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NOTES

UNDERDEVELOPED AND OVEREXPOSED: RETHINKING PHOTO ID VOTING REQUIREMENTS

*Richard Tyler Atkinson**

I. INTRODUCTION

“It’s not the hand that signs the laws that holds the destiny of America.
It’s the hand that casts the ballot.” – Harry Truman¹

Throughout the United States, voting laws require citizens to present proof of identity in order to cast an in-person ballot at polling stations.² Depending on state and municipal rules, this proof varies in form but is generally very simple. In some jurisdictions, giving a full name may be enough to “prove” identity;³ in other places, a voter may need to present at least a utility bill showing the voter’s name and address.⁴ A handful of states have recently attempted to implement a somewhat higher level of proof, requiring voters to provide government-issued photo identification such as a driver’s license.⁵ This of course is also simple evidence—small, inexpensive cards found in most wallets and purses—but the simplicity of photo IDs has helped fuel a fiercely partisan and complicated debate.

This Note attempts to untangle the rhetoric surrounding the photo ID issue.⁶ After

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1. Madhu Sridhar, *Voters’ Guide: A Letter to Voters*, BOSTON GLOBE, Oct. 19, 2004, at F2.

2. See Nat’l Conf. of State Legis., Requirements for Voter Identification (Feb. 1, 2007), available at <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm> [hereinafter Requirements for Voter Identification]. Under the Help America Vote Act, if a voter does not have proper proof of identity, the voter may cast a provisional ballot which will be counted only if the voter can later produce proof of identity within the provisional period. Help America Vote Act, 42 U.S.C.A. § 15482 (West 2007).

3. See, e.g., N.M. STAT. ANN. § 1-12-7.1(D) (West 2007).

4. See, e.g., TEX. ELEC. CODE ANN. § 63.010 (Vernon 2006).

5. See, e.g., FLA STAT. ANN. § 97.0535(3)(a) and § 101.043 (LexisNexis 2007); IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, and 3-11-8-25 (2006).

6. This paper is primarily concerned with laws that require voters to produce *government-issued* photo IDs at *polling stations*. Unless otherwise specified, for the purposes of this essay, “photo IDs” are “government-issued photo IDs.” Examples include state-issued driver’s licenses, state-issued identification cards, passports, and military identification. A few states require voters to produce photo IDs but allow the photo ID to be non-government-issued; examples of these IDs include school photo IDs and credit cards bearing the picture of the credit card holder—such requirements will not be the focus of this essay. See, e.g., LA. REV. STAT. ANN. § 18:562 (2007); S.D. CODIFIED LAWS § 12-18-6.1 and 6.2.

a brief look at the origin of photo ID requirement laws, this paper will examine the policy arguments related to this type of legislation. These policies concern voter security, access, turnout, costs, and confidence. This paper finds that photo ID requirements fail to fulfill their primary purpose (the prevention of fraud); in fact, photo ID requirements decrease legitimate voter turnout (and therefore may *increase* the impact of fraud). Next, this paper will investigate the legality of state photo ID rules in light of federal laws and court rulings. This portion of the essay highlights legal issues that state legislators must consider in order to pass a legal photo ID requirement. Finally, this Note will propose a practical framework for workable photo ID legislation. The crux of this proposal will draw from the legality issue, which relates back to several policy questions. For legal and policy reasons, this paper advocates voter photo ID requirements *only once proactive measures are in place* to ensure that all citizens have access to free photo identification. Without these measures, a photo ID voting requirement risks doing substantially more harm than good.

II. BACKGROUND: THE VOTING BOOTH MEETS THE PHOTO BOOTH

The 2000 presidential election catalyzed a broad reassessment of voting procedures, including a re-evaluation of the voter identification process. Marred by critical organizational failings and protracted litigation, the 2000 election generated a wave of election reform demands.⁷ The general public overwhelmingly agreed that the system needed significant renovation.⁸ Legislators shared this sentiment,⁹ and the months following the 2000 election “witnessed unprecedented attention to the mechanics of election administration.”¹⁰ At the beginning of 2001, the National Commission on Federal Election Reform was established to critically examine the United States’ voting system.¹¹ The Commission organized hearings, launched a number of taskforces, and published several recommendations based on its findings.¹² Targets for these recommendations included voter registration, early voting, overseas voting, felon voting, and identification requirements.¹³ Congress codified many of these recommendations on October 29, 2002, shortly after the conclusion of the Commission, in the Help America Vote Act (“HAVA”).¹⁴

By the time Congress enacted HAVA, the push for election reform had extensively

7. Daniel P Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 689-90 (2005).

8. Bob Ney & Steny H. Hoyer, Op-Ed., *Reform the Election Process: Get Rid of Ancient Technology and Federal Mandates*, WASH. TIMES, May 30, 2001, at A15 (offering polls taken following the 2000 election that show “overwhelming” public support for election reform).

9. See, e.g., Help America Vote Act of 2002, 42 U.S.C.A. §§ 15301–15545 (West 2007) (enacting new federal voting standards following the 2000 election). In Florida, the epicenter of the Presidential dispute, the reform movement quickly led to an electronic balloting system. Florida Election Reform Act of 2001, FLA. STAT. ANN. §§ 101.5604–.56042 (West 2007).

10. Tokaji, *supra* note 7.

11. NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS I (2001).

12. See NAT’L COMM’N ON FED. ELECTION REFORM, FINAL REPORT OF THE NAT’L COMM’N. ON ELECTION REFORM 6–14 (2002), <http://www.reformelections.org/ncfer.asp#finalreport>.

13. *Id.*

14. Help America Vote Act, *supra* note 9; see also Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L. J. 424 (2004).

fractured along party lines, with Republicans and Democrats emphasizing different goals and solutions. This debate has been characterized as a dispute over system “integrity” versus voter “access.”¹⁵ On the one hand, Republicans have commonly emphasized the need to secure the electoral system from fraud, styling their reform as necessary to ensure election integrity. On the other hand, Democrats have emphasized the importance of allowing all citizens meaningful access to the electoral system.¹⁶ Far from a Solomonic resolution to the “integrity/access debate,” HAVA simply addressed low-hanging fruit.¹⁷ For example, HAVA carries a limited voter identification requirement affecting only first-time voters who register, by mail, on or after January 1, 2003.¹⁸ HAVA also provides some basic instructions regarding disability access,¹⁹ auditing,²⁰ and provisional balloting,²¹ but the legislation leaves substantial room for states to engineer their own reforms.²² Consequently, “some of the most important election reform battles” have occurred at the state level.²³

States will remain battlegrounds for election reform, and this will especially be the case for photo ID requirements.²⁴ Nearly half of states have voter identification requirements that are more stringent than those mandated by HAVA,²⁵ most of these more stringent requirements have been adopted in the last four years,²⁶ and state legislators continue to push strict identification standards.²⁷ According to the National

15. THE CENTURY FOUNDATION, BALANCING ACCESS AND INTEGRITY, 1–2, available at <http://www.tcf.org/Publications/ElectionReform/baiintro.pdf>.

16. The labels “integrity” and “access” are somewhat apocryphal; the “Republican position” does not openly intend to limit legitimate access to the system, and the “Democratic position” ultimately concludes that an electoral voting system requires equal access so that the system may have integrity. The labels do, however, help to identify the rhetorical grounds used by participants in the debate over photo ID requirements. See Sally Acharya, *Carter-Baker Commission Mulls Election Reform at AU*, AM. WEEKLY, Apr. 26, 2005, available at <http://veracity.univpubs.american.edu/weeklypast/042605/index.html> (noting that at the first hearing of the Commission on Federal Election Reforms, the co-chairs criticized the “integrity versus access” characterization as a misimpression of the goals of either side).

17. Tokaji, *supra* note 7 at 693, 695–97.

18. This identification requirement mandates that a first-time, mail-registered voter must produce a photo ID or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” 42 U.S.C.A. § 15483(b) (West 2007).

19. 42 U.S.C.A. § 15481 (West 2007).

