Having only eleven out of the thirty states with voter ID laws allowing tribal ID to qualify as valid voter ID creates another burden for Native Americans. Not every tribe issues tribal ID. But many do, and those tribes should be able to use their tribal IDs. Because many tribal members rely

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154. GA. CODE ANN. § 21-2-417(a)(6) (West 2013); IDAHO CODE ANN. § 34-1113 (West 2013); MICH. COMP. LAWS ANN. § 168.523 (West 2013); MONT. CODE ANN. § 13-13-114 (2013); N.D. CENT. CODE ANN. § 16.1-05-07(1)(b) (West 2013); OKLA. STAT. ANN. tit. 26, § 7-114(A)(4) (West 2013); S.D. CODIFIED LAWS § 12-18-6.1 (West 2013); UTAH CODE ANN. § 20A-1-102(82)(b) (West 2013); WASH. REV. CODE ANN. § 29A.40.160(7)(b) (West 2013).

155. ARIZ. REV. STAT. ANN. § 16-166(F)(6) (West 2012)

156. 133 S. Ct. 2247 (2013).

157. *Voter Identification Requirements*, *supra* note 11.

158. *Id.*



solely on their tribal ID, requiring them to obtain another form of ID to vote places another burden on Native Americans.

The U.S. Constitution does not create the powers of tribal governments. Instead, Native American tribes exercise inherent sovereign power.<sup>159</sup> Tribal governments are an important part of tribal sovereignty, and the failure of some states to include tribal ID cards as an acceptable form of ID infringes on tribal sovereignty.<sup>160</sup> Recognizing the strong federal policy of encouraging tribal sovereignty, the federal government and states “accept tribal ID cards [in situations] where they would otherwise require a state or federal ID” card.<sup>161</sup> For example, the Transportation Security Administration (“TSA”) includes Native American or tribal ID on its list of acceptable ID for an individual to get on a flight.<sup>162</sup>

Consequently, in some states, tribes can do everything with their tribal ID that they can do with a federal or state ID except vote in national elections. Not allowing tribal IDs for voting undermines the federal policy of tribal sovereignty and places an unreasonable restriction on Native Americans’ right to vote.

#### *IV. Suggestions for Protecting the Native American Vote Against Voter Identification Laws*

##### *A. Judicial Suggestions – How Native Americans Should Approach Voter Identification Laws in the Courts*

Native American tribes should continue fighting against state voter ID laws. It is important that tribal members fight for their vote in state and federal elections.

Because of lower courts’ broad interpretations of the Supreme Court’s election regulation jurisprudence, the constitutionality of voter ID laws in many states is unsettled. Therefore, it is important for Native Americans in voter identification litigation to realize there is no set rule or test for analyzing voter ID laws. Tribal members can learn a lot from state and federal court decisions that have analyzed the constitutionality of voter ID

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159. *Talton v. Mayes*, 163 U.S. 376 (1896).

160. NAT’L CONG. OF AM. INDIANS, *VOTER ID LAWS & THE NATIVE VOTE: STATES OF CONCERN 2*, 4 (2012), available at [http://www.ncai.org/attachments/PolicyPaper\\_LaOnRbluKyazjpizLTzOsFxrRiBpmwxxbGVFOeCNGMFwEuLZXwz\\_VoterIDs\\_NativeVote\\_States\\_of\\_Concern.pdf](http://www.ncai.org/attachments/PolicyPaper_LaOnRbluKyazjpizLTzOsFxrRiBpmwxxbGVFOeCNGMFwEuLZXwz_VoterIDs_NativeVote_States_of_Concern.pdf).

161. Brief for the Petitioners, *supra* note 138, at \*19.

162. *Acceptable IDs*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/traveler-information/acceptable-ids> (last visited Feb. 10, 2013).

laws. By recognizing what arguments have been successful in various courts, tribal members will be better able to structure their arguments against voter ID laws. When constructing an argument against a voter ID law, it is important to remember the *Anderson* and *Burdick* opinions, noting that the court could apply a balancing test, a set strict scrutiny standard of review, or a sliding scale approach in determining the constitutionality of the law.

The *Crawford* and *Inter Tribal Council of Arizona, Inc.* opinions are also important for tribes to see how the Supreme Court analyzes voter ID issues. The *Crawford* decision is particularly instructive for tribes in strict photo ID states like Indiana. The Court's plurality decision in *Crawford* did not close the door on the constitutionality of voter ID laws; rather, it gives Native Americans a look into how many of the justices will analyze the constitutionality of the law.

