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How Courts Analyze Voter Identification Laws under the First Amendment

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HOW COURTS ANALYZE VOTER IDENTIFICATION LAWS UNDER THE FIRST AMENDMENT

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ABSTRACT

Some scholarship and political experts describe voter ID laws as a form of voter suppression because they make it harder for certain groups of people to vote. First, this thesis considers the historical backdrop of voter discrimination resulting in the passage of the Voting Rights Act of 1965, and subsequent state uses of registration and voter ID laws. Then, this study reviews the theoretical foundation of freedom of expression as developed by Thomas Emerson and individual and social free expression values, including the social value of self-governance explicated by Alexander Meiklejohn. Some scholars also suggest that voter ID laws may be more closely scrutinized by courts if challenged under explicit provisions of state constitutions that grant voters a fundamental right to vote. This thesis begins its analysis by examining state voter ID laws that the National Council of State Legislatures identified in effect in 2018. Next, the study reviews how courts analyzed voter ID laws since the U.S. Supreme Court's approval of a strict ID law in *Crawford v. Marion County Election Board* in 2008. Overall, this thesis found only a few examples where courts used First Amendment rationales and any associated free expression values when addressing ID laws. More commonly, courts applied the *Burdick* balancing test as prescribed by *Crawford* to uphold the law using two common rationales, either the plaintiff did not meet their burden of proving a significant burden on voters or the state's interest of preventing fraud outweighed any burden on voting rights. Finally, this thesis recommends that all courts review voter ID laws under a strict scrutiny analysis with the state having the burden of proof and demand that states justify why certain types of photo IDs are deemed unacceptable.

CHAPTER 1. INTRODUCTION

The United States Supreme Court described the right to vote as "a fundamental political right" in its 1972 decision, *Dunn v. Blumstein*.[1] Voting allows citizens to choose leaders, policy positions, and to influence democracy.[2] Representatives may ignore citizens who cannot or do not vote.[3] Voter identification laws have been contentious since 1950 when South Carolina first required some form of identification at the polls.[4] Within the past decade, however, stricter forms of voter identification requirements have surfaced.[5]

Some scholarship and political experts describe voter identification laws as forms of voter suppression because they make it harder for certain groups of people to vote.[6] In fact, political scientists Zoltan Hajnal, Nazita Lajevardi, and Lindsay Neilson found in a 2017 study that strict identification laws have a negative impact on turnout of racial and ethnic minorities in both primary and general elections.[7] Also, the group found that these laws tend to "skew democracy toward those on the political right."[8]

Voter identification laws are one of the many reasons Secretary Hillary Rodham Clinton raised as to why she lost the 2016 Presidential Election in *What Happened*.[9] For example, in Wisconsin, where Secretary Clinton only lost the state by about 22,000 votes, she cites a Priorities USA study to estimate that a new voter ID law helped reduce turnout by 200,000

[1] Armand Derfner & J. Gerald Hebert, *Voting is Speech*, 34 YALE L. & POL'Y REV. 471, 471-72 (2015). *See Dunn v. Blumstein*, 405 U.S. 330 (1972).
[2] Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter identification laws and the suppression of minority votes*. 79 J. POL. 363, 363 (2017).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] HILLARY RODHAM CLINTON, WHAT HAPPENED 420 (Simon & Schuster, 1st ed. 2017).

votes.[10] Wisconsin was vital for Clinton's projected path to victory because Democrats had won the state in every presidential election since 1992.[11] A Republican representative from Wisconsin predicted before the election that the new law would help President Donald Trump "pull off an upset in the state."[12]

Clinton elaborated that the Associated Press documented subsequent voter denials due to the voter ID law: a Navy veteran with an out-of-state driver's license, a college student using a college ID that lacked an expiration date, and a senior woman with chronic lung disease who had merely lost her license.[13] Conversely, in Illinois, where the state instituted measures to make voting more accessible, turnout was up more than five percent.[14] Clinton states that turnout, especially among African-Americans, was 14 points higher in Illinois than Wisconsin.[15]

American historian, Alexander Keyssar, noted that leading up to the 2008 Presidential Election, Republicans pressed state legislatures to pass legislation that required all prospective voters to present government-issued photo identifications when they showed up at polls.[16] Existing identification requirements varied from state to state, so Republicans argued that this state of affairs was an invitation for voter fraud.[17] According to opinion polls, the idea has popular support.[18] In an age where you need identification to board an airplane or enter an office building, many people feel that it is not unreasonable to impose similar safeguards at the ballot box.[19] Also, photo identification requirements would restore "integrity" of American elections

[10] *Id.*
[11] *Id.* at 384.
[12] *Id.* at 420.
[13] *Id.* at 421.
[14] *Id.* at 420.
[15] *Id.*
[16] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 283 (Basic Books, 2nd ed. 2009).
[17] *Id.* at 283-84.
[18] *Id.* at 284.
[19] *Id.*

among "legitimate" voters who worried about the possibility of fraud, especially in the wake of the 2000 Presidential election debacle in Florida.[20] For the first time since 1888, the candidate winning the highest number of popular votes, Democrat Al Gore, was not the candidate who won the Presidency in the Electoral College vote, Republican George W. Bush.[21]

The *Washington Post*, however, found only four documented cases of voter fraud out of the 136 million votes cast in the 2016 election.[22] In fact, one example included an Iowa woman who voted twice for Trump.[23] Trump's lawyers even said in a Michigan court, "All available evidence suggests that the 2016 general election was not tainted by fraud or mistake."[24]

Nonetheless, a problem lies in identification laws that suppress specific segments of the electorate, namely low-income and African American voters.[25] A Brennan Center study of voter identification laws instituted since 2010 indicates that voter restriction laws vary by state.[26] The website categorizes the restrictions to voting to include making it harder to register to vote, cutting back on early voting hours and days, and making it more challenging to restore voting rights to persons convicted of felonies.[27] In 2016, fourteen states had these various types of new voting restrictions in place for the first time, including Wisconsin.[28]

Although Louisiana did not impose any new voter restrictions for the 2016 Presidential Election, Louisiana has a unique history of voter suppression attempts.[29] When Senator John

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[20] *Id*.
[21] *Id*.
[22] Clinton, *supra* note 9, at 420.
[23] *Id*.
[24] *Id*.
[25] *New Voting Restrictions in Place for 2016 Presidential Election*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/new-voting-restrictions-2010-election (last visited November 21, 2017).
[26] *Id.*
[27] *Id*.
[28] *Id*.
[29] *ELECTION 1986: THE BREAUX/MOORE DEBATE*, LPB Digital Collection, http://ladigitalmedia.org/video_v2/asset-detail/LSEND-19861019 (last visited November 21, 2017).

Breaux first campaigned for the U.S. Senate in 1986, sources linked Breaux's opponent, Republican Congressman W. Henson Moore, III, to a group accused of purging names from voter rolls in rural areas.[30] The purge's target was African-American voters, but prominent members of the Long family were also purged and called attention to the issue.[31] Although Louisiana has a tainted record of voter suppression attempts, modern Louisiana law could also serve as a model for implementing a viable alternative to restrictive voter ID laws.[32] When a voter is unable to present identification to vote, then the voter could sign an affidavit instead.[33]

Through an in-depth examination of published federal appellate court and U.S. Supreme Court cases, this thesis analyzes how courts, if at all, deal with voter identification laws under the First Amendment because literature indicates the Supreme Court has been inconsistent in how it has analyzed First Amendment challenges to voting laws. In addition, this thesis examines what First Amendment values, if any, courts are identifying relating to voting. In doing so, this thesis considers the historical backdrop of voter discrimination before states passed identification laws, especially for veterans, students, senior citizens, females, persons with disabilities, and minorities.

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Keyssar, *supra* note 16, at 283.

CHAPTER 2. BACKGROUND

The United States does have something very close to "universal suffrage," where all adult citizens have the right to vote, with recent exceptions made for convicted felons.[34] Voting discrimination, however, dates back to the American Revolution, arising out of fear of interference with local issues or overwhelmingly favoring one political party.[35] African Americans and women historically struggled for the right to vote in the United States. These two groups successfully secured the right to vote through Constitutional amendments XV in 1870 and XIX in 1920.

While many still consider the Voting Rights Act of 1965 one of the most far-reaching pieces of civil rights legislation in U.S. history, its noble intent of enforcing the provisions of the Fifteenth Amendment and removing local barriers that prevented African Americans from voting was not without unintended consequences. This chapter reviews the Voting Rights Act, states' uses of registration and voter identification laws, and then the Supreme Court's approval of a strict, voter identification law in *Crawford v. Marion County Election Board* in 2008.

The Voting Rights Act

The South was a "cauldron of racial tension" in the 1950s.[36] In Louisiana, for example, members of the White Citizens Council purged black registrants from voting lists for minor paperwork irregularities.[37] Also, a 1960 state law allowed disenfranchisement for people of "bad character," which included anyone participating in a sit-in.[38] President Dwight Eisenhower, however, proceeded cautiously in his first term favoring a more limited federal government.[39]

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[34] *Id.* at xvi-xx.
[35] *Id.* at 9.
[36] *Id.* at 206.
[37] *Id.* at 207.
[38] *Id.*
[39] *Id.* at 208.