20. *Id.*

21. In all states, HAVA requires that state election systems include a provisional balloting process through which a person who cannot satisfy a state’s identification requirement has an opportunity to later produce the necessary identification. However, as this Note will illustrate, the availability of provisional balloting does little to justify a photo ID requirement. This is largely because one who does not possess a valid government-issued photo ID on Election Day will probably not have such an ID within the provisional opportunity to produce one. 42 U.S.C.A. § 15482 (West 2007).

22. Tokaji, *supra* note 7 at 696.

23. *Id.*

24. Although the United States House of Representatives passed a national photo ID requirement, this legislation stalled in the Senate. The photo ID requirement that passed in the House, part of the Federal Election Integrity Act, was approved 228-196, nearly down party-lines. Final Results for Roll Call 459, H.R. 4844, <http://clerk.house.gov/evs/2006/roll459.xml> (last visited Apr. 3, 2007). With the recent shift of power in the House, it is especially unlikely that Congress will enact a national photo ID requirement in the near future.

25. Requirements for Voter Identification, *supra* note 2.

26. Annette Fuentes, *Voter ID Laws Target the Vulnerable*, USA TODAY, Oct. 6, 2006, at 23A.

27. Eunice Moscoso, *National Voter ID Law Unlikely*, AUSTIN AMERICAN-STATESMAN, Dec. 21, 2006, at A12; see, e.g., Cynthia Tucker, *Voter ID Fraud Claims Don't Hold Water*, ATLANTA JOURNAL-CONSTITUTION, Nov. 22, 2006, at 21A (noting that, for the third time, Georgia legislators are working on photo ID voting legislation); see also, e.g., Virginia Young, *High Court Strikes Down Voter ID Law*, ST.

Conference of State Legislatures, only Indiana and Florida currently impose the strictest identification requirement—the requirement at issue in this essay—that voters must produce government-issued photo ID.²⁸ However, other states seem to be approaching ‘this standard. Georgia and Missouri have attempted to pass similar legislation, but so far these efforts have been blocked in courts.²⁹ Arizona has recently passed a requirement that voters either produce one government-issued photo ID or two other designated forms of identification (such as a utility bill and a government check or a paycheck and a bank statement).³⁰ Four states require that a voter produce a photo ID, but this ID need not be government-issued.³¹

By and large, as state politicians nationwide have adopted the election reform movement, they have also embraced their parties’ positions on election reform.³² Many of these politicians have found that photo ID voting laws profoundly align or conflict with personal (and party) positions on election reform.³³ Advocates of photo ID voting requirements, typically Republicans, argue that photo IDs help to prevent voter fraud while placing little or no burden on the voting public.³⁴ Advocates of photo ID laws also warn that government-issued photo ID requirements are increasingly necessary to protect elections from illegal aliens.³⁵ Opponents of photo ID legislation, typically Democrats, argue that these laws prevent little or no fraud but give a partisan advantage to Republicans; many lower-income citizens (who tend to vote Democratic) possess no photo identification and would have a more difficult time securing one.³⁶ The

LOUIS POST-DISPATCH, Oct. 17, 2006, at A1 (reporting that Missouri photo ID sponsors, whose legislation was struck down by the Missouri Supreme Court, will try to craft a new photo ID measure).

28. Requirements for Voter Identification, *supra* note 2.

29. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005), enjoined Georgia’s photo ID laws while *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006), enjoined Missouri’s photo ID requirements.

30. *ARIZ. REV. STAT. ANN. § 16-579 (2006)*.

31. Requirements for Voter Identification, *supra* note 2. Florida, Hawaii, Louisiana, and South Dakota require photo IDs to vote, but these IDs may be issued by certain non-governmental organizations. *Id.*

32. See Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776/>.

33. See Darryl Fears, *Voter ID Law Is Overturned; Georgia Can No Longer Charge For Access to Nov. 8 Election*, WASH. POST, Oct. 28, 2005, at A3 (noting that litigation over the Republican-backed photo ID law in Georgia was being watched nationally “as Republicans and Democrats in many states battle over who will be allowed on the voter rolls”). On the federal level, the passage of a photo ID law in the House came ninety-eight percent down party lines. GovTrack.us, H.R. 4844 [109th]: Federal Election Integrity Act of 2006, <http://www.govtrack.us/congress/bill.xpd?bill=h109-4844> (last visited Apr. 3, 2007).

34. Hasen, *supra* note 32; see also Cynthia Tucker, Op-Ed., *Evangelical Christianity Moving in the Direction of Compassion*, BALT. SUN, Dec. 25, 2006, at 27A (reporting that, according to the former head of the Georgia Christian Coalition, “[e]lections are critical to the family . . . [s]o we need to protect the integrity of the voting process”).

35. See, e.g., Arizona’s Proposition 200, <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf> (last visited Apr. 3, 2007) (simultaneously denying certain public services to illegal immigrants and providing for a stricter photo ID voting requirement); see also, e.g., 152 CONG. REC. H6751 (2006), available at <http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006record&page=H6751&position=all> (urging support for a national photo ID voting requirement, U.S. House Representative Ginny Brown-Waite warned that, “[i]llegal immigrants are populating this country in an unprecedented number, and it is unjust and unfair to citizens of this country that noncitizens have a hand in electing Federal officials”); see also *Phony Urgency on Vote Fraud*, USA TODAY, Sept. 28, 2006, at 11A (reporting that “[t]he House’s passage of a bill to require photo ID . . . appears tailored more to make House Republicans look tough on illegal immigration”).

36. Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776/>; see also Demos, *Voter Identification: A Threat to Election Integrity*, <http://www.demos.org/page337.cfm> (last visited Apr. 3, 2007).

following section will explore these arguments in greater detail.

III. THE PHOTO ID REQUIREMENT DEBATE: A SURVEY OF ARGUMENTS FAVORING AND OPPOSING PHOTO ID VOTING RESTRICTIONS

The arguments associated with photo ID requirements help to explain the motivation to enact or defeat photo ID voting laws. These arguments also help to illustrate how courts might “balance the harms” of photo ID laws,³⁷ an issue that will be addressed in Part II of this essay. Generally, while it is true that there is “precious little evidence” supporting many of the claims of both sides of the photo ID requirement debate,³⁸ there is sufficient data to make some basic conclusions about the possible risks involved in enacting—or failing to enact—photo ID legislation. The following two sections outline arguments frequently offered in favor and against photo ID voting requirements. The third section evaluates the arguments of both sides.

A. Arguments Favoring Photo ID Requirements

Photo ID voting requirements have an elegant rationale: most citizens (particularly those who vote) have photo IDs; a photo ID requirement at polling stations will help prevent fraud; fraud harms the integrity of the voting system; and “[a] State indisputably has a compelling interest in preserving the integrity of its election process.”³⁹

1. Legitimate Voters Already Have Photo IDs

Photo ID requirements have common sense appeal—people already need government-issued photo IDs to board airplanes, buy alcohol, or cash checks. As one Republican legislator remarked, “[t]his is not a new concept.”⁴⁰ The electoral system, the heart of American democracy, deserves as much security as underage drinking laws. And, this vote-security is readily available in a photo ID requirement because “the vast, overwhelming majority of people who want to vote” have government-issued photo IDs.⁴¹ Because those who vote already possess photo IDs, there is no risk of disenfranchisement from a photo ID requirement.

37. If a court determines that a photo ID law does not impact a historically marginalized group, it will likely apply a balancing of harms standard of review. *See, e.g., Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007). *But c.f. Common Cause/Georgia*, 405 F. Supp.2d at 1360 (applying a strict scrutiny standard of review).

38. Daniel P. Tokaji, *The Carter-Baker Report: Two Wrongs Don't Make a Right*, ELECTION LAW @ MORITZ, available at <http://moritzlaw.osu.edu/electionlaw/comments/2005/050920.php>.

39. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

40. *House Passes Voter ID Bill*, USA TODAY.COM, Sept. 20, 2006, http://www.usatoday.com/news/washington/2006-09-20-immigration_x.htm.

