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"Strict in Theory, Fatal in Fact": The Phrase That Rings True in Recent Voting Rights Cases

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TABLE OF CONTENTS

1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995).

* J.D., University of the Pacific, McGeorge School of Law, conferred May 2023; B.S. Business Administration, 2019. I would like to thank the *University of the Pacific Law Review*'s Board of Editors and staff for their help in editing this Comment. I would also like to thank my family and friends for their constant and unwavering support through every step in my journey. I truly would not be where I am without you.

I. INTRODUCTION

Dennis Hatten is a United States Marine veteran living in Milwaukee, Wisconsin—a battleground state.[2] He is also an African American man.[3] Dennis recently moved from Illinois to Wisconsin to receive temporary housing from a Veterans Affairs hospital in Milwaukee.[4] At the time, Dennis possessed both an Illinois driver's license and his veterans identification card.[5] Neither form of identification (ID) would allow him to cast his vote in the State of Wisconsin.[6] To vote in the state where he lived, Dennis faced numerous obstacles.[7] He first received help from a volunteer attorney to track down birth records.[8] In trying to track down his birth records, he eventually realized a discrepancy between the name on his birth certificate and driver's license.[9] He had to legally change his name with the Social Security Administration to obtain an ID to vote.[10]

Daniel Jenkins had a similar experience when he tried to vote in Texas—another battleground state.[11] Daniel has voted in almost every election since 1986.[12] However, he realized he could not vote in the 2014 general election because his recently expired driver's license did not meet Texas's new voter ID

2. Ari Berman, *Wisconsin's Voter ID Law Caused Major Problems at the Polls Last Night*, NATION (Apr. 6, 2016), https://www.thenation.com/article/archive/wisconsins-voter-id-law-caused-major-problems-at-the-polls-last-night/ (on file with the *University of the Pacific Law Review*); *Presidential Battleground States, 2020*, BALLOTPEDIA, https://ballotpedia.org/Presidential_battleground_states,_2020 (last visited Dec. 20, 2021) (on file with the *University of the Pacific Law Review*); *see also* Alexa Jurado, *Wisconsin's History, Impact as a Swing State*, MARQUETTE WIRE (Apr. 1, 2020), https://marquettewire.org/4030210/news/wisconsins-history-impact-as-a-swing-state/ (on file with the *University of the Pacific Law Review*) (defining a battleground state as a state with similar numbers of Republican and Democrat voters, therefore often having a great impact on election outcomes).

3. Berman, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id. But see Dennis' Voter ID Story*, VOTERIDERS, https://www.voteriders.org/dennis-voter-id-story/ (last visited Dec. 20, 2021) (on file with the *University of Pacific Law Review*) (indicating Wisconsin voter ID law now accepts VA cards as a proper form of ID for voting).

7. *Dennis' Voter ID Story*, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. Emily Samsel, *A 93-Year-Old Woman Among Those Facing Voting Hurdles in 2014*, MSNBC (Oct. 29, 2014), https://www.msnbc.com/msnbc/93-year-old-among-those-facing-voting-hurdles-msna446786 (on file with the *University of the Pacific Law Review*); *Presidential Battleground States, 2020*, *supra* note 2.

12. Samsel, *supra* note 11.

requirements.[13] Daniel went to the Texas Department of Public Safety to obtain an ID to vote.[14] Despite the state's website indicating Daniel was eligible for a free Identification Certificate, an employee told him he had to pay for the Election Identification Certificate.[15] After paying for the ID, Daniel confirmed he had, in fact, been eligible for a free ID.[16] A staff member for the Texas Department of Safety acknowledged the situation as a "misunderstanding" resulting from "human error."[17]

While states requiring an ID to vote is not an entirely new concept, it has sparked controversy in recent years.[18] In 2000, a wave of fourteen states passed laws requiring individuals to present some form of ID to vote.[19] Some of these states had legislatures with a Republican majority and some states had legislatures with a Democrat majority.[20] In 2011, 2012, and 2013, another surge of states adopted laws requiring ID.[21] Then in 2018, both Arkansas and North Carolina enacted laws amending their state constitutions to require voters to have a photo ID.[22] A North Carolina trial court found the law unconstitutional due to the legislature's racially discriminatory intent, while the Arkansas Supreme Court upheld its similar photo ID law.[23] In 2021, several Republican-led states either enacted or strengthened existing voter ID requirements, resulting in another surge of voter restrictions.[24]

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13. *Id.*; *Election Results, 2014*, BALLOTPEDIA, https://ballotpedia.org/Election_results,_2014 (last visited Feb. 20, 2022) (on file with the *University of the Pacific Law Review*).

14. Samsel, *supra* note 11.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Voter ID Chronology*, NAT'L CONF. STATE LEGISLATURES (Sept. 29, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id-chronology.aspx (on file with the *University of the Pacific Law Review*).

19. *See id.* (including the following states as states requiring some form of identification to vote: Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Michigan, South Carolina, Tennessee, Texas, and Virginia).

20. *Id.*

21. *See id.* (indicating that states, such as Mississippi, New Hampshire, North Carolina, North Dakota, Tennessee, Texas, and Virginia either enacted a form of photo ID laws or increased the strictness of the state's current photo ID law).

22. Amanda Zoch, *Voter ID: Where Have We Been, Where Are We Going?*, NAT'L CONF. STATE LEGISLATURES (Oct. 4, 2021), https://www.ncsl.org/research/elections-and-campaigns/voter-id-where-have-we-been-where-are-we-going-magazine2021.aspx (on file with the *University of the Pacific Law Review*).

23. *Id.*; Andrew DeMillo, *Arkansas Supreme Court Upholds Revised Voter ID Law*, AP NEWS (Oct. 11, 2018), https://apnews.com/article/db45a171bafb48d1be1beab08719beaa (on file with the *University of the Pacific Law Review*).

24. *See id.* (outlining the various states that enacted, or strengthened, voter ID laws in 2021, such as Arkansas, Indiana, Montana, North Dakota, and Wyoming).

These voter ID restrictions tend to have a more adverse effect on minorities, resulting in a disparate impact.[25] Disparate impact occurs when a policy disproportionately impacts a protected group such as minorities.[26] Often times, individuals then bring a claim for a constitutional violation because the government has impeded upon the fundamental right to vote.[27] The Supreme Court's analysis of these constitutional claims then involves an inquiry into the legislature's intent when enacting a restriction on a fundamental right.[28] When a law impedes upon an individual's freedom of religion, another fundamental right, the Court considers the law's impact when analyzing legislative intent.[29] However, in voting rights cases, the Court does not consider a voting restriction's disparate impact when analyzing legislative intent.[30] Following the legislative intent analysis, the Court balances a state's interests against a law's imposed burdens, making it difficult for individuals to challenge voter ID laws.[31] In voting rights cases, the United States Supreme Court should more thoroughly investigate legislative intent, including consideration of disparate impact, to mirror its analysis in religious freedom cases.[32] Part II discusses a brief history of voter ID laws in the United States and explores the disparate impact of voter ID laws, specifically on minority groups.[33] Part III highlights how the Supreme Court applies varying analyses depending on whether the

25. *See* Zoltan L. Hajnal et al., *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research.*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/ (on file with the *University of the Pacific Law Review*) (finding a significant drop in voting participation within minority groups).

26. *What Are Disparate Impact and Disparate Treatment?*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx (last visited Jan. 1, 2022) (on file with the *University of the Pacific Law Review*).

27. *See* Kevin Cofsky, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 355 (1996) (recognizing an increase in the number of legal challenges to voting restrictions arising in courts).

28. *Strict Scrutiny*, CORNELL L. SCH., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Oct. 27, 2021) (on file with the *University of the Pacific Law Review*).

29. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (addressing various factors to consider in discerning legislative intent).

30. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2339 (2021) ("But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

31. *See* Nina Totenberg, *The Supreme Court Deals a New Blow to Voting Rights, Upholding Arizona Restrictions*, NPR (July 1, 2021), https://www.npr.org/2021/07/01/998758022/the-supreme-court-upheld-upholds-arizona-measures-that-restrict-voting (on file with the *University of the Pacific Law Review*) (discussing the Court's new ruling will make it difficult, possibly even impossible, to challenge voting restrictions); *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) ("The state interests identified as justifications for SEA 483 are both neutral and sufficiently strong to require us to reject petitioners' facial attack on the statute.").

32. *Compare Brnovich*, 141 S. Ct. at 2340 (emphasizing state interests and deciding a law's effect is less relevant), *with Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540 (considering multiple factors to determine a legislature's intent).

33. *Infra* Part II.

fundamental right at issue is the right to vote or religious freedom.[34] Part IV argues the Court should consistently apply a similar analysis for both religious freedom and voting rights cases.[35] Part V demonstrates that a consistent analysis will reduce disparate impact on minority communities' right to vote.[36]

II. VOTER ID RESTRICTIONS AND THEIR DISPARATE IMPACT

In recent years, states—like Indiana, Alabama, and Arkansas—have passed laws infringing upon citizens' right to vote.[37] This increase in restrictive voting laws followed two key Supreme Court rulings—*Crawford v. Marion County Election Board* (*Crawford*) and *Shelby County v. Holder* (*Shelby*).[38] In *Crawford*, the Court upheld Indiana's voter ID law because of the state's strong interest in preventing voter fraud.[39] Five years later, *Shelby* overturned part of the Voting Rights Act of 1965, thus weakening federal oversight of state election laws.[40] Federal oversight, in the form of "preclearance," required certain states to obtain federal approval prior to enacting any change to the voting procedures within the state.[41] Preclearance applied to states where voters needed to comply with tests or other devices in order to vote.[42] States were also subject to preclearance if the voter turnout rate within the state was less than fifty percent in the 1960s.[43] As a result of *Shelby*, many states passed laws requiring voter ID, known as "voter ID" laws.[44]

34. *Infra* Part III.