The 1956 murder of two Mississippi voting rights workers, however, spurred the President and Congress into action. [40]

As the first civil rights bill passed by Congress in 80 years, the Civil Rights Act of 1957 was modest.[41] The Act primarily promoted the voting rights agenda through the creation of the Commission on Civil Rights.[42] The commission recommended the appointment of federal registrars to be dispatched to the South and given the authority to register voters.[43] The commission also lent its power to call for broader national measures after concluding that the reliance on county-by-county litigation was "time consuming, expensive, and difficult" to bring an end to discriminatory voting practices.[44]

Although then President John Kennedy owed his narrow electoral victory to the black vote, he lacked a strong popular mandate and had limited influence in Congress to advocate for a civil rights bill based on the commission's recommendations.[45] His successor, Lyndon Johnson, however, seized the moment of national unity after Kennedy's assassination to obtain the civil rights bill's passage as a tribute to the late president.[46] As the first President to officially align himself with the Civil Rights Movement, Johnson noted in a joint session of Congress that "it is really all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome."[47]

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 209.
[44] *Id.* at 209-10.
[45] *Id.* at 210. Kennedy beat Republican Richard Nixon by only 0.2 percent of the popular vote in 1960. Some alleged that fraud in Texas and Illinois cost Nixon the election. In response, Republicans organized an intricate antifraud campaign titled "Operation Eagle Eye." Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 638 (2007).
[46] Keyssar, *supra* note 16, at 210.
[47] *Id.* at 211.

After successfully being elected as President in his own right in 1964, Johnson signed the historic Voting Rights Act of 1965 that contained critical elements demanded by activists and the Commission on Civil Rights.[48] First, the Act immediately suspended literacy tests and good character voting requirements for five years.[49] Second, the law gave the Attorney General authority to send federal examiners to the South to enroll voters.[50] Also, to prevent future discriminatory requirements, section 5 of the act prohibited the state governments, predominantly in the South, from changing voting laws without first obtaining federal "preclearance."[51] Finally, the Act contained a congressional finding that poll taxes in state elections abridged the right to vote, and authorized the Justice Department to initiate litigation to challenge their constitutionality.[52]

The Voting Rights Act was a milestone in American political history.[53] Interestingly, the essence of the act enforced the Fifteenth Amendment, which had been the law for almost a century.[54] Congress renewed the Voting Rights Act in 1970, 1975, 1982, and 2006.[55] Shortly after President George W. Bush signed the 2006 Voting Rights Act, a Texas utility district challenged section 5 in court after being denied a "bail out" from federal pre-clearance.[56]

The utility district argued that Congress had exceeded its constitutional authority with the pre-clearance requirement.[57] Also, the district alleged that since racial discrimination was no longer a problem in modern society, the Voting Rights Act had achieved its objectives and pre-

[48] *Id.* at 210-11.
[49] *Id.* at 211.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 212.
[54] *Id.*
[55] *Id.* at 212-14.
[56] *Id.* at 215. *See Shelby County v. Holder*, 570 U.S. 2 (2013).
[57] Keyssar, *supra* note 16, at 215.

clearance requirements had become burdensome.[58] Ultimately, in 2013, the Supreme Court agreed with the utility district in *Shelby County v. Holder* and held section 5 of the Voting Rights Act of 1965 unconstitutional.[59] In a divided 5-4 decision, the Court found that the formula impermissibly burdened the principles of federalism and was no longer responsive to the needs of society.[60]

Voter Identification Laws

Although little evidence supports the problem of voter fraud, at best, Republicans pressed state legislatures to pass legislation that required all prospective voters to present government-issued photo IDs in years leading up to the 2008 Presidential election.[61] Existing identification requirements varied from state to state, and Republicans alleged that this was an invitation for voter fraud.[62] Representatives claimed that government-issued IDs could prevent such fraudulent crimes.[63] Also, new photo-ID laws would restore confidence in elections among "legitimate" voters who worried about the possibility of fraud, in the wake of the 2000 election debacle in Florida.[64] Various states tightened ID requirements, including Arizona, Georgia, and Indiana.[65]

As of 2007, no empirical study at either the national or state level had measured the magnitude of voter fraud.[66] Photo-identification advocates have relied on two categories of assertions in support of ID laws, including anecdotal examples of voter fraud and analogies to

[58] *Id.* at 213-15.
[59] *Id.* at 215. *See Shelby County v. Holder*, 570 U.S. 2 (2013).
[60] Keyssar, *supra* note 16, at 215. *See Shelby County v. Holder*, 570 U.S. 2 (2013).
[61] Keyssar, *supra* note 16, at 283.
[62] *Id.* at 283-84.
[63] *Id.* at 284.
[64] *Id.*
[65] *Id.* at 285.
[66] Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 635 (2007).

other contexts that require photo identification.[67] George Washington University Professor of Law Spencer Overton pointed out flaws in both arguments.[68]

First, anecdotal evidence has been heavily discounted in most fields because such evidence permits only a loose inference about matters a field is trying to study.[69] In other words, anecdotes can mislead people to generalize rules based on examples that the anecdotes cannot teach.[70] For example, Republicans cited anecdotal evidence of voter fraud to explain John Kerry's massive Wisconsin win in the 2004 Presidential election.[71] Of the nine allegations of "double-voting" that occurred in the state, a Republican-appointed U.S. attorney failed to indict any of these individuals on fraud charges.[72] These examples are misleading because six of the cases involved clerical errors, and the other three involved individuals with similar names and different birth dates.[73]

Second, voting identification requirements have often been compared to presenting an identification to board an airplane, enter federal buildings, or buy alcohol.[74] While analogies are common rhetorical tools, analogies have limitations.[75] Overton pointed out that the relevant question should be whether voting resembles these other activities sufficiently to warrant identical treatment.[76] In contrast to voting in elections, airline passengers do not cast votes that are totaled to assess the will of the entire airplane and to govern the journey.[77] Similarly, liquor

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[67] *Id*. at 644.
[68] *Id*.
[69] *Id*.
[70] *Id*. at 645.
[71] *Id*. at 645. Another anecdotal example used by Ronald Reagan for years, even after being informed of the true story, is the alleged "welfare queen" he used to discredit the welfare system. Reagan claimed she used 80 different names and a dozen Social Security cards to defraud the government of over $150,000. In reality, this woman used two aliases to recover $8,000. *Id*. at 645.
[72] Overton, *supra* note 66, at 646.
[73] *Id*.
[74] *Id*. at 650.
[75] *Id*.
[76] *Id*. at 651.
[77] *Id*.

stores lack incentives to exclude legitimate consumers, while some politicians benefit from reducing turnout of specific demographic populations likely to vote against them.[78]

Best available data suggests an estimated six to eleven percent of voting-age Americans lack a state-issued photo ID, especially in states like Wisconsin, where seventy-eight percent of black men ages 18-24 lack a driver's license.[79] Without hard data, policymakers could misperceive the risk of voter fraud.[80] Empirical data would also indicate whether such laws would disproportionately exclude certain groups, such as senior citizens, the poor, individuals with disabilities, and people of color. [81]

The Democratic Party resisted the new ID requirements that could disenfranchise as many as nineteen million potential voters who did not or could not possess a valid driver's license or passport.[82] Even if states created ways for individuals to obtain photo IDs, these paths would be inherently burdensome on the underprivileged and potentially cost prohibitive.[83] In sum, new ID requirements potentially could lead to voter suppression that disproportionately impacted the young, elderly, poor, and African Americans, all of whom are more likely to vote Democratic.[84] These laws were challenged in courts on various grounds, including violating state and federal constitutional provisions and the Voting Rights Act.[85] Challengers argued that photo ID laws have placed an undue burden on the right to vote and have amounted to an extra-

[78] *Id*.
[79] *Id*. at 635.
[80] *Id*. at 652.
[81] *Id*. at 653.
[82] Keyssar, *supra* note 16, at 284.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 285.

constitutional franchise requirement.[86] They also argued that voter ID laws disparately have prohibited low-income voters and voters of color from gaining access to the polls.[87]

In 2008, the U.S. Supreme Court heard a challenge to one of the strictest photo ID laws in the nation in *Crawford v. Marion County Election Board*.[88] The Indiana law at issue required voters to present an unexpired government-issued photo ID to vote, and provisional ballots would only count if the voter reported to the county clerk's office within ten days of the election to present their required identification.[89] The U.S. Court of Appeals for the Seventh Circuit concluded that few prospective voters would be burdened by the law, while acknowledging there had been no recent cited instances of voter impersonation.[90]