41. *See, e.g., Carlos Campos, Photo ID Bus Gets Little Use, Tour Averages Fewer than 11 Cards a County*, ATLANTA JOURNAL-CONSTITUTION, Dec. 19, 2005, at 1B (according to Heather Hendrick, a spokesperson for Georgia's Republican governor, the relatively small turnout to a photo ID drive “suggests that the vast, overwhelming majority of people who want to vote in Georgia already have valid IDs”).

2. Voter Fraud is a Serious Threat to the Integrity of the Electoral System

The greater risk of disenfranchisement comes not from photo ID requirements but from fraud, which threatens to dilute the ballots of legal voters. Case law supports the notion that substantial vote dilution is tantamount to disenfranchisement. In *Reynolds v. Sims*, the Supreme Court found that “suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”⁴² The Carter-Ford Commission confirmed that, “[w]hile election fraud is difficult to measure, it occurs.”⁴³ A study by Johns Hopkins University graduate students found that fifty ballots were recently cast using the names of dead voters.⁴⁴ A photo ID requirement would likely prevent dead voters’ ballots from being cast at polling stations. A simple photo ID requirement would have the additional benefit of streamlining the identification process,⁴⁵ freeing poll workers to assist voters and avoid mistakes.

3. Photo ID Requirements Improve Voter Confidence

Even assuming that fraud is not occurring on a substantial level, the public seems to generally believe that photo ID requirements should be enacted.⁴⁶ The Supreme Court has warned that the perception of fraud discourages legitimate voters from casting their ballots.⁴⁷ The Court observed in *Purcell v. Gonzalez* that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”⁴⁸ The Court further noted that “[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised”⁴⁹ and that voter fraud thus “drives honest citizens out of the democratic process.”⁵⁰ Voter ID laws assure honest citizens that fraud will not outweigh their votes; these requirements thus encourage legitimate voters to participate in the democratic process.

4. The Public Supports Photo ID Requirements

The democratic process itself has resulted in the passage of photo ID laws in multiple jurisdictions. In Missouri, Indiana, and Georgia elected representatives have enacted voter photo ID requirements.⁵¹ In Arizona, voters passed similar legislation by

42. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

43. COMM’N ON FED. ELECTION REFORM, *BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMM’N ON FED. ELECTION REFORM 45*, available at http://www.american.edu/ia/cfer/report/CFER_section_5.pdf.

44. Tom Zeller, Jr., *Students Surfing Public Records Learn It’s Easy to Find Out a Lot*, N.Y. TIMES, May 18, 2005, at C1.

45. See *Voter Identification Requirements*, *supra* note 2 (reporting that some states allow as many as twenty-two different ways for voters to prove their identity).

46. According to a Wall Street Journal poll, approximately eighty percent of Americans believe voters should be required to produce some form of photo identification. NBC News/Wall Street Journal Survey, Apr. 2006, <http://online.wsj.com/public/resources/documents/poll20060426.pdf>.

47. See *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006).

48. *Id.*

49. *Id.*

50. *Id.*

51. GA. CODE ANN. § 21-2-417 (2006); IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, and 3-11-8-25 (2006);

proposition.⁵² Photo ID voting requirements are endorsed not only by traditional conservatives but also by populists.⁵³ Nationally, eighty-one percent of Americans polled indicated that they favor some type of photo ID voting requirement (although this poll did not specify that the photo ID must be government-issued).⁵⁴ The public recognizes that elections are a matter of national security, and Americans want “safe borders and they want safe ballots.”⁵⁵ The growth of illegal immigration has increased the threat of election fraud, and the American people should be able to decide how to protect their electoral system.⁵⁶ As security measures, photo ID requirements are particularly inappropriate targets for judicial activism.⁵⁷

B. Arguments Against Photo ID Requirements

Opponents to photo ID requirements argue that photo ID laws will disenfranchise lower-income citizens, that legislative sponsors have misjudged (or misrepresented) the risk of voter impersonation, and that photo ID proponents have mischaracterized court rulings against photo ID laws.⁵⁸

1. Voter Impersonation Is Not a Significant Source of Voter Fraud

Voter impersonation is virtually non-existent at polling stations.⁵⁹ Law professor Richard Hansen, an expert in election law, has found no “evidence of any kind of systematic or serious problems with voters casting ballots in someone else’s name, or with voters registering and actually voting using fictitious names.”⁶⁰ Photo ID advocates warn that voter impersonation is occurring, but is going unrecognized, because defrauders are impersonating registered voters who have not voted for several years.⁶¹ Yet there are no guarantees for a defrauder that an infrequent voter will not vote after years of abstaining; any sizeable practice of stealing infrequent voters’ ballots

MO. REV. STAT. § 115.427 (2006).

52. *ARIZ. REV. STAT. ANN. § 16-579 (2006)*.

53. For example, Lou Dobbs, a self-proclaimed “populist,” strongly supports photo ID requirements, calling its opponents “wrong-headed.” *See, e.g., Lou Dobbs Tonight: Congress Refuses to Implement Solution to Immigration Crisis*, (CNN television broadcast Sept. 22, 2006).

54. NBC News/ Wall Street Journal Survey, *supra* note 46.

55. *House passes voter ID bill*, *supra* note 40.

56. *See, e.g., Tucker*, *supra* note 27 (reporting that one legislative sponsor warned his constituents that there is “evidence of illegal aliens being registered to vote”); *see also, e.g.,* 152 CONG. REC., H6751 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=H6751&position=all (Congresswoman Ginny Brown-Waite warned that “[i]llegal immigrants are populating this country in an unprecedented number, and it is unjust and unfair to citizens of this country that noncitizens should have a hand in electing Federal officials.”).

57. The Missouri Republican Party called the Missouri Supreme Court’s decision to strike down Missouri’s photo ID law “a direct attack on free and fair elections by activist judges.” Young, *supra* note 27.

58. Despite proponents’ allegations of meddling by “activist judges,” many of the judges who have struck down photo ID requirements were appointed by Republicans. In Georgia, for example, the majority of an Eleventh Circuit Panel that ruled against a photo ID law were appointed by Republicans. Darryl Fears, *supra* note 33, at A3.

59. Hasen, *supra* note 32.

60. *Id.*

61. *See, e.g.,* The Voter ID Act, <http://www.voteridact.com/> (follow “About the Act” hyperlink) (last visited Apr. 3, 2007) (warning that “[v]oter fraud is easy. Lists of people (names and addresses) who are registered but have not voted in the past five elections are readily available.”)

would eventually produce at least one documented case of voter impersonation. However, in a letter to Georgia's governor, Georgia's Secretary of State, Cathy Cox, wrote that she "cannot recall one documented case of voter fraud... specifically related to the impersonation of a registered voter at the voting polls."⁶² During hearings before the Seventh Circuit Court of Appeals, Indiana's Solicitor General, Tom Fisher, conceded that he knew of no documented attempts to vote using false identity.⁶³

2. Voter Impersonation Does Not Cause Disenfranchisement

Voter impersonation does not disenfranchise legitimate voters through vote dilution. Even if there is substantial, undetected voter impersonation, the number of fraudulent votes cast must be exceptionally large—in fact, it must exceed the number of legitimate ballots cast—in order to approach the Supreme Court's standard for dilution. In the watershed dilution case, *Reynolds v. Sims*, the Supreme Court found that a denial of suffrage had occurred when one group of people required forty-one votes to equal the weight of a single vote from another group.⁶⁴ In the case of voter impersonation, the dilutive effect of impersonated votes would be measured against all legitimate, "non-fraudulent" votes. In order to achieve the *Reynolds* level of dilution in a national election (which typically include more than 100 million legitimate votes), the number of fraudulent ballots cast would need to equal most of the Earth's population. Yet bipartisan investigations have revealed only minute quantities of vote dilution by fraud, on the order of 1/500,000 to 1/1,500,000 per vote.⁶⁵

3. Photo ID Requirements Distract Legislators from Serious Flaws in the Electoral System and Possibly Cause More Fraud

Critical administrative problems, such as registration errors, account for more miscounted ballots than fraud by a factor of about 18,000.⁶⁶ According to the Caltech/MIT Voting Technology Project, four to six million votes were lost in the national 2000 election due to administrative problems.⁶⁷ The largest cause of vote-loss

62. Letter from Cathy Cox, Secretary of State, State of Georgia, to Sonny Purdue, Governor, State of Georgia (Apr. 8, 2005), available at <http://www.aclu.org/FilesPDFs/ACF2209.pdf>.