The majority in *Crawford* took issue with the lack of evidence affecting the burden implemented on the voting rights of those opposing the law.<sup>163</sup> Because of this lack of evidence, the Court used a low standard of review and held that the voter ID law imposed only a limited burden on voters' rights.<sup>164</sup> The Court also found the state had a legitimate interest in combating voter fraud, bloated voter rolls, and protecting the public's confidence in the integrity of the electoral process.<sup>165</sup> When bringing a claim opposing voter ID laws, tribal members should attempt to undercut the state's interests by arguing that voter fraud is rare.

Furthermore, the burden on tribal members created by voter ID laws has become clearer since the *Crawford* opinion. It will be important to note how voter ID laws regarding the Native American vote impacted the 2012 presidential election.

Tribes should continue collecting data on the burdensome effects of voter ID laws and Native Americans should use this information to produce evidence to the Court showing how voter ID laws raise unique challenges for the tribe. By emphasizing tribe-specific challenges, both state and federal courts may be more receptive to tribes proving that voter ID laws are creating unfair burdens on Native Americans.

It is also important for tribes to recognize the dissent's analysis in the *Crawford* decision because the dissenting justices could potentially be writing the majority the next time a voter ID law case reaches the Supreme

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163. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

164. *Id.* at 202-03.

165. *Id.* at 192-99.

Court. The dissent cited travel costs and fees necessary to obtain the required ID as burdens on the right to vote.<sup>166</sup> These burdens also affect tribal members, and when forming arguments, tribes should emphasize these burdens accordingly. The geographic isolation of many reservations forces respective tribal members to travel great distances to get the required ID. Furthermore, it is difficult for some impoverished tribal members to acquire the requisite voter ID because of the associated costs. Tribes should emphasize these arguments in future voter ID law litigation.

In addition to signaling the need for concrete data on the burden of voter ID regulations, the *Crawford* decision was instructive in another way. In constructing a legal challenge to voter ID laws, tribes should note the heavy burden the *Crawford* petitioners faced by bringing a facial challenge.<sup>167</sup> Native Americans would likely be more successful with an as-applied challenge to a voter ID law, which could potentially shift the sliding scale analysis to heightened scrutiny. This would require the state to produce more legitimate interests and would ease the burden on the tribe by only requiring proof of an individualized burden.

The *Gonzalez* opinion is also important to tribal members entering litigation against voter ID laws, and it is beneficial as an outline for tribes in strict non-photo ID states. Unlike the Indiana voter ID law at issue in the *Crawford* decision, the voter ID law in the *Gonzalez* case did not provide free voter ID. The court found that the failure to provide free ID was not a poll tax under the *Harper* analysis, and therefore did not violate the Twenty-Fourth Amendment.<sup>168</sup> Indiana is a strict photo ID state, while Arizona is a strict non-photo ID state. The difference in the states' ID requirements could have played a role in the Court's decision. For example, if Arizona was a strict photo ID state that did not provide free ID, the Court might have been more willing to find that the voter ID law was an unconstitutional poll tax under the Twenty-Fourth Amendment. Native Americans should continue making the poll tax argument, especially in strict photo ID states that do not provide free ID. However, it seems unlikely that courts will find a voter ID law unconstitutional if the state provides a free voter ID card.

When analyzing the Fourteenth Amendment's Equal Protection claim, the *Gonzalez* court used the balancing approach from *Crawford* and found that requiring an ID provided only a slight burden on voters, and that the

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166. *Id.* at 211.

167. *Id.* at 204.

168. *Gonzalez v. Arizona*, 677 F.3d 383, 388 (2012).

state had legitimate interests in assessing the eligibility and qualification of voters.<sup>169</sup> Finally, tribal members should review the Court's recent holding in *Inter Tribal Council of Arizona, Inc.*, as its holding has an impact on state voter ID requirements that go beyond the requirements of the uniform Federal Form for federal elections.<sup>170</sup>

*B. Alternatives States Should Consider when Implementing a Voter Identification Law*

Litigation alone is not enough to ensure that the Native American vote is protected. Federal, state, and tribal governments should all be concerned about the burden the voter ID laws place on Native Americans' right to vote. All three entities should work together to maintain the purposes behind voter ID laws without disenfranchising Native Americans.

Legislators should pay special attention to Native Americans whose right to vote has faced discrimination. Legislation should strive for inclusiveness and must recognize that Native Americans have the right to participate in America's democracy.