A divided Supreme Court upheld the law as well.[91] In his plurality opinion, Justice Stevens found the "risk of voter fraud" to be "real."[92] Reaching back to 1868 for examples, he wrote, "Flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists."[93] Based on this evidence, Justice Stevens concluded there was no question regarding the importance of the state's interest in preventing voter fraud.[94] He asserted that "inconvenience" for voters lacking requisite identification was merely gathering documents and traveling to a motor vehicle office, which did not amount to an unduly burdensome requirement.[95] Justice Scalia concurred in the

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[86] *Id*.
[87] *Id*.
[88] *Id*. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[89] Keyssar, *supra* note 16, at 285.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Crawford*, 553 U.S. at 195 n. 11. Stevens quoted in a footnote an infamous New York City election influenced by a political machine. "Big Tim" Sullivan, a New York state senator and U.S. congressman, insisted that the voters who were paid to vote multiple times have "whiskers," which could be trimmed multiple times to have multiple appearances. *Id.*
[94] Keyssar, *supra* note 16, at 285.
[95] *Id*.

judgment only.[96] Fearing a floodgate of litigation, he added that the Supreme Court should not get involved in local election law.[97]

In his dissent, Justice Souter insisted that the burden Justice Stevens referred to would be "an unreasonable and irrelevant burden on voters who are poor and old."[98] Also, in the absence of no recent recorded voter impersonation cases, Souter indicated there is no demonstrable need for the strict law.[99] In a separate dissent, while Justice Breyer approved of voter ID laws in general, he found Indiana's to be unduly burdensome for low-income and elderly voters.[100]

The U.S. Supreme Court's election law docket was unusually diverse in 2008, including cases involving campaign finance, voter identification, the Voting Rights Act, and regulation of political parties.[101] Overall, the Roberts Court's treatment of theses cases showed more restraint than was exercised by their predecessors in their treatment of election laws, except for the Court's intense review of campaign finance reforms.[102] Although this docket gave the Court ample opportunity to shift the direction of election law jurisprudence toward promoting competition, the Court opinions stuck with traditional approaches, such as balancing state interests against the right to vote, and avoided asking whether the laws represented a means of entrenching incumbent parties.[103]

After *Crawford*, Republicans across the nation began to press for passage of new photo-identification laws modeled after Indiana's.[104] Exactly how many Indiana residents would be

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[96] *Id.*
[97] *Crawford*, 553 U.S. at 208 (Scalia, A., concurring).
[98] *Id.* at 237.
[99] Keyssar, *supra* note 16, at 286.
[100] *Crawford*, 553 U.S. at 237-39 (Breyer, S., dissenting).
[101] Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 89-90 (2008).
[102] *Id.* at 93.
[103] *Id.* at 94.
[104] Keyssar, *supra* note 16, at 286.

prevented from voting by the new ID law remained unclear, but within weeks of the decision, several senior-aged, Indiana nuns were prevented from voting in a primary because they lacked the required photo ID.[105] Also, in the 2008 Presidential election, the most visible impact of the ID law was on out-of-state college students who tried to register to vote in cities where they were studying, but lacked requisite Indiana IDs.[106] As in other periods of history, the combination of partisan interests, class apprehension, and a desire to win elections were all causes for narrowing the franchise.[107] In addition, a deeply ingrained stereotypical belief existed that poor people, African Americans, and immigrants may be more vulnerable to persuasive politicians, interest groups, or employers who offered monetary incentives in exchange for members of these groups to vote a certain way.[108]

A Constitutional Right to Vote

In 2001, Congressman Jesse Jackson proposed a Constitutional amendment for an "affirmative" right to vote for all citizens.[109] Advocates for the change strongly believed that shoring up a Constitutional amendment could help prevent the legal chaos similar to that caused by *Bush v. Gore* in 2000 and even prevent future election hijacking if a state legislature decided to ignore the popular votes.[110] The amendment, however, failed to gain support for various reasons.[111] Some argued the change is not necessary because there is already an implicit right to vote in the Constitution.[112] Others wanted to avoid a Constitutional amendment altogether to

[105] *Id.*
[106] *Id.*
[107] *Id.* at 286-87.
[108] *Id.* at 287.
[109] *Id.* at 291.
[110] *Id.* at 292. *See Bush v. Gore*, 531 U.S. 98 (2000) (Democratic candidate, Al Gore, filed a complaint contesting the certification of Florida's state results in te 2000 Presidential election. The U.S. Supreme Court held that the manual recounts ordered by Florida Supreme Court, without objective standards for discerning a voter's intent constituted an arbitrary treatment of voters in violation of the Equal Protection Clause.).
[111] Keyssar, *supra* note 16, at 292.
[112] *Id.*

dodge also addressing other initiatives, such as a ban on same-sex marriage.[113] Finally, others feared this change could jeopardize renewal of the Voting Rights Act.[114]

In the 2000 Presidential election, law professor Jamin Raskin wrote that a majority of Americans learned that the U.S. Constitution has allowed state legislatures to disregard the people's votes in Presidential elections.[115] State legislatures have "plenary" power to "appoint, in such Manners as the Legislature thereof may direct, a Number of Electors."[116] Keyssar compared this underlying Constitutional fact to "a half-forgotten corpse" that "had suddenly been jarred loose from the river bottom and floated upward into view."[117]

Additional stark inequities exist in the current franchise structure, including about 571,000 taxpaying, draftable U.S. citizens who live in the District of Columbia (D.C.), but lack any direct voting representation in Congress.[118] Lacking Congressional representation is a double injustice to D.C. residents since Congress acts as both their national and local legislative body.[119] Similarly, about four million American citizens are living in the federal territories of Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands.[120] While Congress allows these citizens to vote for President, they lack representation in the Electoral College.[121] Like D.C. residents, residents of the territories lack any direct representation in Congress other than a non-voting delegate in the House of Representatives.[122]

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[113] *Id.*
[114] *Id.*
[115] Jamin Raskin, *A Right-to-Vote Amendment for the US Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004).
[116] U.S. CONST. art. II, §1, cl. 2.
[117] Raskin, *supra* note 115, at 561.
[118] *Id.* at 564.
[119] U.S. CONST. art. I, §8, cl. 17.
[120] Raskin, *supra* note 115, at 565.
[121] *Id. See* U.S. CONST. art. IV, §3, cl. 2.
[122] Raskin, *supra* note 115, at 565.

Other unresolved issues to be answered by the drafters of the constitutional "right-to-vote" amendment include whether to enfranchise convicted felons, and if so, when to do so, and lowering the voting age to 17 to allow millions of high school graduates to vote.[123] Ironically, the United States was the first nation conceived as a democratic response against tyranny, while also being the only nation on earth that disenfranchises its capital city residents.[124] In the absence of a voting amendment, the next section analyzes whether scholarship or Supreme Court opinions have recognized a constitutional right to vote contained within the First Amendment.

State Constitutional Claims

Derfner and Hebert explained that often the level of judicial scrutiny in voting rights cases could be outcome determinative.[125] The researchers cited a 2012 state appellate decision, *Applewhite v. Commonwealth of Pennsylvania*, where it took two attempts and a directive from the Pennsylvania Supreme Court to strike down the state's ID law as an unconstitutional burden on voters' fundamental right to vote explicitly provided in the state's constitution.[126] On the first review, the *Applewhite* court did not apply strict scrutiny, but indicated it might have reached a different result if it had.[127] After a full trial on remand, the court did apply strict scrutiny with the government required to show a compelling state interest for the law and that the narrow tailoring of the law to meet that interest, which the state did not, and the court struck down the law.[128]

How Is Voting Protected under the First Amendment?

The U.S. Supreme Court has strictly scrutinized campaign spending to influence voters in elections by candidates, political parties, or even corporations as it would any other speech

[123] *Id.* at 567.
[124] *Id.* at 572.
[125] Derfner & Hebert, *supra* note 1, at 477
[126] *Id*. at 478 (citing *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD 2012 (Pa. Commw. Ct. 2012)).
[127] *Applewhite v. Commonwealth of Pennsylvania,* 2012 WL 3332376 (Pa. Commw. Ct. 2012).
[128] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD 2012 (Pa. Commw. Ct. 2012).

regulations under the First Amendment.[129] Scholars, however, have written that the Court began giving a "short shrift" to burdens on the right to vote and voter registration in 1972 when the U.S. Supreme Court addressed *Dunn v. Blumstein*.[130] In *Voting is Speech,* Armand Derfner and J. Gerald Hebert, both civil rights attorneys, stated that voter identification laws pick and choose which types of identification are acceptable, and in doing so, pick and choose which types of voters are acceptable.[131] Over time, courts have applied differing levels of judicial scrutiny when addressing voting rights as First Amendment rights.[132]

Texas enacted the most illustrative law on this issue in 2011, and that voter identification law was subsequently mired in litigation in the *Veasey v. Abbott* line of cases.[133] The law disenfranchised more than 600,000 voters unless they obtained a "qualifying ID," which is more onerous and expensive than registering to vote.[134] The law deemed concealed handgun permits and military IDs as acceptable, which are common forms of identification for white voters.[135] Meanwhile, student IDs and civilian government employee IDs were excluded and more commonly possessed by African American and Hispanic voters.[136] In 2017, the U.S. Supreme Court did not hear an appeal of the case; Chief Justice John Roberts concluded the issues would be better suited for review at a later time.[137]