35. *Infra* Part IV.

36. *Infra* Part V.

37. Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression (on file with the *University of the Pacific Law Review*); Zoch, *supra* note 22.

38. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (upholding SEA 483, a photo ID law because the state's interests and justifications were neutral and strong); *see also* Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013) (striking down a section of the Voting Rights Act); Maddy Teka, *Analysis of Key Voter Law Cases*, FINDLAW (Sept. 18, 2020), https://www.findlaw.com/voting/how-do-i-protect-my-right-to-vote-/analysis-of-key-voter-law-cases.html (on file with the *University of the Pacific Law Review*).

39. *See Crawford*, 553 U.S. at 191 (indicating the state has a compelling interest in deterring and detecting voter fraud, as well as preventing voter fraud and even safeguarding voter confidence).

40. Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 18, 2017), https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/ (on file with the *University of the Pacific Law Review*); *see also Shelby Cnty.*, 570 U.S. at 557 (stating the Court had no choice but to hold § 4(b) of the Voting Rights Act unconstitutional and is not a valid way to base which jurisdictions are subject to preclearance).

41. *Shelby Cnty.*, 570 U.S. at 529.

42. *Id.*

43. *Section 4 of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/section-4-voting-rights-act (last visited Apr. 13, 2022) (on file with the *University of the Pacific Law Review*).

44. *See* Johnson & Feldman, *supra* note 37 (highlighting states that have recently passed voter ID laws, including North Dakota, Texas, and Georgia).

Voter ID laws require voters to provide a government-issued ID as a precondition to voting.[45] While voter ID laws may vary in degrees of stringency, all such laws restrict voters' access to the ballot.[46]

Surrounding the 2020 election, another wave of voter ID legislation swept the nation.[47] In 2020, many American citizens cast their votes by mail because of the coronavirus pandemic.[48] Those critical of mail-in and absentee voting initiatives raised claims that voter fraud affected the 2020 general and presidential elections.[49] State legislatures—such as Georgia and Florida—responded by passing laws in early 2021 requiring a form of ID to submit a mail-in ballot.[50] Other states passed even broader voter ID laws, requiring an ID regardless of whether the voter planned to vote in person or by mail.[51]

Voter ID laws generally limit Americans' access to participate in the democratic voting process, with a greater impact on minority voters.[52] Therefore, such laws have a "disparate impact," meaning the laws have a disproportionately negative impact on a protected group.[53] Specifically, these voter ID restrictions lead to inequity in voter turnout.[54] Blacks, Hispanics, and mixed-race Americans are less likely to vote in elections in states with strict voter ID laws because of such hurdles.[55] From 2008 to 2012, the voter turnout gap both between whites and

45. *Id.*

46. *See Voter Identification*, MIT ELECTION DATA SCI. LAB, https://electionlab.mit.edu/research/voter-identification (last updated June 10, 2021) (on file with the *University of the Pacific Law Review*) ("All states have voter identification requirements, ranging from simply announcing one's name to showing an official photo ID card.").

47. *Id.*

48. *Id. But see* Drew DeSilver, *Mail-In Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020), https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread/ (on file with the *University of the Pacific Law Review*) (showing some states encouraged mail-in voting by either mailing ballots to registered voters or mailing a vote-by-mail application to all registered voters).

49. *Voter Identification*, *supra* note 46.

50. *See id.* (discussing Georgia's SB 202 and Florida's SB 90, which require mail-in ballots to be accompanied with the voter's driver's license number or the last four digits of their Social Security number).

51. *See* Christina A. Cassidy, *New Voter ID Requirements Across the Country for Mail Voting Raise Concerns About Fraud and Ballot Rejection*, CHI. TRIB. (May 22, 2021), https://www.chicagotribune.com/nation-world/ct-aud-nw-mail-voting-id-rules-20210522-my5uwoupbbdjvfa4gepr2q4ryu-story.html (on file with the *University of the Pacific Law Review*) (identifying Florida, Georgia, Arizona, Louisiana, Michigan, Minnesota, New Hampshire, Ohio, South Carolina, and Texas as states that enacted or introduced laws requiring ID for mail-in ballots).

52. Robert Hoffman, *Fact Sheet on Voter ID Laws*, AM. C.L. UNION (May 2017), https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet (on file with the *University of the Pacific Law Review*).

53. *Id.*; *What Are Disparate Impact and Disparate Treatment?*, *supra* note 26.

54. *See* Hoffman, *supra* note 52 (discussing a United States Government Accountability Office study in 2014 that found the implementation of photo ID laws lead to decreased turnout among vulnerable groups, such as racial minorities).

55. Newkirk II, *supra* note 40.

Latinos, and whites and Blacks, nearly doubled in places with strict voter ID laws.[56] The impact of lower minority voter turnout means less minority representation in the democratic voting process.[57]

Both sides of the voter ID argument frame their stances using the same two issues: election integrity and the burden of obtaining an ID.[58] However, each side approaches these two issues using different rationales.[59] An argument in favor of voter ID laws is that these laws protect the honesty and integrity of the election process.[60] This argument is rooted in the idea that requiring an ID to vote will help prevent voter impersonation and fraud.[61] Additional arguments in favor of voter ID laws assert that the laws do not greatly burden voters because most individuals possess the necessary forms of ID.[62]

On the other hand, an argument against voter ID laws is that there is little evidence demonstrating voter fraud.[63] To support this argument, many studies suggest the rate of voter fraud is low—between 0.0003% and 0.0025%.[64] Another argument against voter ID laws claims the laws do, in fact, impose a significant burden on minority populations.[65] Statistically speaking, minority populations disproportionately lack any form of ID.[66] On a national level, almost ninety-two percent of white citizens in the U.S. possess a government-issued photo ID.[67] However, only seventy-five percent of African American citizens possess a photo

56. *Id.*

57. *See* Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, AM. BAR ASS'N (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/why-minority-voters-have-a-lower-voter-turnout/ (on file with the *University of the Pacific Law Review*) ("Minorities have a lower voter turnout compared to whites and, in many cases, this has resulted in discriminatory polling place distributions. Disparities in polling places can also be the result of a change in the majority of election officials; minority populations are more likely to be left-leaning and, as a result, officials may shift polling locations to areas that are more representative of their political ideals.").

58. Johnson & Feldman, *supra* note 37.

59. *See id.* (discussing various arguments present on both sides of the voter ID debate).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth (on file with the *University of the Pacific Law Revie*w) (identifying research supporting the rarity of impersonation voter fraud from the Brennan Center, the Washington Post, the Government Accountability Office, the Republican National Layer's association, a Columbia University political scientist, Arizona University, books, and assessments).

65. *See* Johnson & Feldman, *supra* note 37 (acknowledging states have passed voting restrictions, such as voter ID requirements, which disproportionally burden people of color).

66. Hoffman, *supra* note 52; *see also* Dan Hopkins, *What We Know About Voter ID Laws*, FIVETHIRTYEIGHT (Aug. 21, 2018), https://fivethirtyeight.com/features/what-we-know-about-voter-id-laws/ (on file with the *University of the Pacific Law Review*) (estimating that non-white voters in Michigan, after the enactment of voter ID laws, "were between 2.5 and 6 times as likely as white voters to lack voter ID").

67. Hoffman, *supra* note 52.

ID.[68] Despite the fact that both sides address the same issues regarding voter ID laws, their arguments—and thus, outcomes—differ greatly.[69] Accordingly, much debate continues to surround the issue of voter ID laws with very little resolution.[70]

III. THE SUPREME COURT'S APPLICATION OF THE "STRICT SCRUTINY" ANALYSIS TO VARIOUS AREAS OF LAW

The Fourteenth Amendment Equal Protection Clause ensures states govern fairly and impartially without any preference for any one group of people.[71] When analyzing whether a law violates the Constitution, including the Fourteenth Amendment, courts utilize different standards of review.[72] The lowest level of scrutiny—rational basis review—applies when the liberty interest involved is not a strong one.[73] Such liberty interests include economic liberty and regulatory legislation.[74] To overcome rational basis review, the legislature must only demonstrate the law is "rationally related to any legitimate government purpose."[75] The second level of scrutiny—intermediate scrutiny—applies when a law implicates an immutable characteristic that is not "suspect," such as sex.[76] Under the intermediate scrutiny standard of review, the state must show the law furthers

68. *Id.*

69. *See* Johnson & Feldman, *supra* note 37 (suggesting arguments surrounding voter ID laws often center around election integrity and the level of burden these laws impose).

70. Ryan Chatelain, *Debate Over Photo Voter ID Laws Is Enduring—and Complex*, SPECTRUM NEWS NY1 (July 15, 2021), https://www.ny1.com/nyc/all-boroughs/politics/2021/07/14/debate-over-photo-voter-id-laws-enduring-and-complex (on file with the *University of the Pacific Law Review*).

71. *See* U.S. CONST. amend. XIV ("[N]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

72. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting a more stringent standard of review for cases implicating voting rights, freedom of expression, political association, or for cases where a statute is directed at "particular religious, or national, or racial minorities"); *see also* Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014), https://www.findlaw.com/legal-blogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/ (on file with the *University of the Pacific Law Review*) (identifying the three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review).

73. *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 407, 409 (2016) (acknowledging the rational basis standard of review is applicable in cases involving economic liberty or regulatory legislation).