*1. States Should Provide Free Voter Identification Cards*

At the very least, all states that do not provide free voter ID should do so. It should be a priority for all states with voter ID laws to provide free ID. While all states should provide free ID, it is particularly important for the four strict photo ID states: Georgia, Indiana, Kansas, and Tennessee. The three strict non-photo ID states, Arizona, Ohio, and Virginia, should also be required to provide access to free ID because these states require voters without the proper ID to cast a provisional ballot that will only be counted if the voter returns to election officials with the correct ID within an allotted amount of time.

In these strict photo ID states and strict non-photo ID states, a voter cannot cast a valid ballot without first showing the proper photo ID. Because of this requirement, these states should provide free ID. Without free voter ID, the right to vote of many Native Americans will be negatively impacted, due to the cost prohibitive aspects of obtaining ID many Native American's face.

Providing free voter ID will not completely solve the problem for all Native American voters. The underlying documents needed to get the free photo ID can create another burden on Native Americans if they are unable

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169. *Id.* at 410.

170. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013).

to pay for these documents. States should recognize these additional costs and implement ways for Native Americans to get voter documentation free or for a lesser charge.

For example, the Fair Credit Reporting Act (“FCRA”) requires each of the nationwide consumer reporting companies to provide every eligible American citizen, at his/her request, a free copy of his/her credit report once every twelve months.<sup>171</sup> Congress implemented the FCRA so that people could monitor the accuracy of their credit and protect themselves from identity theft. The constitutionally protected right to vote is much more vital than having access to credit reports. The federal government could mandate that states give free birth certificates to any eligible citizen. While providing free voter ID and free access to the underlying documents required to obtain the requisite ID might place a burden on the states, this burden is outweighed by the importance of ensuring that all eligible voters are able to exercise their right to vote.

*2. States Should Implement a Plan to Assist Tribal Members in Accessing the Locations to Get the Required Voter Identification*

States should work with the federal and tribal governments to facilitate access to locations where tribal members can obtain the required IDs without traveling a significant distance. IHS facilities could be used as locations where Native Americans can register to vote, and could potentially be used as places where they could obtain the requisite ID cards if the state and federal government agreed.<sup>172</sup> The NVRA requires that voter registration services take place at state-based public agencies.<sup>173</sup>

This same section allows the state to designate other offices within the state as voter registration agencies, providing the possibility of federal agencies or non-governmental offices to be designated under the law. This provision of the NVRA allows for “state or local government offices such as public libraries, public schools, [or] offices of city and county clerks” to serve as voting registration agencies.<sup>174</sup> While these other offices allowed by the statute might be appropriate for most citizens, the IHS facility is an ideal location for Native Americans to register to vote and get the required ID.

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171. 15 U.S.C. § 1681j (2006).

172. WANG, *supra* note 135. Voter registration presents a unique problem for Native Americans who may not realize that it is even a requirement to vote because it is not a requirement to participate in many tribal elections. See Ross, *supra* note 79, at 441.

173. 42 U.S.C. § 1973gg-5(a)(3)(A) (2006).

174. *Id.* § 1973gg-5(a)(3)(B).

The IHS facilities are particularly promising locations for obtaining maximum voter participation from Native Americans. Native Americans usually “interact[] with an IHS facility at some point” during each year.<sup>175</sup> Because Native Americans are already visiting the IHS facilities, it is an ideal location for voter registration and voter ID distribution. One of the most important reasons IHS is an ideal location to distribute voter ID cards is the number of Native Americans it reaches. The IHS agency “provides... comprehensive health service[s]...[to] approximately 1.9 million” Native Americans.<sup>176</sup>

Additionally, a possible mailing option could alleviate the burden of traveling long distances. For example, states could set up a way for Native Americans to request the required ID online or through the mail. Provided they meet the requirements, the state would mail the individual his/her ID. Regardless of the approach the state takes, it should strive to make voter ID accessible to tribal members.

*3. States Should Allow the Use of Tribal Identification as an Acceptable Form of Voter Identification*

Tribal ID should be allowed as voter ID in every state with a voter ID law. Tribal members should make a concentrated effort to engage state legislatures about the importance of allowing tribal ID as a form of acceptable voter ID. Tribal members should point out that many tribal members rely on tribal ID as their only ID, and that most federal and state agencies accept tribal ID cards in situations where they would otherwise require a state or federal ID. Furthermore, tribal members should emphasize that because tribal ID is an important part of tribal sovereignty, states should pay special attention to ensuring the use of tribal ID under voter ID laws.