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[129] Derfner & Hebert, *supra* note 1, at 471.
[130] 405 U.S. 330, 336 (1972) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).
[131] Derfner& Hebert, *supra* note 1, at 474.
[132] *Id.*
[133] *Id*. *Veasey v. Abbott*, 265 F. Supp. 3d 684, 699 (2017) (holding that the voter identification law "violates Section 2 of the Voting Rights Act and the 14th and 15th Amendments"); *Veasey v. Abbott*, 830 F.3d 215, 256 (5th Cir. 2016) (holding in part that the voter identification law "imposes significant and disparate burdens on the right to vote").
[134] Derfner& Hebert, *supra* note 1, at 474.
[135] *Id*. TEX. ELEC. CODE. § 63.001(b)(1) (West 2017) (requiring one form of photo ID).
[136] Derfner& Hebert, *supra* note 1, at 474. Various legislatures also passed laws limiting early voting and same-day registration, which usually help enhance minority voter turnout. *Id.*
[137] *Abbott v. Veasey*, 580 U. S. ____, *2 (2017).

Dating back to the 1960s, laws that placed "severe" restrictions, such as property ownership, literacy tests, or poll taxes, on the right to vote, were subject to strict scrutiny by the Court.[138] For instance, *Harper v. Virginia Board of Elections* involved a poll tax that directly restricted some citizens' right to vote.[139] In that 1966 opinion, the Supreme Court identified the right to vote as a "fundamental right" and struck down the law under a strict scrutiny analysis.[140] The burden of proof under strict scrutiny falls on the government to show a compelling state interest and that the restriction is narrowly tailored to meet that interest.[141] Often under strict scrutiny, when the government is unable to show a compelling interest, so the Court overturns the restriction.[142]

The arrival of four new justices turned voting rights cases in a different direction in a series of cases starting in 1973.[143] In *San Antonio Independent School District v. Rodriguez*, the majority opinion indicated it has a long history of providing "zealous protection" against government interference with "the individual's rights to speak and vote" and addressed a nexus between education and voting rights when addressing the Fourteenth Amendment Equal Protection Clause.[144] "Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice,"[145] according to the Court. In a dissenting opinion, Justice Marshall wrote, however, that such

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[138] BARBARI, LECTURE HANDOUTS FOR LOUISIANA JULY 2017: CONSTITUTIONAL LAW 17 (Barbari, Inc., 2017); Joshua A Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL'Y 143, 145-46. (2008).
[139] Joshua A Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL'Y 143, 164. (2008). *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).
[140] Douglas, *supra* note 139, at 164.
[141] *Id*. at 145-46.
[142] *Id*.
[143] Derfner & Hebert, *supra* note 1, at 480. *See Rosario v. Rockefeller*, 410 U.S. 752, 758-62 (1973).
[144] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
[145] *Id*. at 36 (adding "That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.")

important interests underlie the right to vote that the court previously applied strict scrutiny analysis to discriminatory state treatment regarding voting.[146] Derfner and Hebert explained this case as indicating the Constitution only protects the right "to participate in . . . elections on an equal basis with other qualified voters."[147]

In 1974, in *Storer v. Brown*, the Court held, "As a practical matter, there must be a substantial regulation of elections to ensure they are fair and orderly."[148] The Court indicated restrictions would be upheld so long as not "invidious, discriminatory, or excessively burdensome."[149] Thus, courts have allowed state governments to put "reasonable, nondiscriminatory restrictions" on voting.[150] These restrictions enjoy a legal presumption of validity under "rational basis" scrutiny, and the burden of proof falls upon the challenging plaintiff to show the restriction is not "sufficiently justified by an important state interest."[151] Justice William Brennan, however, in his dissenting opinion, stated, "The right to vote derives from the right of association that is at the core of the First Amendment," and thus, courts should subject voting regulations to strict scrutiny.[152]

Then, in 1983, the Supreme Court seemed to swing back toward closer scrutiny of voting regulations.[153] In *Anderson v. Celebrezze*, described as a freedom of association case, the Supreme Court held that a voter's interests under the First Amendment required the Court to strike down a restrictive filing deadline in Ohio for independent candidates.[154] Although the Court did not articulate a particular level of scrutiny, the decision suggests some degree of

[146] *San Antonio Indep. Sch. Dist.*, 411 U.S. 100 (Marshall, J., dissenting).
[147] Derfner & Hebert, *supra* note 1, at 480.
[148] *Id*. *See Storer v. Brown*, 415 U.S. 724 (1974).
[149] Derfner & Hebert, *supra* note 1, at 480.
[150] Barbari, *supra* note 138.
[151] *Id*.
[152] *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, W., dissenting).
[153] Derfner & Hebert, *supra* note 1, at 481.
[154] *Id*. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983).

intermediate scrutiny.[155] *Anderson* had a minimal practical effect on jurisprudence because the Court continued to engage in the "rational basis"-like scrutiny balancing burdens on voting rights against the great deference given to the state's interest in ensuring a fair and orderly election.[156] Although *Anderson* had little impact on the level of scrutiny courts applied, the case provided the analytical framework for the *Burdick* balancing test that the Court used to justify Hawaii's ban on write-in candidates in 1992.[157]

Subsequently, in *Norman v. Reed*, the Supreme Court in 1992 struck down some ballot access requirements for political parties and upheld others.[158] Again, the Court stated these restrictions affected the First Amendment right of association for citizens to express their political preference through voting, and these limits had to be narrowly drawn to advance a compelling state interest, implying strict scrutiny.[159] The Court, however, added the condition "severe" to its criteria for when to apply strict scrutiny in cases alleging voting as a right of association.[160] Examples of "severe" restriction include property ownership and literacy tests.[161]

Ominous warning signs against full First Amendment protections for voting were present as far back as 1986.[162] In *Munro v. Socialist Workers*, the Supreme Court upheld a Washington statute that required minority party candidates to receive at least one percent of all votes cast in the primary election before the state would place the candidate's name on the general election

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[155] Derfner & Hebert, *supra* note 1, at 481.
[156] *Id*.
[157] *Id*. *See Burdick v. Takushi,* 504 U.S. 428, 430 (1992).
[158] Derfner & Hebert, *supra* note 1, at 481. *See Norman v. Reed,* 502 U.S. 279 (1992). It may appear convenient to classify the Court's election law jurisprudence as based on higher scrutiny for laws that burden individual voters and lower level scrutiny for ballot access laws burdening candidates. The Court explicitly rejected this view in a 1972 ballot access case of *Bullock v. Carter*. The Court stated, "The rights of voters and the rights of candidates do not lend themselves to neat separation." Douglas, *supra* note 139, at 164-65. *See Bullock v. Carter,* 405 U.S. 134, 143 (1972).
[159] Derfner & Hebert, *supra* note 1, at 482.
[160] *Id*.
[161] Barbari, *supra* note 138.
[162] *Munro v. Socialist Workers*, 479 U.S. 189 (1986)

ballot.[163] First, the Court explained that states have a right to require candidates to make a preliminary showing of substantial support before placing them on the ballot and are not required to prove evidence of voter confusion from ballot overcrowding to do so.[164] On balance, the Court held the First Amendment burdens did not outweigh the state's interest in restricting access to the general election ballot.[165] The Court found the statute promoted voters' freedom of association because it required citizens to "channel their expressive activity" in a primary campaign, before the general.[166]

In 1992, five months after *Norman*, the Court backtracked on the prior line of cases promoting robust First Amendment protections for voting rights and signaled the Court would tolerate non-severe restrictions, such as Hawaii's ban on "write-in" candidates.[167] Initially, in *Burdick v. Takushi*, the district court concluded that the ban on write-in voting violated petitioner's First Amendment right of expression and entered a preliminary injunction ordering Hawaii to allow casting and tallying write-in votes.[168]

In a similar case, the southern district court of Indiana struck down the state's ban on write in candidates in *Paul v. Indiana*.[169] Here, the plaintiff challenged the law as infringing on their free expression and association rights of both voters and potential candidates.[170] The court noted in its analysis that it "place[d] more importance on a voter's right to vote for the candidate of his choice than on a candidate's right to run for office."[171] The district courts in both *Paul* and

[163] *Id*.
[164] *Id*. at 194-96.
[165] *Id*. at 196-97.
[166] *Id*. at 198-99.
[167] Derfner & Hebert, *supra* note 1, at 483.
[168] *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).
[169] *First Amendment. Voters Speech Rights. Federal District Courts Mandate Availability of Write-In Voting*. *Paul v. Indiana*, 743 F. Supp. 616 (S. D. Ind. 1990); *Burdick v. Takushi*, 737 F. Supp. 582 (D. Haw. 1990), 104 HARV. L. REV. 657 (1990).
[170] *Id*. at 659.
[171] *Paul v. State of Indiana Election Bd*., 743 F. Supp. 616, 623 (S.D. Ind. 1990).