63. Theodore Kim, *Want to Vote? Get Your Photo ID Ready*, INDIANAPOLIS STAR, Oct. 19, 2006, News, at 1.

64. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

65. Nearly 2.9 million people voted in Washington's 2004 general election, yet investigations found only six cases of "double voting." WASH. SEC. OF STATE, 2004 GENERAL ELECTION, SECOND RECOUNT, VOTER TURNOUT, available at <http://vote.wa.gov/Elections/Results/Turnout.aspx?e=fe7e6b45-e39d-4959-95c7-9e27cf6e0b59>. In Ohio, out of more than nine million votes in the 2002 and 2004 elections, the Board of Elections deemed only four to be fraudulent. COALITION ON HOMELESSNESS AND HOUSING IN OHIO (COHHIO) AND THE LEAGUE OF WOMEN VOTERS OF OHIO, JOINT REPORT ON ELECTION REFORM ACTIVITIES IN OHIO, June 14, 2005, available at <http://www.cohhio.org/alerts/Election%20Reform%20Report.pdf>. Over two national general elections, the Justice Department found 120 cases that the Department deemed worthy to investigate. Press Release, U.S. Dept. of Justice, Department of Justice to Hold Ballot Access and Voting Integrity Symposium, Aug. 2, 2005, available at http://www.usdoj.gov/opa/pr/2005/August/05_ag_404.htm.

66. 18,018 is the ratio of the Caltech/MIT Voting Technology Project's low-end estimate of total lost votes due to administrative problems (four million) divided by an estimate of total fraudulent votes based on the findings of the State of Washington (222). See CALTECH AND MIT, VOTING TECHNOLOGY PROJECT, 4 TO 6 MILLION LOST VOTES (2001), available at <http://www.vote.caltech.edu/media/documents/july01/LostVotes.pdf>; see infra note 71 (estimating 222 as the total number of votes due to fraud).

67. CALTECH AND MIT, VOTING TECHNOLOGY PROJECT, VOTING: WHAT IT IS, WHAT IT COULD BE

was errors in the registration process; these errors accounted for one-and-a-half to three million lost votes.⁶⁸ The second largest source of lost votes was voting equipment and ballot layout, which caused about one-and-a-half to two million lost votes.⁶⁹ The third biggest source was procedural errors at polling stations, which accounted for up to a million more lost votes.⁷⁰ In comparison to the four million to six million ballots lost due to administrative problems, fraud probably accounted for about 222 illegal votes.⁷¹

Photo ID requirements do nothing to defeat the most common forms of voter fraud. Voter registration fraud is driven by freelance solicitors who are paid to gather, and who sometimes falsify, new voter applications.⁷² These false applications are typically made with no intent to vote and are often filed with names like “Mickey Mouse.”⁷³ “Invariably,” writes Professor Richard L. Hasen, “Mickey declines to vote on Election Day.”⁷⁴ Voting in multiple states also occurs, but a photo ID requirement (short of a national voter card) could not prevent this form of fraud.⁷⁵ There is evidence of absentee-ballot fraud, but most states do not require proof of identification for absentee ballots.⁷⁶ In fact, photo ID laws have been organized to make it simpler to cast (possibly fraudulent) absentee ballots.⁷⁷

4. A Large Number of Citizens Neither Have a Government-issued Photo ID Nor Can They Afford One; Photo ID Requirements Disenfranchise These Citizens

The right to vote is a “fundamental political right.”⁷⁸ While state governments have an interest in combating the perception of fraud, the right to vote is paramount.⁷⁹ Otherwise, “the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.”⁸⁰ Photo ID requirements place a substantial burden on many lower-income voters who do not have the requisite documents to satisfy photo ID requirements. According to the National Commission on Federal Election Reform, six to ten percent of adult Americans lack state-issued identification and would not be able to satisfy the photo ID requirement.⁸¹ This report concluded that a photo ID requirement would “impose an

(2001), available at http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf.

68. CALTECH AND MIT, VOTING TECHNOLOGY PROJECT, 4 TO 6 MILLION LOST VOTES (2001), available at http://www.vote.caltech.edu/media/documents/july01/Lost_Votes.pdf (summarizing the causes of lost votes).

69. *Id.*

70. *Id.*

71. This estimate is based on an extrapolation from the total number of votes cast (about 111 million) and fraud statistics from the State of Washington’s 2004 election investigations. See Amie Jamieson et. al, U.S. Census Bureau, Voting and Registration in the Election of November 2000 2, available at <http://www.census.gov/prod/2002pubs/p20-542.pdf>.

72. Hasen, *supra* note 32.

73. *Id.*

74. *Id.*

75. *Id.* See U.S. Dept. of Justice, *supra* note 65.

76. See Hasen, *supra* note 32.

77. *Id.*

78. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

79. *Weinschenk v. Missouri*, 203 S.W.3d 201, 212 (Mo. Sup. Ct. 2006).

80. *Id.* at 218.

81. See NAT’L COMM’N ON ELECTION REFORM, *supra* note 11, at 60–66.

additional expense on the exercise of the franchise, a burden that would fall disproportionately on people who are poorer and urban.”⁸²

Photo ID requirements deepen the voting system’s inequitable treatment of minorities and lower-income citizens. Already, administrative problems plague low-income polling stations; there are strong indications that race, class, and language are strongly correlated with administrative errors.⁸³ A University of Wisconsin study found that race, class, and age minorities would disproportionately shoulder the burden of satisfying a photo ID requirement.⁸⁴ The study observed that nearly 100,000 Wisconsin residents between thirty-five and sixty-four have no photo ID.⁸⁵ Of those lacking photo ID, the study noted a sharp difference between whites and minorities, with whites in some areas holding photo IDs by a frequency of twice as often as other groups. The study also found that twenty-three percent of Wisconsin residents over sixty-five do not have photo identification.⁸⁶ This number is line with the AARP’s finding in Georgia, which found that thirty-six percent of Georgia residents seventy-five or older lack driver’s licenses.⁸⁷

5. Photo ID Requirements Decrease Legitimate Voter Turnout, Increasing the Impact of Voter Fraud

More restrictive voter identification rules result in lower voter turnouts.⁸⁸ There are no indications that these declines represent thwarted fraud. Rather, even slight burdens to voting can dramatically decrease voter participation.⁸⁹ An unintended consequence of photo ID laws might be that the impact of fraud actually increases. If, as the evidence suggests, photo ID requirements do not prevent most voter fraud, then a decrease in the overall number of legitimate votes will increase the dilutive effect of fraudulent votes.

6. Illegal Immigration Is Unrelated to Voter Fraud

The link between illegal immigration and illegal voting is a fiction. Just as there is no evidence of significant voter impersonation by legal citizens, there is little evidence of illegal immigrants committing this type of voter fraud.⁹⁰ There is little reason to

82. *Id.* at 77.

83. See Kimball W. Brace et al., U.S. ELECTION ASSISTANCE COMM., FINAL REPORT OF THE 2004 ELECTION DAY SURVEY 2005 7, 9, available at http://www.eac.gov/election_survey_2004/pdf/EDS-Full_Report_wTables.pdf.

84. JOHN PAWASARAT, UNIV. OF WISCONSIN-MILWAUKEE EMPLOYMENT AND TRAINING INSTITUTE, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1-2 (2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

85. *Id.* at 1.

86. *Id.*

87. Deanna Wrenn, *States Take Up Photo IDs at Polls Debate*, SFGATE, Mar. 30, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/03/30/politics/p112344S73.DTL>.