74. *Id.*

75. *Id.* at 402.

76. *Id.* at 406 ("[T]he prerequisites for heightened scrutiny are . . . a history of discrimination based on the characteristic, reason to believe that the legislative judgments are based on stereotype and not actual differences, and the social desirability of eliminating discrimination based on the characteristic."); *see* Craig v. Boren, 429 U.S. 190, 204 (1976) (invalidating a statute discriminating against males after applying an intermediate scrutiny analysis because the statute discriminated on the basis of sex); *see also* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (defining an immutable characteristic as one that is "determined solely by the accident of birth").

"important governmental objectives" and that the law is "substantially related" to achieving those objectives.[77] The most stringent standard of review that courts employ is strict scrutiny.[78]

Courts generally apply strict scrutiny when a law either implicates a "suspect classification" or substantially infringes on a fundamental right.[79] Generally, in a strict scrutiny analysis, the government carries the burden of demonstrating two main requirements.[80] First, the government must show the law furthers a compelling government interest.[81] Second, the government must show the law is narrowly tailored to achieve that interest, in that it is the least restrictive means available.[82] When the law imposes on a fundamental right, or discriminates against a suspect class, the government must satisfy both prongs of the strict scrutiny test.[83] A fundamental right is one that is "deeply rooted" in United States' history and tradition.[84] A suspect class is a group that experienced unequal treatment and therefore deserves special protection.[85] Suspect classes include race, national origin, religion, and alienage.[86]

77. *See* United States v. Virginia, 518 U.S. 515, 516 (1996) ("To meet the burden of justification, a State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.") (quotations omitted).

78. *Strict Scrutiny*, *supra* note 28.

79. *See* Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIAMI INTER-AM. L. REV. 63, 65 (2020) ("A suspect class is a group that meets a series of factors that suggest the group is historically subject to discrimination or political powerlessness and warrants protection."); *see also Strict Scrutiny*, *supra* note 28.

80. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295 (2015).

81. *Id.*

82. *See* Fisher v. Univ. of Tex., 570 U.S. 297, 312 (2013) (explaining that to show "narrow tailoring" the law or policy must be necessary to achieve the state's interest yet need not exhaust every conceivable alternative).

83. Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (indicating that courts will apply strict scrutiny when "state action implicate[s] a fundamental right"); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (stating strict scrutiny applies in cases involving suspect classes such as race, national origin, or alienage).

84. *Glucksberg*, 521 U.S. at 720–21; *see also Fundamental Right*, CORNELL L. SCH., https://www.law.cornell.edu/wex/fundamental_right (last visited Dec. 28, 2021) (on file with the *University of the Pacific Law Review*) (providing various examples of fundamental rights, including the right to marriage, privacy, interstate travel, procreation, and voting).

85. *See* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating*, *Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991) ("A suspect class is a group of individuals whom the Court recognizes as deserving special protection from our majoritarian, political process because the group has a history of having been subjected to purposeful, unjustified discrimination, and a history of political powerlessness.").

86. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); *see also id.* at 939, 947 (suggesting religion is a suspect class just as race, nationality, and alienage are).

When a law implicates a suspect class, the litigant must show the law is discriminatory against members of that class.[87] A law can either be discriminatory on its face or facially neutral.[88] A law is facially neutral when the language of the statute appears nondiscriminatory.[89] However, a law is facially discriminatory when the law explicitly discriminates against a class.[90] The Court applies the strict scrutiny analysis to a law that is discriminatory on its face.[91] When considering a facially-neutral law, the Court looks to relevant facts to determine whether the legislature's intent involved a discriminatory purpose.[92] A legislature acts with a discriminatory purpose when discrimination is one of the legislature's objectives.[93] Put simply, the legislature must have enacted the law with the intention to create discriminatory effects.[94] This legislative intent analysis includes an inquiry into statements of purpose, effects, historical background and events, and legislative history—including committee reports, floor debates, and legislators' statements.[95] Disparate impact can be a factor the Court considers when determining whether an invidious discriminatory purpose is present.[96] However, disparate impact alone is not sufficient to show discriminatory intent on behalf of the legislature.[97]

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87. *See Cleburne Living Ctr.*, 473 U.S. at 440 (articulating that statutes implicating a suspect class are subject to strict scrutiny and must be "suitably tailored to serve a compelling state interest").

88. *See* Washington v. Davis, 426 U.S. 229, 241 (1976) (acknowledging laws can be explicitly discriminatory or applied in a discriminatory manner).

89. *Id.*; *see also* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022) (suggesting that today most legislatures would not "be so foolish as to openly admit their racial motivations"); *Suspect Classifications Based on Race*, LAWSHELF, https://lawshelf.com/courseware contentview/suspect-classifications-based-on-race (last visited Apr. 20, 2022) (on file with the *University of the Pacific Law Review*) (suggesting a facially neutral law is more subtle than a facially discriminatory law, and therefore does not explicitly discriminate).

90. *Suspect Classifications Based on Race*, *supra* note 89.

91. Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding Virginia's miscegenation statutes—which were facially discriminatory because they drew a distinction solely on the basis of race—were unconstitutional after applying strict scrutiny).

92. *See Davis*, 426 U.S. at 242 ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); *see also League of Women Voters of Fla., Inc.*, 595 F. Supp. 3d at 1077 (suggesting courts look to the following factors when determining if a legislature had discriminatory intent: "(1) the challenged law's impact; (2) the law's historical background; (3) the specific sequence of events leading up to the law's passage, which includes (4) procedural and substantive departure; . . . (5) the contemporary statements and actions of key legislators . . . (6) the foreseeability of the disparate impact; (7) knowledge of that impact, and (8) the availability of less discriminatory alternatives") (quotations omitted).

93. *See* Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (describing that a law is discriminatory if a motiving factor behind the enactment of a law is an invidious discriminatory purpose).

94. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979) ("'[D]iscriminatory purpose' implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

95. *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 25–35 (1992) (listing the various evidence the Court looks to in ascertaining actual purpose).

96. *See Davis*, 426 U.S. at 242 (suggesting the Court may look to the totality of the circumstances to infer a discriminatory purpose).

97. *See id.* ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious

Once the Court finds a law is discriminatory, that law is subject to strict scrutiny review, thus the government carries the high burden of defending that legislation.[98] Section A discusses the fundamental right to vote and the Supreme Court's typical analysis of voting rights cases.[99] Section B outlines the Court's analysis in cases regarding religious freedom—also a fundamental right.[100]

A. Voting is a Fundamental Right, Yet the Supreme Court's Analysis of Voting Restrictions is Not So Strict

Since at least 1886, the U.S. Supreme Court has acknowledged the Constitution provides citizens with the fundamental right to vote.[101] In the 1960s, the Court reaffirmed its sentiment stating, "the right of suffrage is a fundamental matter in a free and democratic society."[102] The Court has gone so far as to argue that no right is "more precious" than the right to vote.[103] However, the Court does not necessarily treat the right to vote as fundamental because it inconsistently applies the strict scrutiny analysis.[104]

The Court has decided that a strict scrutiny analysis need not always apply to election laws.[105] Instead, voting restrictions are subject to strict scrutiny when they are "severe."[106] The Court reached this conclusion after finding election laws

racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.") (citations omitted).

98. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 803 (2019) (addressing the government's unlikely success in a strict scrutiny analysis when balanced against the claimant's individual rights because the Court applies the test in favor of the individual).

99. *Infra* Section III.A.

100. *Infra* Section III.B.

101. *See* Yick v. Hopkins, 118 U.S. 356, 370 (1886) (indicating that although voting was not necessarily a natural right, it is a right that society considers as "fundamental political right"); *see also* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Harper v. Virginia State Bd. Of Elections, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, s 2, of the Constitution . . . ."); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969) (discussing the need for exacting scrutiny when evaluated the right to vote because the right is the "foundation of our representative society").

102. *Reynolds*, 377 U.S. at 561–62.

103. *See* Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

104. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (acknowledging that just because a state regulation imposes barriers on the right to vote, it does not require that regulation to undergo a strict scrutiny analysis); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983) ("Although these rights of voters are fundamental, not all restrictions imposed by the States . . . impose constitutionally-suspect burdens on voters' rights . . . .").

105. *See Burdick*, 504 U.S. at 433 ("[T]he mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.") (quotations omitted).

106. *See id.* at 434 ("[A] regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to 'severe' restrictions.").

inevitably impose at least some burden upon individuals' ability to vote.[107] Accordingly, the Court has held that a more flexible standard should apply.[108] This standard requires courts to weigh the "character and magnitude" of the imposed burdens against the state's interests in a balancing test.[109] When evaluating the state's interests, courts also consider how necessary the state's interests are to impose such burdens.[110] Accordingly, the level of the burden influences how strong the state's interests must be.[111]

On one side of the balancing test the Court uses to evaluate a voting restriction is a law's imposed burdens and effects.[112] However, the burden must be more than a mere inconvenience.[113] A burden must be more than an inconvenience because every voting rule imposes some sort of burden.[114] The Court may also consider that the burdens have a disparate impact.[115] However, the disparate impact must be severe, as a mere disparity is not sufficient to show a law is unequally burdensome.[116] The Court has also indicated that such effects do not carry strong weight.[117] When specifically addressing voter ID restrictions, the Court held that statutes imposing voter ID did not place "excessively burdensome requirements" on a specific voter class.[118] These laws are not excessively burdensome because they only impose a limited burden that is inherent with the right to vote.[119]

On the other side of the balancing test, the Court looks to the state's interests.[120] The Court has found several justifiable state interests when specifically addressing laws imposing an ID restriction.[121] The Court has also made it clear that such interests are often strong and carry substantial weight.[122] Legislation requiring voter ID implicates a state interest both in detecting and preventing incidents of

107. *See id.* at 433 ("Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'").