Burdick took a step, in the context of write-in voting, where they refined the right to vote as an element of political expression.[172] Other cases also view write-in voting as a constitutionally protected protest. In *Dixon v. Maryland State Administrative Board of Election Laws*, the Fourth Circuit appellate court reasoned that write-ins for fictional or non-existent characters, such as "Donald Duck," do not lose constitutional protection because "the right to vote for the candidate of one's choice includes that right to say that no candidate is acceptable."[173]

As a leading First Amendment scholar, Alexander Meiklejohn, explained, "[t]he freedom that the First Amendment protects is…the presence of self-government."[174] Citizens vote to elect representatives after selecting certain ideas through political expression.[175] As the *Burdick* district court wrote, "Political participation should not be limited to those who adhere to the ideals and goals of the major political parties."[176] Thus, the district courts incorporated the theoretical interdependence between voting and political expression into jurisprudence.[177]

On the other hand, both *Burdick* and *Paul* suggest the possibility that certain state interests may outweigh the unrestricted right to write-in.[178] For instance, the state has a write to ensure that victorious write-in candidates are legally qualified to hold their elected office.[179] Reversing the district court, the Ninth Circuit court of appeals in *Burdick* held that although prohibiting write-in votes "places some restrictions" on citizens' rights of expression, the burden

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[172] *First Amendment. Voters Speech Rights*., *supra* note 169, at 660.
[173] *Dixon v. Md. State Administrative Election Laws*, 878 F.2d 776, 782 (4th Cir. 1989).
[174] *First Amendment. Voters Speech Rights*., *supra* note 169, at 660. *See* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 252.
[175] *First Amendment. Voters Speech Rights*., *supra* note 169, at 660.
[176] *Burdick v. Takushi*, 737 F. Supp. 582, 587 (D. Haw. 1990).
[177] *First Amendment. Voters Speech Rights*., *supra* note 169, at 660.
[178] *Id*. at 663.
[179] *Id*.

is justified given Hawaii's ease of access to ballots, providing sufficient alternatives to voters to express their political beliefs, and the state's broad power and interest in regulating elections.[180]

The U.S. Supreme Court agreed that Hawaii's ban was sufficiently justified. Regarding the right of association, the Court stated, "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.'"[181] Instead, the Court asserted, "the 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.'"[182] The Court elaborated on the state's interest in preventing voter confusion and fraud at the polls as a legitimate one and lowered the level of review to something akin to rational basis review with the court presuming the validity of the state law and requiring the challenger prove an unconstitutional burden on voting rights.[183] Interestingly, Justice Anthony Kennedy's dissent agrees with the majority that the right of expression is not implicated in this case because "the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression."[184]

All Supreme Court justices in *Burdick* agreed that voting only determines office holders, and does not contribute to the marketplace of ideas.[185] The Fourth Circuit's holding that a write-in vote can be an expression of dissent in *Dixon* now lacked constitutional support.[186] The *Burdick* court also minimized the potential burden of Hawaii' ban of write-in candidates, even if

[180] *Burdick v. Takushi,* 504 U.S. at 432 (majority opinion).
[181] *Id*. at 433.
[182] *Id*.
[183] Derfner & Hebert, *supra* note 1, at 483.
[184] *Burdick*, 504 U.S. at 445 (Kennedy, A., dissenting)
[185] David Perney, *Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off, The*, 58 MO. L. REV. 945, 965 (1993).
[186] *Id*.

voting were speech, when the majority identified the ban as only burdening voters who identify their candidate late in the election process.[187] The dissent noted that this reasoning, however, ignores the significance of late breaking information upon the electorate.[188] Another point of contention lies in the majority failing to mention the dominance of the Democratic Party in Hawaii.[189] The dissent points out that any party who uses an election law to maintain the status quo provides strong evidence of the unconstitutionality of those laws.[190]

Derfner and Hebert concluded that voting rights should be given full First Amendment protection and offered a viable alternative model for subjecting restrictive voter ID laws to strict scrutiny.[191] The Supreme Court has never explicitly said voting should not receive the same First Amendment protections as speech.[192] Analogous case law, however, supports full First Amendment protection for the right to vote as giving "opportunities for all voters to express their own political preferences."[193]

Other expressive functions implicated by voting are strong.[194] First, a vote is expressive regardless of whether the voter even casts a ballot.[195] Unlike many other countries, the United States does not require citizens to vote.[196] The decision not to vote may express protest, in itself, to the unresponsiveness of government.[197] Second, ignoring the expressive nature of voting contradicts the robust protections granted to monetary expression in politics.[198]

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[187] *Id*. at 967. *See Burdick*, 504 U.S. at 437 (majority opinion).
[188] *Burdick*, 504 U.S. at 445 (Kennedy, A., dissenting).
[189] Perney, *supra* note 185, at 967.
[190] *Burdick*, 504 U.S. at 444 (Kennedy, A., dissenting)
[191] Derfner & Hebert, *supra* note 1, at 485.
[192] *Id*.
[193] *Id*. at 485-86 (citing *Norman v. Reed*, 502 U.S. 279, 288 (1992)).
[194] Derfner & Hebert, *supra* note 1, at 488.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 489.

In its 1976 seminal case, *Buckley v. Valeo*, the Supreme Court held "money is speech [i]n a republic where people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."[199] Voters then take the information from the marketplace of ideas and make decisions about whose views to adopt.[200] The Court stated in a footnote, the "central purpose of the Speech and Press Clauses was to assure a society in which…public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish".[201]

The footnote cites the 1964 case, *New York Times Co. v. Sullivan*, where Sullivan was an elected commissioner of the Montgomery, Alabama, police department.[202] The Court stated that First Amendment speech does not lose constitutional protection to which it would otherwise be entitled because it appears in the form of a paid advertisement.[203]

When asserting the advertisement served as constitutionally-protected expression, this Court cited *NAACP v. Button*, which stated the various political functions of the advertisement, including "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[204] The Court explained, "That erroneous

[199] *Id. (*citing 424 U.S. 1, 14-15 (1976)).
[200] Derfner & Hebert, *supra* note 1, at 489.
[201] *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976).
[202] *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). Sullivan sued the New York Times claiming the paper published libelous statements in an advertisement, some of which were false, about police action during a civil rights demonstration. *Id.* The trial judge instructed the jury that these statements were "libelous per se" without requiring Sullivan to prove "actual malice," or show that statements were published with knowledge of their falsity or reckless disregard for the truth. *Id.* at 262. The U.S. Supreme Court held that the trial judge erroneously instructed the jury to presume malice under the First and Fourteen Amendments. *Id.* at 265. The Court prevented awarding damages to public officials for falsehoods relating to official conduct of public officials unless "actual malice" is proven. *Id.*
[203] *New York Times Co. v. Sullivan*, 376 U.S. at 265-66.
[204] *Id.* at 266.

statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need…to survive.'"[205]

The Court addressed both First Amendment freedom of association and expression in *NAACP v. Button*.[206] The First Amendment protects abstract discussion and vigorous advocacy to the lawful end of opposing government intrusion of individual rights.[207]

In sum, *Buckley* held that campaign spending is a form of protected political speech so a "healthy representative democracy can flourish."[208] *Sullivan* protected an advertisement as political expression that "communicated information" and "expressed opinion."[209] *Button* held abstract discussion and vigorous advocacy to be protected forms of expression.[210] All of these activities ultimately attempt to influence and may culminate in the expression of one's political preference via the ballot box.[211] Thus, Derfner and Hebert concluded that the Court should reverse *Burdick*'s "rational basis"-like standard for analyzing voting regulations and place the right to vote at the "top of the pantheon" of protected First Amendment rights.[212]

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[205] *Id.* at 271-72.
[206] *NAACP v. Button,* 371 U.S. 415, 428-29 (1963). Virginia amended its attorney malpractice statutes to broaden the definition of "solicitation" to include accepting compensation from any person or organization not a party to a judicial proceeding. *Id.* at 416. The NAACP then sought a declaratory judgment seeking to enjoin enforcing the statute because the statute would prevent the organization from giving assistance in cases involving racial discrimination. *Id.* The Court stated that even though the NAACP is a corporation, the organization may assert the rights of its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their constitutional rights. *Id.* at 428. Specifically in the context of NAACP's objectives, litigation is a form of political expression as a means to achieve equal treatment at all levels of government for the black community. *Id.* at 429-30.
[207] *NAACP v. Button*, 371 U.S. at 429.
[208] *Buckley*, 424 U.S. at 93 n.127.
[209] *New York Times Co.*, 376 U.S. at 266.
[210] *NAACP v. Button*, 371 U.S. at 429. This case also allowed a corporation to assert members' right of association for the purpose of legally redressing infringements upon the members' constitutional rights. *Id.*
[211] Derfner & Hebert, *supra* note 1, at 490.
[212] *Id.*

CHAPTER 3. LITERATURE REVIEW

Our modern-day conception of free expression includes the right to form and hold beliefs and opinions on any subject and to communicate those ideas using any medium.[213] At the same time, controversial legal issues arise when courts reconcile free expression rights with other individual and societal interests.[214] An effective system of free expression mandates a realistic administrative structure.[215] Legal theorist and architect of civil liberties law, Thomas Emerson, examines the legal foundations upon which free expression rests in the United States.[216]

This chapter reviews the theoretical foundation of the freedom of expression, which encompasses both speech and press rights in the First Amendment, as developed by Thomas Emerson. Then, the focus shifts toward individual and social values of free expression, including the social foundation of self-governance explicated by Alexander Meiklejohn. Finally, some scholars suggest that voter ID laws may be more closely scrutinized by courts if challenged under explicit provisions of state constitutions that grant voters a fundamental right to vote.