88. Timothy Vercellotti, *Protecting the Franchise, or Restricting it? The Effects of Voter Identification Requirements on Turnout*, AM. POL. SCI. ASS’N (Aug./Sep. 2006), available at <http://moritzlaw.osu.edu/blogs/tokaji/voter%20id%20and%20turnout%20study.pdf>.

89. Richard Jankowski, *Buying a Lottery Ticket to Help the Poor: Altruism, Civic Duty, and Self-Interest in the Decision to Vote*, in RATIONALITY AND SOCIETY 14, 55-77 (Sage Publications, 2002).

90. *Phony Urgency on Vote Fraud*, USA TODAY, Sept. 28, 2006, News, at 11A.

expect illegal immigrants to attempt voter impersonation. First, voting among illegal immigrants would be extremely unusual considering voting patterns of legal citizens. Illegal immigrants, with generally very low incomes, low educations, and low civic involvement, tend to fit the profile of non-voters.⁹¹ Second, studies have observed that voter turnout decreases substantially when the cost of voting increases slightly.⁹² The risk of deportation would seem to be a very high cost. Finally, even without a photo ID requirement, in order to vote at a polling station, an illegal immigrant would need to register to vote and later prove his or her identity at a polling station.⁹³ In the final analysis, if (despite the evidence) some illegal immigrants are committing voter fraud under current voting systems, there would be little added risk for these individuals to produce counterfeit photo IDs.

C. Analysis of the Arguments

The debate over photo ID requirements has been likened to a “religious argument,” based on impressions, with neither side offering convincing data to support its position.⁹⁴ However, this view ignores crucial aspects of the debate. At the very least, there is considerable evidence that millions of Americans do not have a qualifying photo ID⁹⁵ and that photo ID requirements have a significant, negative impact on voter turnout.⁹⁶ On the other hand, legislators will continue to be mindful, with or without data on fraud, of apparently substantial public support *in favor* of a photo ID requirement.

There is also evidence pointing to a low frequency of voter identity theft. Precisely how often registered voters have their votes stolen is unknown. However, there is a strong indication of an upper limit to what this rate may be, and we know that the rate of incidence is probably minute. In contrast to this ambiguity, we know that administrative problems have denied votes to millions of legitimate voters. We also know that lower-income individuals have been particularly exposed to administrative problems. These lower-income voters would account for the vast majority of voters negatively affected by photo ID requirements.

There is evidence that a significant number of American adults, *who have voted* in the recent past, do not possess photo IDs.⁹⁷ Proponents disagree, however, arguing that

91. See Jankowski, *supra* note 89.

92. Vercellotti, *supra* note 88.

93. See Voter Identification Requirements., *supra* note 2.

94. According to Doug Chapin, an editor for electionline.org,

One side claims that there is rampant voter fraud, but we really don't have any studies that support that. The other side worries that tighter ID requirements will disenfranchise people and we don't really have data for that either. So the resulting debate looks like almost more like a religious argument than it does a policy debate.

CNN.com, *Lou Dobbs Tonight: Congress Refuses to Implement Solution to Immigration Crisis*, <http://transcripts.cnn.com/TRANSCRIPTS/060922/ldt.01.html> (last visited Apr. 3, 2007).

95. See John Pawasarat, Univ. of Wisc. Employment and Training Institute, *The Driver License Status of the Voting Age Population in Wisconsin* (June 2005), available at <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

96. See Vercellotti, *supra* note 88.

97. See, e.g., Campos, *supra* note 41 (noting that, according to AARP Georgia, 153,000 Georgians over age sixty voted in 2004 but do not have government-issued photo ID).

the “vast majority” of citizens who vote already possess photo IDs.⁹⁸ Yet, even if the vast majority of past voters did in fact possess photo IDs, this alone would not seem to validate a procedure that could bear on non-voting citizens’ *continuing* fundamental right to vote.⁹⁹ Non-voters should not be, in-effect, frozen out of the system.

There is significant evidence that a photo ID law would increase voter confidence. Eighty-one percent of Americans polled said they prefer some form of photo ID requirement, although this poll did not specify whether the photo ID requirement should only allow government-issued identification.¹⁰⁰ In contrast to administrative changes, which may go unnoticed by the voting public, standardized photo ID requirements are immediately perceptible. As voters seem to be growing more skeptical about the fairness of elections, a photo ID might go a long way as a physical affirmation of electoral security. Moreover, photo ID requirements might provide evidence to show whether fraud occurred during an election.

IV. LEGAL HURDLES: POSSIBLE LEGAL COMPLICATIONS FOR STATE PHOTO ID LEGISLATION

Since the enactment of HAVA, the federal government has generally left election reform to the discretion of the states. The House of Representatives attempted in late 2006 to amend HAVA to require all voters to produce photo ID at polling stations,¹⁰¹ but this legislation stalled in the Senate. Since the failure of the House’s photo ID resolution, the Democratic Party has taken the majority in the House.¹⁰² Thus, new attempts to pass national legislation in the near future have become even more unlikely.¹⁰³ In contrast, since HAVA, states have implemented a variety of election reform measures—including the tightening of voter identification requirements—and new photo ID legislation will continue to be enacted and fought over. So far, four states have recently attempted to implement photo ID voting requirements,¹⁰⁴ and two of these states’ efforts have been blocked by state and federal courts.¹⁰⁵

The following sections outline legal constraints against state-made voter photo ID requirements. The first section considers limits posed by the Twenty-Fourth Amendment, the Voting Rights Act, and the REAL ID Act. The next two sections examine court treatment of photo ID laws, first looking at standards of review and then at specific cases.

98. See *supra* note 41.

99. *Dunn v. Blumstein*, 405 U.S. 330 at 336 (stating that the right to vote is a “fundamental political right”).

100. See *supra* note 46.

101. H.R. REP. NO. 109–666, at 1 (2006).

102. Robin Toner, *A Loud Message for Bush*, N.Y. TIMES, Nov. 8, 2006, at A1.

103. Moscoso, *supra* note 27.

104. *ARIZ. REV. STAT. ANN.* § 16-579 (West 2007); *GA. CODE ANN.* § 21-2-417 (West 2007); *IN. CODE ANN.* § 3-5-2-40.5, § 3-10-1-7.2, § 3-11-8-25 (West 2007); *MO. ANN. STAT.* § 115.427 (2006).

105. See *supra* note 29 and accompanying text.

*A. Selected Federal Laws***1. Prohibition Against Poll Taxes; the Twenty-Fourth Amendment**

“Poll taxes,” fees associated with the exercise of the right to vote, are strictly prohibited by the U.S. Constitution. Section one of the Twenty-Fourth Amendment provides that:

[t]he right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.¹⁰⁶

A photo ID requirement might run afoul of this Section if the regulation mandates that all eligible voters must obtain photo IDs in order to vote yet does not provide a way for voters to avoid paying a fee to obtain a photo ID. For this reason, in October 2005, a U.S. District Court suspended the enforcement of Georgia’s first photo ID requirement.¹⁰⁷ Although the Georgia law provided free IDs for indigents, the court found that the cost for anyone to obtain a Georgia license in order to vote was tantamount to a poll tax.¹⁰⁸ The court also noted that explicit punishments for perjury might dissuade indigent people from signing affidavits to swear their status.¹⁰⁹ Later revisions of the Georgia law provided that photo IDs would be made free to all Georgians.¹¹⁰

2. States Must Require Documentation to Issue Certain IDs; the REAL ID Act

The REAL ID Act saddles “free” photo IDs with indirect costs and therefore possibly turns photo ID requirements into poll taxes. Under the REAL ID Act, after May 11, 2008, “a Federal agency may not accept, for any official purpose, a driver’s license or identification card issued by a State to any person unless the State [meets Real ID Act requirements].”¹¹¹ Among these requirements, before issuing identification, states must require documentation showing the applicant’s birthdate, name, and address of principal residence.¹¹² This documentation is usually not free to the applicant; rather, it can cost as much as a driver license, if not more.¹¹³ These indirect costs to vote may negate (on the grounds of the Twenty-Fourth Amendment ban on poll taxes) even attempts to provide photo IDs for free (in the absence of additional free documents to satisfy the REAL ID Act requirements).