108. *Id.* at 434.

109. *Id.*

110. *Id.*

111. *See Burdick*, 504 U.S. at 439 ("Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction.").

112. *Id.* at 434.

113. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338 (2021).

114. *Id.*

115. *See id.* at 2339 ("The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider.").

116. *See id.* ("[T]he mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

117. *See id.* at 2340 (2021) ("[T]heir relevance is much less direct.").

118. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008).

119. *Id.* at 202–03.

120. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

121. *See Crawford*, 553 U.S. at 191 (identifying several state interests to justify SEA 483, an Indiana state statute that requires presentation of a government-issued photo ID for individuals casting their votes in person).

122. *Id.* at 204; *Brnovich*, 141 S. Ct. at 2340.

voter fraud within state elections.[123] Additionally, the interest in preventing voter fraud automatically implicates a second state interest: safeguarding voters' confidence in elections.[124] In *Crawford*, the Court found a legislature's interest in protecting public confidence in elections was important and weighty even absent evidence of extensive voter fraud.[125] Further, in *Brnovich v. Democratic National Committee*, the Court upheld two Arizona laws.[126] The first law required voters who cast their vote in person on the day of the election must vote within their precinct for their vote to count.[127] The second law required only certain people to collect mail-in ballots, subject to criminal penalties.[128] Here, the Court held the state's interest in preventing voter fraud was strong, even without evidence fraud had occurred.[129] The Court reasoned that a state's interest in preserving election integrity was a compelling one.[130] Accordingly, the Court has indicated a state's interest in preventing voter fraud will almost always outweigh a law's imposed burdens, including disparate impact.[131]

B. The Court's Analysis of Other Fundamental Rights, Such as an Individual's Religious Freedom, is More "Strict"

The First Amendment grants various protections to American citizens, including the freedom of religion.[132] The United States Supreme Court acknowledged the longstanding right to the free exercise of one's religion as fundamental.[133] Because freedom of religion is a fundamental right, the government cannot impede upon an individual's religious practices.[134] The Court

123. *Crawford*, 553 U.S. at 191; *see also Brnovich*, 141 S. Ct. at 2340 (indicating the state's interest in preserving integrity within its elections is a compelling interest).

124. *Crawford*, 553 U.S. at 191.

125. *See id.* at 194 (highlighting that while no evidence of extensive voter fraud exists in elections in the United States, there are some instances of fraud or multiple voting occur, so photo ID can generate greater public confidence).

126. *Brnovich*, 141 S. Ct. at 2330.

127. *Id.*

128. *Id.*

129. *Id.* at 2340.

130. *Id.* at 2347.

131. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (discussing that the state's interest in promoting election integrity sufficiently outweighs any burdens imposed by Indiana's photo ID law); *see also* Johnson & Feldman, *supra* note 37 (indicating an interest in preventing voter fraud as a key argument for voter ID laws).

132. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

133. *See* Wisconsin v. Yoder, 406 U.S. 206, 214 (1972) (describing that the government must balance its own interests against the fundamental rights in the Religion Clauses if there is government interreference).

134. *First Amendment*, CORNELL L. SCH., https://www.law.cornell.edu/constitution/first_amendment (last visited Oct. 29, 2021) (on file with the *University of the Pacific Law Review*).

applies a strict scrutiny analysis to cases involving religious freedom.[135] Therefore, the government must justify any infringement on one's ability to practice their religion with proof of a compelling state interest.[136]

A law is unconstitutional if the purpose of the law is to impede on the freedom to practice religion.[137] In other words, the government cannot enact a law with the intention that it will infringe upon—or demonstrate hostility towards—one's religion.[138] In fact, courts even hold facially neutral laws unconstitutional if hostility—either covert or overt—is present because this violates free exercise.[139] Further, a neutral law may offend the Constitution if it creates an undue burden upon an individual's practice of their religion.[140]

The Supreme Court considers various factors to determine whether a law is neutral.[141] For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (*Lukumi*), the Court addressed the legality of an ordinance pertaining to ritual animal slaughter.[142] In *Lukumi*, the Court reviewed both direct and circumstantial evidence to determine the law's purpose.[143] Factors the Court considered included historical background, specific events leading to the city council's enactment of the law, and the legislative history, such as councilmembers' statements.[144] In *Lukumi*, the Court reviewed city council members' hostile statements, as well as the deputy city attorney and other city officials' hostile statements as indicative of discrimination.[145] The Court found this animosity led to a clear conclusion—the city enacted these ordinances to suppress religion.[146]

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135. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987).

136. *See* Caleb C. Wolanek & Heidi H. Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 281 (2017) ("[S]trict scrutiny exists in many (if not most) religious liberty cases.").

137. Sherbert v. Verner, 374 U.S. 398, 404 (1963); Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

138. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

139. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534; *see also Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731 (finding that the State violated its "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint").

140. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

141. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540 (concluding that the four substantive ordinances at issue in the case may be treated as a group for neutrality purposes because all the statutes were passed on the same day); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731 ("Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by the members of the decision-making body.") (quotations omitted).

142. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 527–28.

143. *Id.* at 540; Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (indicating that invidious purpose requires an inquiry into circumstantial evidence).

144. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

145. *Id.* at 541–42.

146. *See id.* at 542 ("In sum, the neutrality inquiry leads to *one* conclusion: The ordinances had as their

In 2018, the Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (*Masterpiece*) and applied the factors discussed in *Lukumi*.[147] In *Masterpiece*, a bakery owner refused to create a wedding cake for a same-sex couple because of his religious opposition.[148] The Court reasoned the Commission—which found the shop's actions were improper—was both intolerant and disrespectful of the litigant's religious beliefs.[149] The Court held the Commission's hostility towards the litigant was inconsistent with the First Amendment's guarantee of religious neutrality.[150] Accordingly, the Court applies a strict scrutiny analysis in religious freedom cases with an expansive look into legislative history to determine whether or not a law is in fact neutral.[151]

IV. THE SUPREME COURT SHOULD APPLY A CONSISTENT ANALYSIS IN BOTH RELIGION AND VOTING RIGHTS CASES

The American judicial system highly values uniform administration of the law.[152] When the Court applies the law inconsistently, the legitimacy of the rule of law is at risk.[153] Section A outlines the similarity between the right to vote and the right to practice religion freely—both fundamental rights.[154] Section B argues the Court should apply a more consistent analysis to both voting rights cases and freedom of religion cases to promote uniformity.[155]

object the suppression of religion.") (emphasis added).

147. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1726 (describing the Colorado Civil Rights Commission issued a cease-and-desist order to a cakeshop that refused to sell a wedding cake to a same-sex couple).

148. *Id.* at 1723.

149. *Id.* at 1731.

150. *See id.* ("On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.").

151. *Id.* at 1734; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

152. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasizing a need for permanent judicial appointments includes "inflexible and uniform adherence to the rights of the Constitution").

153. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1585 (2008) (explaining "legal legitimacy"—related to the rule of law—sociological legitimacy—the public's opinion—and moral legitimacy—moral justification of a rule—are at risk when a court issues inconsistent decisions).

154. *See infra* Section IV.A; *see also* U.S. CONST. amend. I (indicating the Constitution grants the right to freedom of religion); *see also What Does the Constitution Say About the Right to Vote?*, DEMOCRACY DOCKET (Feb. 3, 2022), https://www.democracydocket.com/news/what-does-the-constitution-say-about-the-right-to-vote/ (on file with the *University of the Pacific Law Review*) ("[N]owhere in the original text does it say that U.S. citizens have a right to vote. Instead, much of the government's authority to protect voting rights stems from amendments adopted following the civil war and legislation passed during the civil rights movement.").

155. *See infra* Section IV.B.

A. The Supreme Court Holds Both the Right to Vote and the Right to Freely Practice Religion in Similar Regard Within the American Legal System

The Constitution safeguards both the right to vote—rooted in the Fourteenth and Fifteenth Amendments—and the right to freedom of religion—in the First Amendment.[156] Because both rights stem from the Constitution, the Supreme Court considers both the right to vote and the right to freely practice one's religion as fundamental.[157] It follows that the Court protects these rights from government encroachment through judicial review.[158] Such fundamental rights are generally subject to strict scrutiny review.[159]

The requirements for a law to pass strict scrutiny should be the same regardless of whether the law implicates the right to vote or the right to religious freedom.[160] The government typically needs to show that a law furthers a compelling governmental interest, which is narrowly tailored to achieve that interest.[161] Before applying the strict scrutiny analysis, the Court must review the legislature's intent when enacting the law to determine whether it is purposefully discriminatory.[162] This burden generally falls on the litigant.[163] A law can be purposefully discriminatory either on its face or, with a facially neutral law, in its application or effects.[164] In the case of a facially neutral law, the Court's legislative intent analysis in voting rights cases differs from religious freedom cases, despite both being fundamental rights.[165]

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156. U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. I; *What Does the Constitution Say About the Right to Vote?*, *supra* note 154.

157. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) (stating the right to vote is fundamental to a democratic society); Wisconsin v. Yoder, 406 U.S. 206, 214 (1972).

158. *Fundamental Right*, *supra* note 84.

159. *Id.*

160. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1281–82 (2007) (showing strict scrutiny applies to freedom of religion and to equal protection cases implicating the fundamental right to vote).

161. *See* Spece & Yokum, *supra* note 80, at 295.