Our system of free expression rests upon four major values.[217] While the validity of the values has never been proven or disproven, our society acts upon the faith that they hold true.[218] First, free expression is essential to assure individual self-fulfillment.[219] Second, the system ensures knowledge advancement and the discovery of truth.[220]

More aligned with the purpose of this thesis, the third value states that freedom of expression allows participation in political decision-making, participation for all members of

[213] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (Vintage Books, 1970).
[214] *Id.*
[215] *Id.* at 4.
[216] *Id.*
[217] *Id.* at 6.
[218] *Id.* at 7.
[219] *Id.* at 6.
[220] *Id.*

society.[221] The Declaration of Independence, which states governments "derive their just powers from the consent of the governed," contains the roots of this premise.[222] The final value is that the system of free expression allows for a more adaptable and stable community.[223] The principles of the system must constantly be reshaped to meet new social conditions or threats to existence.[224] Any suppression of discussion makes rational judgment impossible and substitutes force for reason.[225]

In 1970, Emerson wrote that the Supreme Court had not developed any comprehensive theory of what the Constitution guarantees regarding the meaning of free expression or how the lower courts should apply free expression theory in cases.[226] Often, the Court avoids First Amendment issues entirely by invoking other doctrines, such as vagueness or overbreadth.[227] At other times, the commonly used a balancing test often producing inconsistent results.[228]

In his 1963 article, *Toward a General Theory of the First Amendment*, Emerson developed a more comprehensive First Amendment theory.[229] He stated that achieving a system of free expression could only be possible if expression received full First Amendment protection.[230] That means expression must be protected against all government curtailment even when in conflict with other social interests.[231] As opposed to how the Court usually develops

[221] *Id.* at 7.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 12.
[225] *Id.* at 7.
[226] *Id.* at 15.
[227] *Id.* at 16.
[228] *Id.*
[229] *Id. See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).
[230] Emerson, *supra* note 213, at 16.
[231] *Id.* at 17.

First Amendment doctrine by balancing expression against other social values, Emerson explained that the judiciary should instead define key terms, like expression, abridge, and law.[232]

Emerson stated that "abridge" usually means when the government limits expression to advance other interests.[233] The definition, however, becomes obscure when the government attempts to regulate the internal operations of the system of expression, such as voter identification laws.[234] Finally, the context of "law" arises largely within the rights of expression in private associations.[235]

Freedom of Speech and Self-Governance

Philosopher and free-speech advocate, Alexander Meiklejohn acknowledged that Americans view ourselves as politically free.[236] He said, "If men are to be governed, then the governing must be done, not by others, but by themselves."[237] Then, Meiklejohn admits that the American political program of self-government is a work in progress.[238]

The foundation of every self-governing plan is an agreement between all citizens that all matters of public policy shall be decided by "corporate actions," or majority rule.[239] Such decisions shall be equally binding on citizens, whether they agreed or not, and if need be, the decisions shall, by legal procedure, be enforced by the government upon anyone who refuses to conform to these decisions.[240] Since both systems require some form of obedience, Meiklejohn

[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 3 (Harper & Brothers Publishers, 1948).
[237] *Id.*
[238] *Id.*
[239] *Id.* at 9.
[240] *Id.*

explained that government by "consent" means people can talk about their government, not always in terms it favors, regarding their rights and their ability to reason.[241]

The First Amendment does not necessarily forbid abridging all forms of speech, such as libelous assertions, slander, or incitement.[242] Here, the interests of promoting the general welfare outweigh the speaker's individual rights.[243]

When self-governing men demand free speech, they are not saying that every individual has the right to speak whenever on whatever topic.[244] The ultimate issue is not the words of the speaker.[245] The First Amendment protects the minds of the hearers to inform them of all content on a public issue.[246] "*It is that mutilation of the thinking process of the community against which the First Amendment is directed*," said Meiklejohn.[247]

The distinction between public and private interests becomes clearer when comparing the First Amendment to the Fifth Amendment text, "No person shall be…deprived of life, liberty, or property, without due process of law."[248] The Supreme Court has defined "liberty" to include "liberty of speech."[249] The difference in the amendments is that the Fifth Amendment appears to deal with a class of utterances which the legislature may legitimately address, such as libel or

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[241] *Id.* at 10. Under the Preamble to the U.S. Constitution "We the People" agreed to be self-governed and all other provisions of the Constitution, all statutes, and all administrative decrees are subsidiary and dependent. *Id.* at 15. One such Constitutional provision, the First Amendment, decrees "Congress shall make no law…abridging the freedom of speech." *Id.* at 16. A distinguishing feature of this prohibition includes only Congress' ability to abridge speech, but the legislative body is allowed to enlarge the scope of the right. *Id.* Second, the provision is absolute and makes no qualifications or exceptions. *Id.* at 17. Also, the Framers of the Constitution intentionally wrote the amendment as timelessly applicable in both times of war and peace. *Id.*
[242] Meiklejohn, *supra* note 236, at 18-19.
[243] *Id.* at 18. Meiklejohn used the format of a town hall meeting, where citizens gather to discuss matters of public interest. *Id.* at 22.The moderator conducts business and has the negative role of abridging speech according to mutually agreed procedures. *Id.* at 23. If a speaker wanders too far from the point at issue, he should be declared "out of order." *Id.* Either he must stop speaking, or if he continues to disobey the rules, he may be "denied the floor." *Id.* These speech abridging activities are what the First Amendment does not forbid. *Id.*
[244] Meiklejohn, *supra* note 236, at 24.
[245] *Id.* at 25.
[246] *Id.* at 25.
[247] *Id.* at 26.
[248] *Id.* at 37. *See* U.S. CONST. amend. V.
[249] Meiklejohn, *supra* note 236, at 37.

slander, which are private rights.[250] In contrast, the First Amendment deals with public utterances which the legislature may never address even with due process.[251]

Under the Constitution, citizens agreed to be self-governed by corporate actions and defined "just powers" of the government.[252] In the compact, government power does not mean that someone else has power over citizens.[253] Instead, the citizens select who is given governing authority through voting.[254]

In 1955, Meiklejohn testified before the U.S. Senate Subcommittee on Constitutional Rights and addressed voting rights.[255] Article I, Section 2 of the U.S. Constitution authorizes the people as "electors" to choose their representatives.[256] Meiklejohn said, "We the people are not only the supreme agency. We are also, politically, an active electorate—a Fourth, or perhaps better, a First Branch which, through its reserved powers, governs at the polls."[257] It follows that under the Constitution, Americans are politically free only insofar as voting is free.[258]

When citizens vote, they not only choose among candidates, but also among the issues.[259] As a self-governing body, the people have two demands to promote the general welfare.[260] First, judgment of public issues must be free and independent.[261] Second, citizens must be equally free and independent in expressing their choice at the polls.[262] Meiklejohn wrote, "Censorship over

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[250] *Id.* at 38.
[251] *Id.* at 38-39.
[252] *Id.* at 105.
[253] *Id.*
[254] *Id.*
[255] Alexander Meiklejohn, *Testimony Presented before the Subcommittee on Constitutional Rights, United States Senate Committee on the Judiciary*, in FREEDOM OF SPEECH IN THE HISTORY OF IDEAS 515 (West Academic Publishing, 2016).
[256] *Id.* at 521. *See* U.S. CONST. art. I, §2.
[257] Meiklejohn, *supra* note 255, at 521.
[258] *Id.* at 521.
[259] *Id.* at 522.
[260] *Id.*
[261] *Id.*
[262] *Id.*

our thinking, duress over our voting; are alike forbidden by the First Amendment."[263] Accordingly, any person or governing body that practices censorship or duress stands in "contempt" of the sovereign people of the United States.[264]

Citizens exercise multiple expressive processes through voting in a self-governing system.[265] First, people make up their minds by reading printed records of thoughts and beliefs of others.[266] People express thoughts through active associations in private and public discussion.[267] Finally, the voter must be allowed on Election Day to express their choice using a ballot.[268]