Tribes that do not issue tribal ID or tribes that issue tribal ID different from the voter ID requirement should start issuing ID that meets the required voter ID standard. This is especially urgent in states with large Native American populations that have voter ID laws in place.

While voter ID laws vary from state to state, ensuring tribal ID includes a photograph of the cardholder, an expiration date, and the cardholder’s signature should meet the voter ID standards in most states. Tribes in Indiana, Kansas, and Pennsylvania require expiration dates, so tribal members should pay special attention to ensuring tribal ID has an

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175. WANG, *supra* note 135, at 15.

176. *Id.*

expiration date to meet these standards. Likewise, tribes in Florida and Hawaii should require the tribal ID to have the requisite signature to meet these two state provisions.

Many state voter ID laws provide exceptions to who is obligated to show ID under its voter ID law. States could also make an exception for tribal members or for tribal ID. For example, Indiana has an exception for voters voting inside a nursing home; they are exempt from showing the required ID.<sup>177</sup> Indiana and other voter ID states could make a similar exception to the voter ID requirement for Native American voters voting inside a reservation. State, federal, and tribal governments should make sure tribal members have the appropriate ID or require ID that most tribal members have access to in meeting the voting requirements.

*4. States Should Implement a Marketing Campaign to Notify Tribal Members of the States' Voter Identification Laws and How They Can Acquire the Requisite Identification*

States with voter ID laws should make concerted efforts to notify voters who may lack the required ID cards and inform them about the availability of free voter ID cards (if the state provides them) and the steps necessary to obtaining the required voter ID. States could achieve this goal by providing notice to Native Americans. Additionally, the state could mail notice about its voter ID laws to known members with street addresses.

Public service announcements and advertising campaigns could also help notify tribal members about the state's voter ID requirements. States could also provide notice in the tribal newspaper or magazine about the steps needed to obtain the required voter ID.

Federal, state, and tribal governments should all work together to stress the importance of voting and Native Americans' ability to vote. Ensuring that all eligible citizens have the opportunity to vote in elections should take priority in all voter ID states.

Tribal members should also play a role in helping other tribal members understand voter ID laws. They should work to educate their communities on the requirements of voter ID laws and make sure tribal members receive up to date information about voting requirements. Creating accessible areas on the reservation for tribal members to register and get voter IDs would provide a good way to reach many tribal members. Tribal members could also provide a checklist for members to ensure they have the required ID and know how and where to vote on election day.

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177. IND. CODE ANN. § 3-10-1-7.2(e) (West 2013).

*5. States Should Work with Tribal Members to Alleviate the Long Distances Some Tribal Members Must Travel*

Tribal communities could set up voting drives to engage tribal members to take steps necessary to obtain the proper ID. These drives should be set up at locations in areas frequently populated by Native Americans, and leave enough time before the election for tribal members to get the required ID.

The NCAI has suggested “[c]ommunity-organized carpools to designated ID distribution centers” to reduce financial and geographic burdens.<sup>178</sup> The implementation of these carpools is a creative way to help Native Americans acquire access to the required ID.

States should also provide carpool services for the strict photo ID and non-strict photo ID states that require provisional ballots. Requiring provisional ballots forces another long trip that Native American voters will have to take to have their votes count.

*V. Conclusion*

Voter ID laws are in a state of limbo. Because of the variety of requirements that different states have in their voter ID laws and the Supreme Court’s ambiguity in the interpretation of voting regulations, tribal members must pay close attention to ever-evolving voter ID laws and how their right to vote is impacted. Voter ID laws raise unique challenges to Native Americans because of the costs associated with obtaining the required ID and tribal members’ geographic isolation. These unique challenges may have the effect of disproportionately disenfranchising Native American voters.

Because of the potential for disenfranchisement of tribal members, state and federal legislators should pay special attention to the Native American vote, making sure that it does not face the discrimination and exclusion it has in the past. Tribal members should continue fighting to ensure that election process represents the tribal vote accordingly.

Making voter ID cards free, accepting tribal ID, making access to voter ID distribution centers easier for tribal members, notifying tribal members about the state’s voter ID laws, and setting up carpool drives will not solve all the problems associated with how voter ID laws impact tribal members.

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178. NAT’L CONG. OF AM. INDIANS, *supra* note 160, at 7.



Nonetheless, they are important steps that could have a significant impact on the voting rights of Native Americans.