106. U.S. CONST. amend. XXIV.

107. *See Common Cause/Georgia*, 406 F. Supp.2d at 1326.

108. *Id.* at 1366–68.

109. *Id.* at 1363.

110. *After Long Haul, Voter ID Law to Get First Statewide Test in Primaries*, USATODAY.COM, June 25, 2006, http://www.usatoday.com/news/nation/2006-06-25-voter-identification_x.htm.

111. Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

112. *Id.*

113. *See Weinschenk*, 203 S.W.3d at 201.

3. General Prohibition against Voting Discrimination; Voting Rights Act, Section Two

Section Two of the Voting Rights Act of 1965 (VRA), as amended in 1982, is a general prohibition against any voting practice or procedure that has a discriminatory impact.¹¹⁴ Proof of intentional discrimination is not necessary to make a Section Two claim. Rather, a plaintiff must only show that an electoral process is not equally accessible to minority and non-minority voters.¹¹⁵ Ultimately, however, Section Two does not specify—and courts are yet to adopt—“a fair and workable standard” to assess vote denial claims against recent election reforms.¹¹⁶ A Section Two claim would probably succeed against a photo ID voting restriction if the claimant can show that the restriction systematically affects minorities (who disparately lack government-issued photo IDs). Opponents to photo IDs, though, have so far offered insufficient evidence to convince courts of this type of inconsistent treatment.¹¹⁷

4. Pre-clearance under the Voting Rights Act, Section Five

Under Section Five of the VRA, if a new voting procedure might affect minorities, certain jurisdictions must submit any changes to the Justice Department or, alternatively, to the Attorney General.¹¹⁸ A Section Five jurisdiction has the burden of showing that a proposed photo ID rule will not be “retrogressive.”¹¹⁹ The reviewer (either the court or the Department of Justice) can either stop the proposed changes or can issue a “pre-clearance,” allowing the changes to proceed.¹²⁰

It is unclear whether any photo ID requirements would fail to pass the Justice Department’s pre-clearance scrutiny. When Georgia recently submitted its photo ID requirement to the Justice Department, high-ranking political appointees overrode the findings of a team of career analysts. The team had found—by a vote of four to one—that the Georgia photo ID law was likely to discriminate against blacks.¹²¹ According to the analysts’ fifty-one page report, “[w]hile no single piece of data confirms that blacks will [be] disparately impacted compared to whites, the totality of the evidence points to that conclusion.”¹²² The report also found that “[Georgia] has failed to meet its burden of demonstrating that the change is not retrogressive.”¹²³ One day after its

114. 42 U.S.C.A. § 1973(a) (West 2007).

115. Section Two of the Voting Rights Act prohibits any election policy that “results in a denial or abridgement of the right . . . to vote on account of race.” *Id.* In *United States v. Berks Cty.*, 250 F. Supp. 2d 525 (E.D. Pa. 2003), a Pennsylvania federal district court held, without direct evidence of discriminatory intent, that election officials had violated Section Two by systematically and inconsistently enforcing voting rules against Latinos.

116. There are only a handful of court decisions weighing in on claims of vote denial against recent reforms. Daniel P Tokaji, *supra* note 7, at 691. There are only a handful of court decisions weighing in on claims of vote denial against recent reforms. *Id.* at 709. Voter ID is an emerging area, in much need of a clear legal standard for vote-denial claims. *Id.* at 712.

117. *See, e.g.*, *Common Cause/Georgia*, 406 F.Supp.2d at 1326.

118. 42 U.S.C.A. § 1973(c) (West 2007).

119. *Beer v. United States* 425 U.S. 130, 140–1 (1976); *see* 42 U.S.C.A. § 1973(c) (West 2007).

120. 42 U.S.C.A. § 1973(c) (West 2007).

121. U.S. DEPT. OF JUSTICE, SECTION 5 REC. MEMO. (2005), available at <http://www.votingrights.org/news/downloads/Section%205%20Recommendation%20Memorandum.pdf>.

122. *Id.*

123. *Id.*

publication, with little explanation, the report was set aside by political appointees, and the Department pre-cleared the Georgia law.¹²⁴

B. Strict Scrutiny Versus a “Flexible Standard of Review”

Citizens have an equal right to vote, but this right is not absolute.¹²⁵ States may impose certain administrative qualifications and restrictions, such as polling schedules and locations.¹²⁶ Qualifications and restrictions, however, cannot unduly burden or abridge the right to vote.¹²⁷ To decide whether a qualification or restriction is an undue burden, courts may turn to two standards: strict scrutiny or a “flexible standard of review.”¹²⁸ Courts apply strict scrutiny when the restriction is considered “severe.”¹²⁹ Courts apply a flexible standard of review when voting rights are subjected to more “reasonable, nondiscriminatory restrictions.”¹³⁰

The strict scrutiny standard requires that a voting qualification be narrowly drawn and satisfy a legitimate state interest.¹³¹ Under the strict scrutiny standard, a court in a photo ID case would investigate whether the law is narrowly drawn to prevent voter fraud.¹³² In contrast, a flexible standard is essentially a balancing test. In photo ID cases, a court applying this standard would probably weigh the legislation’s potential to reduce fraud versus the difficulties the law would create for voters.¹³³ So far, courts that have applied a balancing test tend to equate the risks of voter fraud with the risk of voter disenfranchisement, ultimately allowing the legislation to continue.¹³⁴ In contrast, courts that have applied the strict scrutiny test have found that the photo ID laws fail to serve a narrow purpose.¹³⁵

C. Selected Voter ID Cases

1. Purcell v. Gonzalez (Arizona)

In 2004, Arizona voters passed Proposition 200, an anti-illegal immigration measure which included a photo ID voting requirement.¹³⁶ The voting requirement carries an exception that allows a voter who lacks photo ID to cast a provisional ballot

124. Dan Eggen, *Criticism of Voting Law Was Overruled; Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, at A1.

125. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

126. *Id.*

127. *Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 217 (1986).

128. For example in *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), the Seventh Circuit chose a flexible standards of review; in *Common Cause/Georgia*, 406 F. Supp.2d 1326 (2005), a Federal District Court in Georgia applied a strict scrutiny standard of review.

129. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

130. *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

131. *Kramer*, 395 U.S. at 627.

132. *See, e.g., Common Cause/Georgia*, 406 F.Supp.2d at 1326.

133. *See, e.g., Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952–53 (7th Cir. 2007).

134. *See, e.g., Id.*

135. *See, e.g., Common Cause/Georgia*, 406 F.Supp.2d at 1326.

136. ARIZ. REV. STAT. ANN. § 16-579 (West 2007). *See also Arizona Ballet Proposition 200* (2004), available at <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>.

in state elections;¹³⁷ however, such provisional ballots are counted only if the voter's identity can be verified within 10 days after a general election and within five business days for all other elections.¹³⁸ On May 6, 2005, the U.S. Attorney General pre-cleared¹³⁹ the new law. One year later, residents, tribes, and community organizations brought a federal suit to stop the law.¹⁴⁰ On September 11, 2006, a federal district court denied a preliminary injunction against the new photo ID requirement, but the court gave no finding of facts.¹⁴¹ The court's decision was reversed on October 5, 2006, and the Ninth Circuit enjoined the enforcement of the photo ID requirement.¹⁴² The Ninth Circuit offered no rationale for its decision.¹⁴³ On October 11, 2006, the district court offered its findings, stating that the "plaintiffs have shown a possibility of success on the merits' of some of their arguments but the Court 'cannot say that at this stage they have shown a strong likelihood.'"¹⁴⁴

The Supreme Court's decision in *Purcell v. Gonzalez* vacated the Ninth Circuit's order and reinstated the photo ID requirement.¹⁴⁵ In a unanimous opinion, the Court equated the potential weight of the State's argument (that fraud risks diminishing voter confidence)¹⁴⁶ with the potential weight of the Plaintiff's argument (that photo ID requirements cause voter disenfranchisement).¹⁴⁷ The Court found that conflicting rulings, especially near an election day, confuse voters and provide "incentive to remain away from the polls."¹⁴⁸ The Court's opinion in *Purcell*, however, offered little insight into how the Supreme Court may ultimately view photo ID voting requirements. Rather, the Court was explicit that it merely rejected last-minute changes to voting rules.¹⁴⁹

Eighteen days after the Court's opinion, with the photo ID voting requirement in place, Arizonans went to the polls.¹⁵⁰ Fourteen of fifteen counties have since reported that about 2,500 would-be voters went to polling stations but left without casting a

137. ARIZ. REV. STAT. ANN. § 16-542 (2006).

138. ARIZ. REV. STAT. ANN. § 16-135 (2006).

139. See *supra* notes 118–20 and accompanying text. Because Arizona is a Section Five jurisdiction under the Voting Rights Act, it is required to get permission to implement new voting standards, practices, or procedures. Either the District Court for the District of Columbia or the United States Attorney General must review new rules to ensure that the new policy does "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C.A. § 1973(c) (West 2007).