Even though voting is typically done in secret or anonymously, this practice is not universal.[269] For example, Iowa uses public caucuses to vote in presidential primary elections.[270] Regardless, the Supreme Court has consistently given strong protection to anonymous speech in campaign finance cases.[271] While individuals may cast their ballot anonymously, citizens first declare their choice to participate in the democratic process in front of their community and create a public record of their choice.[272] States then publish the aggregated votes and convey the electorate's opinions of various candidates, ballot propositions, recalls, or referendums.[273]

Free Expression Values

Free expression values fall into two distinct models.[274] The liberty model focuses on values of the individual, while the audience model focuses primarily on societal values.[275] First,

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[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] Derfner & Hebert, *supra* note 1, at 488.
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] ERIN K. COYLE, THE PRESS AND RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOM VS. INVASION OF PRIVACY CLAIMS 23 (LFB Scholarly Publishing, 2012).
[275] *Id.*

the liberty model includes one's right to communicate and publish information, along with other values, such as autonomy, self-fulfillment, and self-realization.[276] The liberty model also allows individuals to participate in democracy and search for the truth.[277] The audience model, however, focuses on society's right's to receive information.[278] Corresponding audience values include: enabling self-governance, checking government, creating a marketplace of ideas, maintaining a balance between social stability and change, and fostering toleration.[279]

The first individual value, individual autonomy and democracy, is rooted in Emerson's four key values of freedom of expression as articulated in *The System of Freedom of Expression*.[280] Emerson explained that one's ability to express ideas, without fear of censorship, is essential to developing personal dignity and affirming one's sense of personal autonomy.[281] He elaborated that individuals must also be able to discover truth through discussion and debate, which is essential to the ultimate good of society.[282] Finally, Emerson describes a necessary part of free expression as allowing one to assert opinions as both autonomous individuals and as members of society.[283]

Individual autonomy and self-realization is the second individual value, which was first articulated by leading First Amendment scholar, C. Edwin Baker in his article, "Scope of the First Amendment Freedom of Speech."[284] Baker advocated for a broad "liberty model" that

[276] *Id.*
[277] *Id.*
[278] *Id.* at 28.
[279] *Id.*
[280] *Id.* at 25. As previously discussed, Emerson's four values include: 1) encouraging self-fulfillment or self-realization, 2) attaining truth, 3) participating in social and political decision-making, and 4) promoting orderly change within society. Emerson, *supra* note 213, at 6-7.
[281] Coyle, *supra* note 274, at 25.
[282] *Id.* at 25.
[283] *Id.* at 25-26.
[284] C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1977).

required the community to respect "the dignity and equal worth" of individual members.[285] Under Baker's model, the speakers would have the freedom to choose the content of their speech that fosters self-realization without interfering with the same legitimate claim of others.[286] The government could only limit speech to non-violent, non-coercive activities to avoid causing harm to other individuals.[287]

Autonomy and self-realization is another individual value.[288] Two of the early theorists include John Milton and John Stuart Mill.[289] In 1644, English poet, John Milton, published *Areopagatica*, wherein he laid a foundational model for personal liberty and freedom from censorship.[290] Two centuries later, British philosopher and political economist, John Stuart Mill, published *On Liberty* in 1859.[291] Mill argued that government suppression, either upon individuals or the press, undermined human development.[292] Emphasizing individual liberty, Mill referred to expression as linked to the "sphere of life in which 'society…has, if any, only an indirect interest.'"[293] This individual sphere contains four components: 1) "the inward domain of consciousness," 2) "liberty of conscience," 3) "liberty of thought and feeling," and 4) "absolute freedom of opinion and sentiment on all subjects."[294]

In contrast, the audience model, which may also be considered a societal model, focuses solely on society's right's to receive information or their right to know.[295] These societal values

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[285] Coyle, *supra* note 274, at 24.
[286] *Id.* The third individual value is liberty for the press, which allows each communicator to determine the content of their communications. *Id.* at 26. This value is similar to Baker's autonomy value and also applicable to free speech as well as the press. *Id.*
[287] Coyle, *supra* note 274, at 26.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.* at 26-27.
[294] *Id.* at 27.
[295] *Id.* at 28.

include: enabling self-governance, providing a check on government, creating a marketplace of ideas, maintaining a balance between social stability and change, and fostering toleration.[296]

The first societal value is audience and self-governance, which is rooted in Meiklejohn's theory of free speech detailed in his 1948 book, *Free Speech and Its Relation to Self-Government*.[297] As opposed to the liberty model theorists, Meiklejohn provides narrower protection for free expression.[298] As previously discussed, he proposed a constitutional dichotomy wherein the First Amendment absolutely protects speech on matters of governing importance, referred to as public speech.[299] Other types of speech, or private speech, fell under the more limited protections of the Due Process Clause of the Fifth Amendment.[300]

Audiences and democracy is the second societal value advocated by prominent First Amendment theorist, Harry Kalven, Jr., following *New York Times v. Sullivan* in 1964.[301] As discussed, the Supreme Court ruled in favor of the *New York Times* when the paper published allegedly libelous statements in an advertisement, some of which were false and others were true, about police action during a civil rights demonstration.[302] Here, Kalven explained that if the Court allowed sanctioning speech for government criticism, then the ruling may dissuade other speakers from making true, critical statements about the government.[303]

Another societal value that addresses freedom of expression and democracy focuses First Amendment protections on the public's "right to know."[304] The leading theorist on this value,

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[296] *Id.*
[297] Meiklejohn, *supra* note 236, at 3.
[298] Coyle, *supra* note 274, at 29.
[299] *Id.*
[300] *Id.*
[301] Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of The First Amendment,"* 1964 SUP. CT. REV. 191, 208 (citing 376 U.S. 254, 273-76 (1964)).
[302] *New York Times Co. v. Sullivan*, 376 U.S. at 256.
[303] Kalven, *supra* note 301, at 208. *See* Coyle, *supra* note 274, at 30.
[304] Coyle, *supra* note 274, at 31.

Emerson proposed, in 1976, that the "right to know" is an "integral part" of a well-functioning system of free expression with two related features.[305] First, the public has the right to read, to listen, to see, and to receive communications.[306] The public also possesses the corollary right to obtain information as a basis for transmitting ideas or facts to others.[307] Combined these rights form the reverse of one's right to communicate and serves the crucial role of ensuring the electorate remains informed.[308] Emerson suggested that this value could be of the greatest value to society when exercised by the public to obtain information from government actors.[309]

The next audience-based value is the marketplace of ideas.[310] Developed by Supreme Court Justice Oliver Wendell Holmes in his 1919 dissenting opinion in *Abrams v. United States*, when the majority upheld the conviction a group of self-proclaimed "revolutionists" charged with espionage for printing leaflets to resist U.S. war efforts.[311] A major First Amendment scholar, Rodney Smolla, suggested the marketplace value emphasizes the societal component of the public's search for the truth.[312] Some scholars, however, have indicated the marketplace theory has fundamentally flawed assumptions.[313] For example, Baker criticized the theory for failing in an unrestricted economic society where individuals lack equal access to media, or where media monopolies could limit the diversity of viewpoints available in media.[314]

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[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id. See Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, O., dissenting).
[312] RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (Alfred A. Knopf, 1992). *See* Coyle, *supra* note 274, at 32.
[313] Coyle, *supra* note 274, at 32.
[314] Baker, *supra* note 284, at 964. *See* Coyle, *supra* note 274, at 32.

Maintaining social stability while also facilitating change is another societal value, which presumes a free flow of information benefits society by acting as a safety valve that enriches discussion and debate.[315] When the safety value is off, secrecy and violence could result.[316]

Relatedly, the final societal value is toleration, which was developed by Professor Lee C. Bollinger, a First Amendment legal scholar.[317] Bollinger suggested that a system of free expression is one wherein people share and receive diverse opinions.[318] He wrote, "Through toleration…we create the community."[319] Bollinger proposed that listening to extreme viewpoints that may contradict one's beliefs may help individuals in search of truth.[320]

In sum, the audience-based values prioritize the benefits of free expression to society.[321] On the other hand, liberty-based values prioritize the benefits of free expression for individual communicators.[322] Courts may draw distinctions amongst values when considering how much First Amendment protections to give certain acts.[323] For example, Meiklejohn's theory would only provide absolute First Amendment protection to speech that facilitates self-governance, or societal good.[324]

[315] Coyle, *supra* note 274, at 33.
[316] *Id.*
[317] Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 438 (1983). *See* Coyle, *supra* note 418, at 33.
[318] Coyle, *supra* note 418, at 33.
[319] *Id.*
[320] *Id.*
[321] *Id.* at 34.
[322] *Id.*
[323] *Id.*
[324] *Id.*

CHAPTER 4. RESEARCH QUESTIONS

RQ 1: How do courts, if at all, analyze voter identification law challenges as infringing on First Amendment freedom of expression?

RQ 2: What individual or societal expression values, if any, do courts invoke when addressing challenges to voter identification laws?