162. *See* Winkler, *supra* note 98, at 802–03 (implying strict scrutiny applies to laws a legislature has enacted with an improper, invidious purpose).

163. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (pointing to the fact that challengers of a law may only prevail if they prove the legislature had a racial motivation); *see also* Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R. C.L. L. REV. 517, 517 (2010).

164. *See Davis*, 426 U.S. at 241 (suggesting that a law can either be facially discriminatory or, while neutral on its face, applied in a way that is discriminatory).

165. *Compare* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (arguing a state's interest in safeguarding elections are relevant, legitimate, and weighty, and therefore the intent behind such a restriction is neutral), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (engaging in an investigation into both direct and circumstantial evidence to ascertain if the legislature acted with discriminatory intent).

B. The Supreme Court Should Alter Its Analysis in Voting Rights Cases so that the Analysis is Consistent with Religious Freedom Cases

The Supreme Court theoretically should apply strict scrutiny to voting rights cases and freedom of religion cases because both are fundamental rights.[166] However, the Court often analyzes these cases very differently.[167] Section 1 outlines the Court's inconsistent analysis in determining legislative intent and how the Court can achieve a more consistent analysis.[168] Section 2 discusses the Court's varying analysis when evaluating the state's compelling interests in enacting a law and how this analysis could be more consistent.[169] Section 3 considers how to analyze a law's imposed burdens in voting rights cases to be more analogous to that of religious freedom cases.[170]

1. The Expansive Look into Legislative Intent Often Afforded in Religion Cases Should Also Apply in Voting Rights Cases

While the Supreme Court sometimes finds voting restrictions discriminatory, the Court more often finds such restrictions facially neutral.[171] The Court acknowledged certain state interests are almost always valid, thus increasing the likelihood that the Court will find such restrictions are neutral.[172] These interests include promoting election integrity, preventing fraud, and increasing voter confidence.[173] Coincidentally, legislatures often point to these interests whenever enacting a voter ID law.[174] By stating these interests—the same interests legislatures use to back voter ID restrictions—are almost always valid, the Court has practically assumed a voting restriction's neutrality.[175] For example, in *Crawford*, the Court found there is always a strong state interest in promoting election integrity and preventing fraud, despite no actual evidence of voter fraud.[176]

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166. *See Fundamental Right*, *supra* note 84 (demonstrating strict scrutiny applies to fundamental rights, including the right to vote and the right to freely practice religion).

167. *See, e.g.*, *Crawford*, 553 U.S. at 204 (placing strong emphasis on state interests and requiring a showing of severe burden on behalf of the claimant); *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 (surmising slight suspicion of animosity is sufficient to show invidious discrimination and that a law cannot impose any burden on religion without a purely secular reason).

168. *Infra* Subsection IV.B.1.

169. *Infra* Subsection IV.B.2.

170. *Infra* Subsection IV.B.3.

171. *See* Carrington v. Rash, 380 U.S. 89, 96 (1965) (finding a Texas law invidious, and thus unconstitutional, because it denied members of the armed forces from voting in Texas).

172. *See Crawford*, 553 U.S. at 204 (claiming state interests in safeguarding elections are sufficiently strong and provide neutral justifications for enacting voting restrictions).

173. *Id.* at 191, 194, 197 (2008).

174. Johnson & Feldman, *supra* note 37.

175. *See Crawford*, 553 U.S. at 204 (holding the state's interests, such as promoting election integrity, are justifications for enacting the voter ID law were neutral).

176. *See id.* at 194 (acknowledging that while voting fraud could possibly occur, "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting").

Further, the Court found restrictions protecting election integrity were evenhanded and therefore not invidiously discriminatory.[177] Voter ID laws almost automatically implicate interests of advancing election integrity, safeguarding elections from fraud, and promoting voter confidence.[178] Accordingly, states will always have a strong state interest when voter ID restrictions are at issue, and courts will find such laws are neutral.[179] Once the Court deems the law is neutral, a less stringent analysis applies.[180] Thus, this reasoning makes it easier for the Court to find these laws restricting the right to vote as constitutional.[181]

In contrast, the Court applies a much more thorough analysis into the legislative intent of religious freedom cases.[182] For example, in *Lukumi*, the Court reviewed many factors surrounding the city council's enactment of various ordinances to discern the council's intent.[183] The Court evaluated factors such as historical background, events leading up to the council's enactment, and council members' statements.[184] Further, the Court claimed the effects of a law may serve as strong evidence of its underlying purpose or object.[185] Although the Court clarified that adverse impact does not always result in a purposefully discriminatory law, it is a factor the Court considered in *Lukumi*.[186] Generally, evidence of discriminatory intent exists when the Court finds significant hostility, animosity, or differential treatment toward a religion.[187] It is evident that the analysis into legislative intent goes beyond the text and includes surrounding circumstances and the law's impact.[188]

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177. *See id.* at 189 (defining a restriction on the right to vote as invidious if the restriction is unrelated to a voter's qualifications); *see also id.* at 205 (2008) (Scalia, J., concurring) (discussing the Court's finding that the ID law at issue applies evenhandedly, meaning it is generally applicable).

178. *See id.* at 191 (majority opinion) (the state's interests in deterring and detecting voter fraud and safeguarding voter confidence are "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process").

179. *See id.* at 189–91 (claiming state interests in preventing election fraud are generally applicable, and therefore not invidious).

180. *See* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (implying that all strict scrutiny only applies in voting rights cases when the burden is severe; the creation of some barriers is not sufficient to trigger a strict scrutiny review).

181. *See* Cofsky, *supra* note 27 at 356 (suggesting it is less difficult to strike down a law as unconstitutional under a strict scrutiny analysis, and easier to uphold a law under a lesser standard of scrutiny).

182. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541–42 (1993) (determining the government's objective by evaluating "direct *and* circumstantial evidence") (emphasis added); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (discussing the analysis for determining whether a legislature acted with invidious purpose includes examining circumstantial evidence of intent).

183. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

184. *Id.*

185. *Id.* at 535.

186. *Id.*

187. *Id.* at 541–42 (1993); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1730 (2018).

188. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

The factors determining legislative intent in religion cases should apply in voting rights cases, because both rights are similar in that they are fundamental.[189] Such factors include historical background, legislators' statements, hostility towards certain groups, and a law's effects.[190] In states with voter ID restrictions, legislators made statements indicating their intent to suppress the right to vote.[191] For example, a staff aid in Wisconsin admitted several GOP senators indicated various voter ID bills would suppress minority votes.[192] The staff aid also recalled various senators' excitement that the voter ID bills would have this effect.[193] These statements are hostile, and possibly even animus, as the statements single out minority voters in particular.[194] More recently, various Republican Congressmen called for the need to challenge the U.S. election system to maintain a chance of electing a Republican president in the future.[195] Even former President Donald Trump stated the increased voter turnout would mean the U.S. would never have a Republican elected again.[196] The Court found in *Masterpiece* the Commission's statements indicating the litigant may believe what he wants but cannot act on those beliefs in a business setting were hostile.[197] The comments from various elected officials are just as hostile and single out minority voters in the same way

189. *Id.* at 540 (1993); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1722, 1731; *see also* Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969) (indicating the right to vote is foundational in our society); JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating the right to freely exercise one's religion is a fundamental, inalienable right).

190. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540; *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1722, 1731.

191. *See* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1094–95 (N.D. Fla. 2022) (reviewing legislators' statements regarding SB 90 to find that there was at least a partisan purpose behind the enactment of the law); *see also* Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html (on file with the *University of the Pacific Law Review*) (discussing statements made at a Senate Republican Caucus meeting).

192. Wines, *supra* note 191.

193. *Id.*

194. *See Hostile*, MERRIAM WEBSTER, https://www.merriam-webster.com/ dictionary/hostile (last visited Jan. 2, 2022) (on file with the *University of the Pacific Law Review*) (defining hostile as unfriendly, opposed, resisting, or antagonistic); *see also Animus*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/animus (last visited Jan. 2, 2022) (on file with the *University of the Pacific Law Review*) (expressing the definition of animus as prejudiced or spiteful ill will).

195. *See* Aaron Blake, *The GOP's Increasingly Blunt Argument: It Needs Voting Restrictions to Win*, WASH. POST (June 14, 2021), https://www.washingtonpost .com/politics/2021/06/14/gops-increasingly-blunt-argument-it-needs-voting-restrictions-win/ (on file with the *University of the Pacific Law Review*) (illustrating various Republican Congressmen, such as Matt Gaetz and Lindsey Graham, made statements warning that increased voter turnout would risk the possibility of ever electing a Republican president in the future).

196. *Id.*

197. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (finding statements such as "'[Claimant can believe] what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state'" as hostile to claimant's religious beliefs).

the Commission's statements singled out religious beliefs.[198] Such statements indicate a desired effect of the law—that it will suppress minority votes.[199] A desired effect of a law often demonstrates the intent behind the law's enactment.[200]

The Court should also consider statements demonstrating neutral intent.[201] For example, as Justice Ginsburg discussed in her dissenting opinion in *Shelby*, Congress was still concerned with voting discrimination when it renewed the Voting Rights Act.[202] Therefore, Congress engaged in thorough investigation and debate prior to this renewal.[203] In signing the renewal of the Voting Rights Act, President Bush reiterated concerns of discrimination and recognized the need for more work to fight against injustice.[204] Despite these statements suggesting a neutral purpose, the Court found that a portion of the Voting Rights Act had a purposefully discriminatory intent.[205]

In religious freedom cases, the Court also examines historical background.[206] Therefore, the Court should consider various states—including Alabama, Virginia, Florida and Mississippi—passed voter ID laws immediately after the Court weakened the Voting Rights Act in *Shelby*.[207] In fact, on the exact same day the Court weakened the Voting Rights Act, Texas instituted a voter ID law.[208] The Texas legislature had previously been unable to pass this law because the Voting Rights Act barred such a law.[209] But with the Court's weakening of the Voting Rights Act, Texas passed its law almost instantaneously.[210] This timing suggests

198. *Id.*; Wines, *supra* note 191.