140. *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2006 U.S. Dist. LEXIS 93477, at *1–*6 (D. Ariz. Sep. 11, 2006).

141. *Id.* at *6–*7.

142. *Purcell v. Gonzalez* __ U.S. __, 127 S. Ct. 5, 6 (2006).

143. *Id.*

144. *Gonzalez v. Ariz.*, No. CV 06-1268-PHX-ROS, 2006 U.S. Dist. LEXIS 76638, at *16 (D. Ariz. Oct. 11, 2006) (quoting *Sw. Voter Regis. Ed. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)).

145. *Purcell*, 127 S. Ct. at 8.

146. *Id.* at 7.

147. *Id.* The Court conceded that "the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges." *Id.*

148. *Id.*

149. *Purcell*, 127 S. Ct. at 8 (warning that "[w]e underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases").

150. The Supreme Court decided *Purcell* on October 20, 2006. The Arizona general election took place on November 7, 2006. Arizona Secretary of State Jan Brewer Homepage, 2006 Election Important Dates, <http://www.azsos.gov/election/2006/info/ImportantDates.htm> (last visited Apr. 3, 2007).

ballot.¹⁵¹ This number does not include voters who simply did not show up, knowing that they would be turned away.

Ultimately, the Court's decision in *Purcell* has some paradoxical implications. In particular, the Court was strident in making an example out of the Ninth Circuit's four-sentence, "eleventh hour" injunction. Yet the Court's own eleventh hour opinion also changed the voting rules, this time back to a more restrictive method of identification (a type of last-minute change that actually could result in lost votes). Also, the Court's ruling implies a preference for post-election litigation, and this type of litigation arguably has even more of a negative impact on voter confidence. Finally, the Court seems to conflate voter disenchantment with voter disenfranchisement. The Court wrote, "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will *feel* disenfranchised."¹⁵² The *feeling* of disenfranchisement is not disenfranchisement.

2. Indiana Democratic Party v. Rokita (Indiana)

In 2005, Indiana's Republican General Assembly passed a photo ID voting requirement¹⁵³ that included a provisional balloting window, open until the second Monday after the election day.¹⁵⁴ The legislation also included an option for voters to sign an affidavit claiming indigence or religious objection to being photographed.¹⁵⁵ The Indiana Democratic Party, the League of Women Voters, and the Marion Democratic Committee challenged the photo requirement in *Indiana Democratic Party v. Rokita*,¹⁵⁶ a case that has reached the Seventh Circuit on appeal.¹⁵⁷

Indiana legislators have explained that the photo ID requirement is needed to combat systemic voter fraud.¹⁵⁸ However, during the Seventh Circuit hearings, Indiana's Solicitor could not identify a single documented incidence of fraud.¹⁵⁹ In court, Indiana argued that the law could help catch potential voter impersonation that otherwise would go undetected.¹⁶⁰ However, the law contains absentee and affidavit exceptions¹⁶¹ which only require signatures and offer little or no additional investigative utility. In other words, the law is based on an assumption that signature-checks are more reliable proofs of identity than, for example, utility bills and bank statements.

The Seventh Circuit chose not to enjoin the photo ID regulation for the December

151. David Kravets, *Judges Debate Arizona Voter ID Rule* (Associated Press, San Francisco, Cal.), Jan. 8, 2007, available at <http://www.tusconcitizen.com/daily/local/3800.php>.

152. *Purcell*, 127 S. Ct. at 7 (emphasis added).

153. See IND. CODE ANN. § 3-5-2-40.5 (West 2007).

154. IND. CODE ANN. § 3-10-1-7.2 (West 2007).

155. IND. CODE ANN. § 3-11-8-25.1 (West 2007).

156. *Indiana Dem. Party v. Rokita*, 458 F.Supp. 2d 775, 782 (S.D. Ind. 2006).

157. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 950 (7th Cir. 2007).

158. Theodore Kim, *Want to Vote? Get Your Photo ID Ready*, INDIANAPOLIS STAR, Oct. 19, 2006, at A1.

159. *Id.*

160. *Id.*

161. See IND. CODE ANN. § 3-11-8-25.1 (West 2007). The law allows indigents and adherents to certain religions to sign an affidavit that they cannot produce a photo ID. This provision was included to help make the law constitutional. Ironically, requiring people of certain religions to take additional measures to be able to vote may be unconstitutional. See *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966).

2006 election, and on January 4, 2007, the court ruled to uphold the law.¹⁶² In a two to one decision, the majority chose to apply the flexible balancing standard rather than strict scrutiny.¹⁶³ The court found that “[t]he election procedures implemented... do not necessarily result in the turning away of qualified, registered voters by election officials for lack of proper identification.”¹⁶⁴ Judge Richard Posner looked at the totality of voter disenfranchisement, finding that “[n]o doubt there are at least a few” people who will be unable to cast a ballot under the new law, but “the fewer people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer.”¹⁶⁵ Writing the dissent, Judge Terence Evans observed that “[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”¹⁶⁶

3. *Weinschenk v. State* (Missouri)

In *Weinschenk v. State*, the Missouri Supreme Court overturned Missouri’s photo ID voting requirement.¹⁶⁷ The Missouri legislature had enacted the requirement in 2006.¹⁶⁸ Although the statute provided that photo IDs would be provided for free, the state would still be required to follow the Federal REAL ID Act of 2005. The REAL ID Act does not permit Missouri to issue photo IDs that could be used for federal purposes without applicants first providing certain other identification, such as a passport or birth certificate.¹⁶⁹ The court noted that this type of identification can cost from fifteen dollars for a certified birth certificate to \$236 for an expedited passport.¹⁷⁰ In other words, the “free” IDs could still cost money. The Missouri Court noted that three to four percent of Missouri citizens lack a government-issued photo ID.¹⁷¹ Given the costs involved in obtaining free photo identification, the Court found that the requirement placed a substantial burden on these citizens’ right to vote.¹⁷² Consequently, in light of this burden, the Court subjected the photo ID to a strict scrutiny standard.¹⁷³ The law failed this test. The Court held that, although Missouri has a broad interest in preserving the integrity of its elections, the photo ID requirement was not necessary to achieve this goal.¹⁷⁴

The Missouri Court was careful to distinguish the importance of voter confidence and the weight of the right to vote. The Court accepted the State’s argument that the public generally believes photo ID requirements would curb unchecked voter fraud.¹⁷⁵ The Court found, however, that the public’s fear of unchecked voter fraud must be more

162. *Crawford*, 472 F.3d at 954.

163. *Id.* at 952–53. *See supra* notes 125–35 and accompanying text.

164. *Purcell v. Gonzalez*, 127 S. Ct. 5, 6 (2006).

165. *Crawford*, 472 F.3d at 952.

166. *Id.* at 954.

167. *Weinschenk v. Missouri*, 203 S.W.3d 201, 221–22 (Mo. 2006).