199. *See* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1097 (N.D. Fla. 2022) (considering Senator Baxley's acknowledgment that SB 90 will impact Black voters as evidence of a foreseeable disparate impact); *see also* Wines, *supra* note 191 ("A handful of the GOP Senators were giddy about the ramifications and literally singled out the prospects of suppressing minority and college voters.").

200. *See* Leon Friedman, *Intent, Purpose and Motivation in Constitutional Litigation*, 15 TOURO L. REV. 1607, 1615 (1999) (explaining a plaintiff's demonstration that legislators desired or acted to achieve a specific result is sufficient to show intent in an equal protection claim).

201. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 563–64 (2013) (Ginsburg, J., dissenting) (arguing Congress continuously reauthorized the Voting Rights Act as a response to various barriers that impacted minority groups' ability to access the polls).

202. *Id.*

203. *See id.* at 564–65 (discussing Congress's extensive hearings and debates regarding the reauthorization of the Voting Rights Act).

204. *Id.* at 565.

205. *See id.* at 556–57 (majority opinion) (holding § 4(b)—regarding preclearance—unconstitutional).

206. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1722, 1731 (2018).

207. *Voting Rights: A Short History*, CARNEGIE CORP. N.Y. (Nov. 18, 2019), https://www.carnegie.org/topics/topic-articles/voting-rights/voting-rights-timeline/ (on file with the *University of the Pacific Law Review*).

208. *Id.*; Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2355 (2021) (Kagan, J., dissenting); Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–46 (2015).

209. *See Brnovich*, 141 S. Ct. at 2355 (Kagan, J., dissenting) ("Once Section 5's strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters.").

210. *See* Elmendorf & Spencer, *supra* note 208, at 2145 (stating Section 5 of the Voting Rights Act previously blocked Texas from passing a strict voter ID law).

that the passage of voting restrictions have discriminatory intent.[211] State legislatures passed these restrictions immediately after the Court weakened the Voting Rights Act—an act which ensured protection of minorities.[212] Essentially, state legislatures capitalized on the Court's decision to remove protections for minority voters.[213] States' immediate enactment of voting restrictions is evidence of discriminatory intent.[214] This sequence of events should influence the Court's legislative intent analysis.[215]

In voting rights cases, the Court should also consider the effect of a law as evidence of the law's object or purpose.[216] Voter ID laws tend to have the greatest impact on minority voters who disproportionately lack ID.[217] This effect should factor into the Court's analysis, just as a law's effect demonstrates intent in religious freedom cases.[218] While the Court sometimes considers a law's effect as intent, in voting rights cases, the effect is not dispositive.[219] The Court also decides how much weight it should give to a law's effect.[220] In voting rights cases, the Court often assigns little weight to the effects of such voter restrictions.[221] By assigning little weight to a law's effects, these effects have little relevance when ascertaining legislative intent.[222] In order to analyze voting rights cases in a manner that is consistent with other fundamental rights, courts need to engage in a more expansive legislative intent analysis.[223]

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211. *See* Farrell, *supra* note 95, at 35–36 (listing "specific sequence of events" as evidence the Court looks to in ascertaining actual purpose).

212. *See Brnovich*, 141 S. Ct. at 2354 (Kagan, J., dissenting) (arguing the intention behind Section 5 of the Voting Rights Act was to combat discriminatory efforts).

213. *See id.* at 2355 (2021) (Kagan, J., dissenting) (identifying multiple states introducing laws restricting the right to vote as soon as the Court weakened the Voting Rights Act).

214. *See* Farrell, *supra* note 95, at 35–36 (contending events surrounding a legislature's enactment of a law can provide context of the legislature's intent).

215. *See* Farrell, *supra* note 95, at 35 ("The specific sequence of events leading up to a legislative enactment may also be relevant as proof of legislative purpose.").

216. *See, e.g.*, League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1098 (N.D. Fla. 2022) (considering SB 90's effects); *see also* Farrell, *supra* note 95, at 33 ("Sometimes, the best evidence of legislative purpose comes . . . from the actual impact of the law itself.").

217. *See* Edward Lempinen, *Stacking the Deck: How the GOP Works to Suppress Minority Voting*, BERKELEY NEWS (Sept. 29, 2020), https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/ (on file with the *University of the Pacific Law Review*) (estimating at least 20 million individuals that are eligible to vote lack proper ID and that the majority of those lacking ID are people of color, young, or low-income individuals).

218. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (considering a law's effect as a factor in evaluating legislative intent).

219. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that disparate impact, alone, cannot serve as evidence of invidious intent and thus does not trigger strict scrutiny).

220. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340 (2021) (acknowledging the Court determined the law's effects were of low relevance when evaluating a law's constitutionality).

221. *Id.*

222. *See id.* (suggesting a law's discriminatory effects have a less direct relevance).

223. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (assigning great weight to a state's interests in safeguarding elections, and thus finding voting restrictions with such interests are neutral); *see also* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022) (suggesting a reliance on circumstantial evidence to discern legislative intent).

2. The Court Places Great Weight on a State's Compelling Interest in Voting Rights Cases, Despite any Evidence Such Interests are Strong

Another difference between voting rights cases and freedom of religion cases is the evaluation of a state's compelling interests.[224] The Supreme Court often automatically attaches the state interests of preventing voter fraud and promoting voters' confidence in elections to voting rights cases.[225] For example, in *Brnovich*, the Court assumed a strong state interest despite the state not offering any evidence of voter fraud.[226] The Court explained that it places great weight on both interests of preventing voter fraud and increasing voter confidence, deeming these interests as always compelling.[227] However, in religious freedom cases, the Court does not assume any interests; rather, the Court requires the governmental entity meet their burden and demonstrate its compelling interest.[228] The effect of this burden means that in religious freedom cases, the government often loses.[229] Despite the similarities between religious freedom and voting rights, the government's burden is often lower in voting rights cases.[230] The Court allows a lower burden due to the automatic compelling interest in safeguarding elections from fraud.[231]

Under the strict scrutiny analysis, the government must also prove its interest is narrowly tailored, meaning it is the least restrictive means available.[232] Notably, voter ID laws often do not provide meaningful alternatives for voters who do not possess the requisite ID.[233] States indicate their voter ID laws often allow voters to cast a provisional ballot without the necessary ID.[234] However, a voter will still

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224. *Compare Crawford*, 553 U.S. at 181 (holding the state's interest of both deterring and detecting voter fraud, modernizing election procedures, promoting voters' confidence are weighty to justify *any* burden) (emphasis added), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543, 546 (1993) (stating the government cannot impose burdens on religious beliefs, even in pursuit of legitimate interests such as public health and prevention of animal cruelty).

225. *See Crawford*, 553 U.S. at 191 (claiming the state's interests in preventing voter fraud and safeguarding voter confidence are "unquestionably relevant").

226. *Brnovich*, 141 S. Ct. at 2339–40, 2347; *id.* at 2371 (Kagan, J., dissenting).

227. *Crawford*, 553 U.S. at 191.

228. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546–47 (conducting a thorough investigation into the state's interests and ultimately finding they were not narrowly tailored because they were overbroad and overinclusive).

229. *See id.* at 546 (1993) (finding the city council's interests were neither compelling nor narrowly tailored).

230. *Compare Brnovich*, 141 S. Ct. at 2340 (claiming state interests in preventing voter fraud are a strong state interest and that strong state interests will make it much less likely a law will violate the Voting Rights Act), *with Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546 (placing a high burden on the city council to demonstrate a compelling, narrowly tailored interest); *Fundamental Right*, *supra* note 84.

231. *See Brnovich*, 141 S. Ct. at 2340 (recognizing state interests in preventing voter fraud as a strong and compelling interest).

232. Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1252 (2010) ("[N]arrowly tailored . . . requires the state to show that it employed the least restrictive means to achieve its compelling interest.").

233. Johnson & Feldman, *supra* note 37.

234. *See Provisional Ballots*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/elec-

need to get the proper ID within only a few days for their vote to count.[235] Due to the limited time frame and the fact that many minorities lack the proper paperwork to obtain an ID, the alternatives are not necessarily accessible.[236] For example, some individual's names on their ID do not match their birth certificate.[237] This means that an individual may need to obtain a new document to change their name—a process that involves going to court and may cost up to $250.[238] Accordingly, states frequently do not narrowly tailor voter ID laws because most voter ID laws do not account for these potential obstacles.[239]

3. In Voting Rights Cases, the Supreme Court Requires a Showing of a Severe Burden, Unlike in Religious Freedom Cases

Finally, the Supreme Court analyzes the law's potential burdens.[240] The Court balances the law's burdens imposed on voters against the state's interests.[241] Over the last fifty years, the Court presumed voter ID laws will impose at least a minimal burden on some voters.[242] Therefore, the party bringing suit often needs to

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tions-and-campaigns/provisional-ballots.aspx (last updated Nov. 4, 2022) (on file with the *University of the Pacific Law Review*) (highlighting states allow voters to cast a provisional ballot if do not have the necessary identification).

235. *See id.* ("Voters have the opportunity to show ID within a few days of the election, and if not, the provisional ballot is not counted.").

236. *See* Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly.*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html (on file with the *University of the Pacific Law Review*) ("People take a day off work to go down to get the so-called free birth certificates. People who are poor, with no car and no Internet access, get up, take the bus, transfer a couple of times, stand in line for an hour and then are told they don't have the right documents or it will cost them money they don't have."); *see also* Ina Jaffe, *For Older Voters, Getting The Right ID Can Be Especially Tough*, NPR (Sept. 7, 2018), https://www.npr .org/2018/09/07/644648955/for-older-voters-getting-the-right-id-can-be-especially-tough (on file with the *University of the Pacific Law Review*) (acknowledging a birth certificate and photo ID cost $57 in Georgia—a state with strict voter ID requirements).

237. *See* Horwitz, *supra* note 236 (documenting one man's attempt to obtain an ID involved changing his name, going to court, and ultimately spending $250 dollars).

238. *Id.*

239. Louis Jacobson & Amy Sherman, *As Extremes Shape Voter ID Debate, the Rules Keep Getting Stricter*, POLITIFACT (Aug. 9, 2021) https://www.politifact.com/article/2021/aug/09/extremes-shape-voter-id-debate-rules-keep-getting/ (on file with the *University of the Pacific Law Review*) (suggesting states with strict voter ID often do not have another option to vote, besides casting a provisional ballot; however, non-strict states sometimes allow at least some voters to cast their vote in an alternative method).

240. Randall R. Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002).

241. *Id.*; *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) ("However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'").

242. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2339–40 (2021) (acknowledging every voting law imposes some sort of burden on voters); *see also* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (election laws "inevitably affect[]—at least to some degree—the individual's right to vote").

demonstrate the law imposes a substantial burden.[243] In *Crawford*, the Court found that requiring an ID to vote does not impose a substantial burden.[244] In turn, the Court reasoned the burden for an individual to obtain an ID was minimal because it is not much more of a burden than the "usual burdens of voting."[245] Essentially, the Court dismissed the burden of gathering the necessary documents, going to the Bureau of Motor Vehicles, and taking a photo as a mere inconvenience.[246] The effects and magnitude of these burdens are often exacerbated in minority communities.[247] For example, many people of color living in urban areas face a substantial burden in accessing ID-issuing offices because they often rely on public transportation.[248] Public transportation could mean hours of travel.[249] Urban offices also often have long wait times because they serve large communities.[250] Minority individuals may struggle to make long travel times and long wait times fit into their work schedules.[251] Further, minority voters often work jobs with less flexible hours, so the effect of these obstacles are exacerbated.[252]

In voting rights cases, the Court requires the party bringing suit to demonstrate a severe burden.[253] However, in religious freedom cases, the Court easily finds a substantial burden exists.[254] Essentially, if a law impedes upon an individual's ability to engage in religious conduct, then a substantial burden exists.[255] The Court is more accepting of a lesser showing of a burden in religious freedom cases than in voting rights cases.[256] In cases involving voting rights, the Court's inquiry into

243. *See Crawford*, 553 U.S. at 199–200 (emphasizing the petitioners have not presented sufficient evidence to demonstrate a severe burden).

244. *Id.*

245. *Id.* at 198.

246. *Id.*; *see also Welcome to the Indiana BMV*, IN.GOV, https://www.in.gov/bmv/ (last visited Mar. 1, 2022) (on file with the *University of Pacific Law Review*) (showing the Bureau of Motor Vehicles as Indiana's version of a Department of Motor Vehicles).

247. *See* Vij, *supra* note 57 ("[R]estrictions in the election system have resulted in systematic discrimination toward minority populations, making them ineligible to vote.").

248. KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUST., THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1, 10 (2012), https://www.brennancenter.org/our-work/research-reports/challenge-obtaining-voter-identification (on file with the *University of the Pacific Law Review*).

249. *Id.*

250. *Id.*

251. *Id.; see also* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1104 (N.D. Fla. 2022) (addressing the fact that minority voters have less transportation access and may need to travel long distances).

252. *See League of Women Voters of Fla., Inc.*, 595 F. Supp. 3d at 1104 ("Black voters are overrepresented in the service sector, and they are underrepresented in management positions. So Black voters will typically work less flexible hours.").

253. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 199 (2008) (acknowledging various groups of individuals will face a greater burden when trying to obtain the necessary ID, then dismisses this burden by stating members in these groups can vote with a provisional ballot).

254. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 352–53 (2015) (claiming that a Muslim prisoner "easily satisfies" his obligation in demonstrating prison grooming policy substantially burden his ability to practice his religion).

255. *Id.* at 353.

256. *Compare id.* at 352–53 (suggesting the petitioner easily demonstrated the law substantially burdened

a law's potential burden does not consider an individual's inability to engage in the voting process.[257] The burden analysis in voting rights cases should include an investigation into the true difficulties of obtaining a necessary ID, especially for certain voters facing additional barriers.[258]

V. APPLYING THE SUPREME COURT'S ANALYSIS IN RELIGIOUS FREEDOM CASES TO VOTER ID LAWS WILL REDUCE THE DISPARATE IMPACT

By engaging in similar legislative intent analyses in voting rights cases and religious freedom cases, the Supreme Court will likely reduce voter ID laws' disparate impact on minorities.[259] If the Court utilizes the various factors to determine legislative intent in voting rights cases, the Court will have to engage in a more expansive analysis.[260] This more expansive investigation into legislative intent is incredibly important because today, most legislatures will hide any possible racial motivations behind a law.[261] One of the greatest indicators of legislative intent is legislator statements.[262] In some instances, legislators' statements demonstrate an intent to suppress minority votes through the passage of voter ID laws.[263] When considering these statements, the Court will more likely find legislatures enacted laws with an intent to discriminate or suppress minority votes.[264]

Additional factors, such as historical background and the law's effects, may also point the Court to conclude the intent behind voter ID laws is purposefully discriminatory.[265] A thorough investigation into the historical background of voter

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his religion because he was unable to grow a half-inch beard as a prisoner, per the Arkansas Department of Corrections policy), *with Crawford*, 553 U.S. at 199 (permitting a law to impose a heavier burden when only a limited number of individuals experience the burden).

257. *See Crawford*, 553 U.S. at 201–02 (recognizing the voter ID law resulted in at least one individual, a homeless woman, being unable to vote, yet admitting the single example was not sufficient to show a severe burden).

258. *See id.* (discussing various groups the voter ID law would have a greater effect on, such as the elderly and the indigent, and concluding the law would not impose severe burdens because they could still obtain an ID).

259. *Compare* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (suggesting a strong state interest is usually sufficient to demonstrate a restriction is nondiscriminatory), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (indicating even a legitimate interest is not sufficient for the government to impose burdens on religious beliefs); *see* Vij, *supra* note 57 (demonstrating voting restrictions have a disparate impact on minority populations).

260. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540 (listing the various factors the Court considers in a legislative intent analysis, including: historical background, events leading to the law's enactment, and legislative history).

261. *See* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022) ("[I]n this day and age, few would be so foolish as to openly admit their racial motivations—knowing that any such statement would provide fodder for a law's opponents.").

262. Kenneth R. Dortzbach, L*egislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 162 (1996) ("Actual statements made by legislators . . . can be persuasive if that individual played a key role in developing the legislation.").

263. Wines, *supra* note 191.

264. *See id.* (indicating legislators admitted to intending to suppress minority voters).

265. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

ID laws suggests legislatures typically enact these laws during key election years, such as 2000, 2012, and 2020.[266] Even more concerning, many states enacted voter ID laws immediately after *Shelby*, suggesting a correlation between the weakening of the Voting Rights Act and the imposition of voter restrictions.[267] Additionally, the Court would then consider a voter ID law's effect on minority voters.[268] With minority voters possessing IDs at significantly lower rates than their white counterparts, these laws will have a greater impact on minority populations.[269] The Court should consider this effect—a disproportionate number of minority voters prevented from voting—when discerning the legislative intent.[270]

Further, the Court should employ the test it applies in religious cases to voting rights cases.[271] Applying a similar test to voting rights cases will ensure the state's interest is truly compelling and outweighs the actual burdens the law imposes.[272] States should have to argue voter fraud is an actual concern instead of relying on the Court's assumption that state interests in safeguarding its elections automatically apply.[273] This increased burden means the state would have to present evidence of voter fraud to show the state does, in fact, have a strong and compelling interest.[274] A state's need to present this evidence would increase the

266. *Voter ID Chronology*, *supra* note 18 (highlighting the enactment of voter ID laws surged around 2000 and 2012); *see also* Zoch, *supra* note 22 (demonstrating a "flurry" of states proposing voter ID laws in 2021); Lesley Kennedy, *How the 2000 Election Came Down to a Supreme Court Decision*, HISTORY (Nov. 4, 2020), https://www.history.com/news/2000-election-bush-gore-votes-supreme-court (on file with the *University of the Pacific Law Review*) (indicating the Supreme Court's decision regarding the 2000 election was "one of the most controversial Supreme Court decisions in American history"); Peter Henderson, *Mail-In Ballots: the Hanging Chads of 2012?*, REUTERS (Nov. 4, 2012), https://www.reuters.com/article/us-usa-campaign-mailin/mail-in-ballots-the-hanging-chads-of-2012-idUSBRE8A308I20121104 (on file with the *University of the Pacific Law Review*) (suggesting the 2012 election was controversial because of mail-in ballots); Connor Matteson, *The 2020 Presidential Election has Caused Controversy Across the United States*, KOTA TERRITORY ABC (Dec. 1, 2020), https://www.kotatv.com/2020/12/01/the-2020-presidential-election-has-caused-controversy-across-the-united-states/ (on file with the *University of the Pacific Law Review*) (addressing the controversy surrounding the 2020 election stemmed from concerns of fraudulent ballots).