168. MO. REV. STAT. § 115.427 (2006) (incorporating Missouri Senate Bill 1014).

169. *See supra* note 103 and accompanying text.

170. *Weinschenk*, 203 S.W.3d at 208.

171. *Id.* at 212–13.

172. *Id.* at 215.

173. *See supra* notes 125–35 and accompanying text.

174. *Weinschenk*, 203 S.W.3d at 217.

175. *Id.* at 218.

than a “mere perception” to abridge the “fundamental right to vote.”¹⁷⁶ The Court observed that “[p]erceptions are malleable” and “the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to vote or other fundamental rights.” The Court concluded that “the protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception.”¹⁷⁷

4. Common Cause/Georgia v. Billups (Georgia)

Act 53, Georgia’s first attempt to enact a photo ID requirement, became effective on July 1, 2005.¹⁷⁸ The law provided a forty-eight hour provisional ballot window, and included a stipulation that allowed voters to obtain a free ID if they were indigent, could not pay the application fee, and had no other approved forms of identification.¹⁷⁹ The Northern District Court of Georgia issued a preliminary injunction against the requirement, finding that the photo ID requirement likely posed an undue burden on citizens’ right to vote and also likely violated the Constitutional ban on poll taxes.¹⁸⁰ Consequently, Georgia’s Republican legislature amended the law to provide that any citizen could obtain a photo ID for free, and every county was mandated to have at least one location where citizens could obtain this ID.¹⁸¹ On July 14, 2006, the federal district court issued a preliminary injunction against the new Act; however, this injunction was based solely on the likely success of the Plaintiffs’ undue burden claim.¹⁸² The court hinted that if the State advertised the photo ID requirements so that voters would have time to adjust to them, then the law might ultimately hold up for later elections. One commentator observed, “[p]laintiffs may have won the battle and lost the war.”¹⁸³

V. TOWARD A WORKABLE SOLUTION

This Note has presented an overview of the arguments and the legal issues surrounding photo ID voting requirements. The most convincing justification for photo ID voting requirements seems to be that these rules may improve voter confidence in the electoral process. However, policymakers should be aware of several issues when deciding whether to enact photo ID voting requirements. Higher voter confidence may not translate into higher voter turnout; rather, as voting procedures become more burdensome to voters, the right to vote is exercised less. Even more important than protecting voter turnout, states must protect citizens’ fundamental right to vote. This fundamental right is denied by voting rules that make voting too costly or substantially too difficult. Policymakers should also keep in mind that voter fraud, though a salient

176. *Id.*

177. *Id.* at 219.

178. *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1331 (N.D. Ga. 2005).

179. *Id.* at 1336.

180. *Id.* at 1366–7.

181. *At a Glance: Voter ID*, AT ISSUE (Senate Research Office, Georgia), Aug. 2006, at 1, 4.

182. *Common Cause/Georgia, League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006).

183. Election Law at Moritz, *Common Cause/Georgia v. Billups – Summary*, <http://moritzlaw.osu.edu/electionlaw/litigation/common-cause-summary.php> (last visited Apr. 3, 2007).

issue of public concern, affects elections far less than administrative deficiencies.

For legal and policy reasons, any legislation that establishes a photo ID voting requirement should also institute the following measures:

1. Voter cards or an acceptable form of photo ID should be made available, for free, to all citizens: Under the Twenty-Fourth Amendment, no voter should be compelled to pay a fee to vote, even if the fee is small relative to the income of the voter.¹⁸⁴ Moreover, even if the costs of obtaining a photo ID are not viewed as an impermissible tax, photo IDs may harm the integrity of elections by negatively affecting voter turnout.¹⁸⁵ While photo IDs may improve voter confidence and thereby increase voter turnout, photo IDs raise burdens and may result in decreased voting. Free, widely available photo IDs would help to decrease the (possibly unconstitutional) burden that photo ID requirements place on the act of voting.
2. Any documentation necessary to obtain free photo ID should also be free: Documentation requirements pose indirect costs to citizens who wish to vote but must first obtain other credentials to acquire a photo ID.¹⁸⁶ It is misleading to offer a photo ID for “free” without ensuring that there are actually no costs to obtaining the ID.
3. Free photo IDs should be geographically accessible to all citizens.
4. Voting requirements should be clearly publicized.
5. Voters who do not bring proper ID to the poll station should be able to sign an affidavit swearing identity and lack of photo ID: This is an exception provided in South Dakota, which recently adapted an otherwise strict photo ID voting requirement.¹⁸⁷ It has allowed as many as twenty-five percent of Native American, who possess no photo ID, to vote.¹⁸⁸

An affidavit provision can be designed to allow a vote to be counted without further effort on the part of the voter once the affidavit has been verified by a signature-check (the same security as absentee ballots). Detractors of standard signature-check voting requirements typically argue that this form of identification is too time consuming, requiring specialists to perform reliable analysis. According to these detractors, while absentee ballots can be checked days in advance, election-day voting leaves too little time to perform the check. However, this would not be a problem for a system providing an affidavit *exception*.

In jurisdictions where the vast majority of voters already have photo IDs, this type of exception will be exercised rarely; presumably, the number of affidavits would be so small that each could be independently checked. In jurisdictions where the number of voters without photo ID approaches the level observed in South Dakota, a photo ID requirement lacking such an exception would unconstitutionally disenfranchise a substantial number of citizens. An additional benefit of the affidavit exception would be that it safeguards the vote of those who lose or misplace their photo ID immediately before an election.

184. See *supra* notes 106–10 and accompanying text.

185. The Supreme Court has recognized that voter turnout is critical to election integrity. See *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

186. See The REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) (setting minimum credential standards for states to check before issuing IDs that can be used for federal purposes).

187. S.D. CODIFIED LAWS § 12-18-6.2 (2007).

188. Deanna Wrenn, *supra* note 87.

VI. CONCLUSION

Partisan reform efforts¹⁸⁹ provoke voter distrust, and election litigation contributes to voter confusion and detracts from voter confidence. Historically, attempts to pass photo ID voting laws have resulted in partisan stalemates, lawsuits, and greater suspicion of (unverified) fraud. Unless legislative supporters of photo ID requirements begin to include meaningful protections for negatively-affected citizens, there is a substantial risk that photo IDs will fuel a firestorm of lawsuits. As many as six to ten percent of Americans will be disenfranchised by photo ID requirements.¹⁹⁰ For *each* individual allegation of voter disenfranchisement, there is a recurring chance that a court will apply a strict scrutiny standard of review.¹⁹¹ Whereas even-handed reform will curb spiraling litigation and improve voter confidence, if new photo ID laws—or any other election reforms—are thought to give partisan advantage to either party, then litigation (and its injurious effect on voter confidence¹⁹²) will likely increase.¹⁹³ For the sake of all Americans, the political and legal climate requires more bipartisan cooperation on election reform—not less.

189. Both parties have engaged in heavily one-sided election reform efforts. See John H. Fund, *Cross Country: Marylanders Will Vote Early—and Often*, WALL STREET JOURNAL at A13, Feb. 9, 2006 (recounting Democratic efforts in Maryland to override the Republican governors veto of election-related bills).

190. See NAT'L COMM'N ON ELECTION REFORM, *supra* note 11, at 60–66.

191. See *supra* notes 125–35 and accompanying text.

192. See *Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (holding that post-election court interference disturbs the democratic process and hinders voter confidence).

193. Since 2000, both political parties have become involved as plaintiffs in an explosion of lawsuits over election results. In the three years preceding *Bush v. Gore*, the yearly average for litigated elections was ninety cases; the succeeding three years averaged 254. Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776/>. Neither political party is more prone than the other to question the legitimacy of elections; rather, in individual races, the losing side is more likely to feel that the election was unfair. For example, compared to only three percent of Republicans, 21.5 percent of Democrats thought the 2004 general election was somewhat or very unfair. Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 943 (2005). In the close Washington gubernatorial election, in which a Democrat was proclaimed the winner after a series of recounts, Republicans were more than twice as likely to believe the election process was “unfair.” *Id.*