267. *Voting Rights: A Short History*, *supra* note 207.

268. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 (utilizing a law's impact as evidence of legislative intent).

269. *See* Vanessa M. Perez, *Americans with Photo Id: A Breakdown of Demographic Characteristics*, PROJECT VOTE 1 (2015), http://www.project vote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf (on file with the *University of the Pacific Law Review*) ("Thirteen percent of Blacks, 10 percent of Hispanics, but only 5 percent of Whites lack photographic identification.").

270. *See Voter ID 101: The Right to Vote Shouldn't Come with Barriers*, INDIVISIBLE, https://indivisible.org/resource/voter-id-101-right-vote-shouldnt-come-barriers (last visited Jan. 3, 2021) (on file with the *University of the Pacific Law Review*) (indicating the effect of voter ID laws do not impact all citizens the same).

271. *Compare* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (finding the state's interests are strong enough to find a law's neutrality), *with Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534 (indicating a court can ascertain legislative intent through any evidence of hostility, whether covert or overt).

272. *See Crawford*, 553 U.S. at 190 (following a balancing approach which weighs the state interest against the burden).

273. *See id.* at 191 (assuming voter fraud is always a compelling state interest); *see also* League of Women Voters of Fla., Inc. v. Lee, 595 F. Supp. 3d 1042, 1073 (N.D. Fla. 2022) (finding no evidence supporting voter fraud during the 2020 election in Florida).

274. *See Crawford*, 553 U.S. at 194–96 (showing the record contains no evidence of voter fraud, yet there was no question of the importance or legitimacy of the state's interest).

state's burden to demonstrate a compelling interest, mirroring the government's heavy burden in religious freedom cases.[275] Increasing the government's burden in voting rights cases will also ensure such cases follow a true strict scrutiny analysis.[276] A state's burden to prove evidence of voter fraud may pose challenges because the rate of voter fraud is extremely rare.[277] Even when voters cast their vote via absentee ballot, only about six or seven cases of fraud occur per year.[278] With overwhelming evidence demonstrating voter fraud is rare, states will have the burden of showing a need for voter ID laws to demonstrate their compelling interest.[279]

On the other side of this balancing test is the burden voter ID laws impose, especially on minorities.[280] By considering voter ID laws may actually prevent individuals from exercising their fundamental right to vote, the Court will likely find a significant burden.[281] Such analysis would differ from the Court's current analysis determining that voting restrictions only impose a mere inconvenience.[282] This increased burden on minority voters will lead the Court to place a higher weight on the burden side of the balancing test.[283] If the Court imposes a higher burden, the government will have to present stronger interests to justify the increased burden.[284] Through the application of a more consistent analysis, the

275. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546–47 (placing the burden on the government to demonstrate its interests are compelling and narrowly tailored).

276. *See* Spece & Yokum, *supra* note 80, at 297 (requiring "particularly weighty government interests, actual advancement of government interests, and avoidance of unnecessary harm" for a strict scrutiny analysis).

277. Tom McLaughlin, *Is Voter Fraud a Danger or a Myth?*, RUTGERS (Oct. 19, 2020), https://www.rutgers.edu/news/voter-fraud-danger-or-myth (on file with the *University of the Pacific Law Review*).

278. *See id.* ("[The conservative Heritage Foundation's] database, going back to 1988, actually contains just 206 cases of 'Fraudulent Use of an Absentee Ballot,' or roughly six or seven cases per year.").

279. Grace Panetta, *Americans Are More Likely to Be Struck by Lightning Than Commit Election Fraud*, BUS. INSIDER (Nov. 11, 2020), https://www.businessinsider.com/voter-election-fraud-statistics-rare-president-biden-trump-2020-2020-11 (on file with the *University of the Pacific Law Review*) (identifying only "31 credible cases of voter impersonation between 2000 and 2014, a time period during which over one billion votes were cast").

280. *See Crawford*, 553 U.S. at 190 (weighing a law's imposed burden as on one side of its balancing analysis).

281. *See Voter ID 101: The Right to Vote Shouldn't Come with Barriers*, *supra* note 270 (discussing what it takes to obtain an ID, and that predominantly Black areas face even greater obstacles because they are farther from DMVs).

282. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338 (2021) (recognizing all voting rules impose some level of a burden, therefore a mere burden is not sufficient to show a violation); *see also* Totenberg, *supra* note 31 (pointing to Justice Alito's opinion in *Brnovich v. Democratic National Committee*, where he characterized the law's potential burdens as "inconvenient for some").

283. *See* Cofsky, *supra* note 27 at 391 ("[E]lection laws which place 'severe' burdens upon constitutional rights are subject to strict scrutiny.") (quotations omitted).

284. *See* Fallon, *supra* note 160, at 1273 ("[W]here strict scrutiny applies, the burden falls on the government to defend challenged legislation by demonstrating that it serves a compelling interest.").

Court will increase its uniformity, and in turn, its legitimacy.[285] Accordingly, the Court should apply a similar analysis in both voting rights cases and religious freedom cases.[286]

VI. CONCLUSION

States are capitalizing on the Supreme Court's recent decisions weakening voting rights by proposing and enacting laws requiring voters to present an ID to cast their ballot.[287] These restrictions tend to disproportionately affect minority voters because they impose burdens making it more difficult to exercise the fundamental right to vote.[288] In theory, voting restrictions should not infringe upon an individual's right to vote, as this right is fundamental for all citizens.[289] However, the Supreme Court's analysis of voting rights cases actually allows states to restrict access to voting.[290] To restrict access, the Court heavily relies on the state's interests in promoting election integrity and ignoring a law's actual burden on minority individuals.[291] In voting rights cases, the Court does not consider burdens impacting minority populations as severe; therefore, restrictions burdening minority populations are not severe enough to find a violation.[292] Accordingly, the Court generally upholds laws placing restrictions on voters, which results in disparate access to the ballot box.[293]

To rectify this problem, the Court should mirror its analysis in voting rights cases to match that of religious freedom cases.[294] By engaging in a similar analysis,

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285. *See* Frost, *supra* note 153, 1585 (suggesting the Court's uniformity and consistency in its decision making increases its legitimacy).

286. *Compare* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (requiring a state to show a compelling interest only after the Court finds evidence of a severe burden on the right to vote), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (stating the government must demonstrate a compelling interest if it imposes any burden on the ability to practice religion).

287. *See Voting Rights: A Short History*, *supra* note 207 (identifying states that introduced voting restrictions in the wake of the Court's decision in *Shelby*, which weakened the Voting Rights Act).

288. *Voter ID 101: The Right to Vote Shouldn't Come with Barriers*, *supra* note 270.

289. *See* Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Burdick*, 504 U.S. at 433 (suggesting voting regulations that impose some burden on the voter need not automatically compel close scrutiny).

290. *See* Sam Levine, *US Supreme Court Deals Blow to Voting Rights by Upholding Arizona Restrictions,* GUARDIAN (July 1, 2021), https://www.theguardian.com/us-news/2021/jul/01/us-voting-rights-supreme-court-arizona (on file with the *University of the Pacific Law Review*) ("The . . . [S]upreme [C]ourt has taken away all the major available tools for going after voting restrictions.") (quotations omitted).

291. *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338–40 (2021) (considering the state's interests as highly relevant, unlike the law's effect which was much less relevant).

292. *See id.* at 2339 ("To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote.").

293. *See* Levine, *supra* note 290 (demonstrating the Court's recent trend in upholding laws that place restrictions on voting).

294. *Compare Brnovich*, 141 S. Ct. at 2339–40 (prioritizing a state's interests while deciding to apply little

the Court will perform a more expansive investigation into legislative intent.[295] Further, the Court would require the state to demonstrate evidence of a compelling interest instead of simply assuming one exists.[296] Finally, the Court would then have to examine the burdens voter ID laws impose on all individuals, especially minority groups.[297]

Under the proposed analysis, states will have the burden of demonstrating compelling state interests that sufficiently outweigh burdens imposed on minorities.[298] This heightened burden will make voting restrictions less likely to pass constitutional muster.[299] In applying a stricter level of scrutiny, courts will ensure the fundamental right to vote for all Americans, thus reducing the disparate impact of voting restrictions on minorities.[300]

relevancy to a law's effects), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (requiring the government to demonstrate a compelling interest in order to impose any burden on the ability to practice religion).

295. *See* Farrell, *supra* note 95, at 8 (indicating the Court's evaluation into legislative intent is aimed at determining the scope of what the legislature was attempting to accomplish in enacting a law).

296. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (supposing protecting election integrity always applies as a compelling state interest).

297. *Compare* Newkirk II, *supra* note 40 (evidencing strict voting laws do suppress the ballot along racial lines), *with Brnovich*, 141 S. Ct. at 2338–39 (acknowledging a mere disparity in a law's effect does not necessarily create a severe burden on voting rights).

298. *See* Spece & Yokum, *supra* note 80, at 295 (placing the burden on the government to prove a compelling state interest that is narrowly tailored).

299. *See* Snider, *supra* note 72 (requiring the government to prove a compelling state interest, and that the law is narrowly tailored for the highest level of scrutiny).

300. *See* Hajnal et al., *supra* note 25 (suggesting voting restrictions have a disparate impact on minority groups; therefore, by reducing the number of voting restrictions that pass constitutional muster, the impact on minorities will also decrease).