RQ 3: How do courts' analysis differ, if at all, for voter identification challenges under state constitutional provisions explicitly providing for a fundament right to vote?

CHAPTER 5. METHODS

This study reviews a categorical overview of state voter ID law that the National Council of State Legislatures identified as being in effect in 2018 and then reviews how courts have analyzed voter ID laws under the First Amendment.[325] Since the U.S. Supreme Court published its most relevant opinion in 2008 in *Crawford v. Marion County Election Board*, this thesis focuses on court rulings published since 2008.

According to a National Council of State Legislatures study, sixteen states do not require voters to present any documentation to vote.[326] The remaining thirty-four states require some form of identification before voting.[327] The author of this thesis identified any major trends in the laws identified in the Council's study.

The Council further divides the 34 states based upon whether the states require a voter lacking an ID to take additional steps for their provisional ballot to count or not, known as strict and non-strict states respectively.[328] The author of this thesis broke down the various actions required by voters and ranked each state law from least to most onerous on voters. The author classified the alternative means states use to verify a voter's identity and ranked each state from least to most onerous on voters. Then, the author identified any clusters of states that imposed the same or similar burdens on voters to cast a provisional ballot.

This study attempted a systematic review of post-*Crawford* state high court, U.S. Court of Appeals, and U.S. district court rulings between May 2008 and May 2018 to determine

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[325] Wendy Underhill, VOTER IDENTIFICATION REQUIREMENTS | VOTER ID LAWS, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx#Details (last visited Jun 4, 2018). The council categorizes voter ID laws in two ways. *Id.* First, the council sorts the laws by whether the states require a photo ID or whether the state accepts non-photo IDs. *Id.* Second, the council divides that laws into based on whether the state requires further action by the voter who lacks an ID for the ballot to count, labeled as "strict" states, or whether the state verifies a voter's identity using other means, or "non-strict." *Id.*
[326] Underhill, *supra* note 325.
[327] *Id.*
[328] *Id.*

whether and how courts address free expression theory by reading courts opinions to determine if any First Amendment arguments were raised.[329] In addition, the analysis examined whether and how plaintiffs or courts addressed free expression values in explaining why voting implicated First Amendment protection.[330] Finally, the analysis concluded with examining voter ID challenges under various state constitutions to examine whether the level of judicial scrutiny or analytical framework used by the courts differed.[331]

The case analysis focused on state high courts' rulings and U.S. Court of Appeals' rulings because state high courts have binding authority over lower state courts within their respective states.[332] The author also reviewed the federal district court rulings reviewed by these higher courts, some even predating *Crawford*, for a more detailed explication of the evidence presented in the case and to gain context on how *Crawford* changed the analysis of voter ID cases.[333]

The author identified cases by searching the online versions of Westlaw, which is a leading legal database used by legal scholars.[334] Search criteria limitations included voter identification cases reported after April 28, 2008, when the U.S. Supreme Court ruled in *Crawford*.[335]

The searches were performed using Boolean keyword searches, using "Boolean logic," or a mathematical formula that uses specific words and operators to narrow searches."[336] Search

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[329] Coyle, *supra* note 274, at 53.
[330] *Id.*
[331] *Id.*
[332] *Id.* at 54. Federal circuit courts of appeal have binding authority over all federal district courts within their circuits. *Id.* State courts have subject-matter jurisdiction over state law claims. *Id.*Federal courts have subject-matter jurisdiction to hear federal issues, including conflicts between the First Amendment and state law. *Id.* Federal courts also have diversity jurisdiction to hear cases involving disputes between residents of different states when damages exceed $75,000. *Id.*In cases that do not involve federal issues, federal courts are constitutionally required to apply and interpret state law. *Id.*
[333] Coyle, *supra* note 274, at 54.
[334] *Id.*
[335] *Id.*
[336] STEPHEN ELIAS, LEGAL RESEARCH: HOW TO FIND & UNDERSTAND THE LAW 31 (Janet Portman, 15th ed. 2009).

one illustrates the sample size of cases available on Westlaw classified as "voter identification," and Search two limits the results further to voter identification cases with First Amendment claims. The keyword searches used by this author in the database consisted of:

> Search 1 = ("voter identification" OR "voter ID") % contribution = 305 cases
>
> Search 2 = ("freedom #of expression" OR "freedom #of speech" OR "free speech") AND ("First Amendment") AND ("voter identification" OR "voter ID") % contribution = 33 cases

The "%" represents "but not" in Boolean logic. This search criterion was added to the search logic to exclude cases concerning campaign contributions. The final search yielded thirty-three cases with First Amendment claims out of the entire sample of three hundred and five voter ID cases, which preliminarily indicates that First Amendments claims were addressed in almost eleven percent of voter identification appellate court cases. After reviewing all thirty-three cases with First Amendment claims, the author eliminated twenty-eight election law cases that did not challenge voter ID laws.[337]

Of the five cases remaining, *Veasey v. Perry* appeared twice in the search results at two different stages in the posture of the case, and the author analyzed these two results together.[338] Next, *ACLU of New Mexico v. Santillanes* yielded an appellate court decision reversing the lower court opinion that came down right after *Crawford*.[339] The author also reviewed the district court ruling, even though it predates *Crawford*, for context on how *Crawford* changed the analysis of voter ID cases.[340] Since scholarship cited for this study also addressed a state constitutional

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[337] Of the 28 eliminated cases, eight dealt with electioneering and get-out-the-vote efforts, fourteen dealt with ballot access for candidates or organizations collecting early ballots, and three dealt with local property tax elections to raise revenues for public schools. The final three cases dealt with miscellaneous topics, including the First Amendment right to petition government, separation of powers, and compelled disclosure of criminal suspects' emails in violation of the Fourth Amendment.

[338] *Veasey v. Perry*, 29 F.Supp.3d 896 (S.D. Texas 2014) and *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014).

[339] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).

[340] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007).

challenge in *Applewhite v. Commonwealth of Pennsylvania*, that opinion was also analyzed.[341] Since *Applewhite* addressed a state constitutional challenge, two recent 2018 decisions challenging Alabama and Oklahoma's voter ID laws under their respective state constitutions also were reviewed.[342] Therefore, the sample for the study is seven cases or N=7. The thesis also examined relative cases identified in literature and opinions reviewed for the thesis.[343]

The author used traditional textual analysis to assess whether and how courts discussed First Amendment theory and values when explaining rationales for holdings, concurrences, or dissents.[344] Opinions categories included: 1) discussing free expression theory and values; 2) discussing free expression theory and not values; 3) discussing free expression values and not theory; 4) not discussing free expression.[345] When a court addressed free expression values, these values were further divided into individual or social values as found in the literature.[346]

Regarding free expression theory, this study first searches for references to any of Emerson's four values of free expression: 1) assure individual self-fulfillment, 2) advance knowledge and the discovery of truth, 3) promote political decision-making for all members of society, and 4) allow for a more adaptable and stable community.[347] Next, since Meiklejohn specifically addressed voting as speech in his 1955 testimony before the U.S. Senate Subcommittee on Constitutional Rights,[348] this study addresses Meiklejohn's assertion that the First Amendment provides absolute protection to ideas and beliefs regarding matters of public

[341] Derfner & Hebert, *supra* note 1, at 478 (citing *Applewhite v. Commonwealth of Pennsylvania*, 2012 WL 3332376 (Pa. Commw. Ct. 2012)).
[342] *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d 1253 (N.D. Ala. 2018) and *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018).
[343] *E.g.*, *One Wisconsin Institute, Inc. v. Mark Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016).
[344] Coyle, *supra* note 274, at 55.
[345] *Id.*
[346] *Id.*
[347] Emerson, *supra* note 213, at 6-7.
[348]Meiklejohn, *supra* note 255, at 522.

governance.[349] In contrast, he asserted the complementary Fifth Amendment provides only qualified due process protections for private speech, such as libel or slander.[350] This study also assesses whether opinions address Meiklejohn's identification of multiple expressive processes exercised through voting, such as reading printed information and participating in public and private discussions, or their expression of choice using a ballot.[351]

When identifying individual and societal free expression values, the study uses the scholar's explications of those values.[352] The individual values include autonomy, self-fulfillment, self-realization, the discovery of truth, and participation in political decision-making.[353] The societal values are Meiklejohn's effective self-governance, government checking, the marketplace of ideas, balance between social stability and change, and toleration.[354]

Finally, this study has several limitations.[355] First, the sample restrictions were published cases reported by Westlaw, as identified by using search tools and identified in relevant literature.[356] It is possible that some relevant cases were not included in the database or not associated with search mechanisms used for the service or mentioned in literature.[357] Also, limiting state cases to those decided by state high courts and federal cases to district court opinions reviewed by appellate courts may result in missing some significant discussions by lower state courts and unappealed federal court decision.[358]

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[349] Meiklejohn, *supra* note 236, at 17-19.
[350] Coyle, *supra* note 274, at 37-39.
[351] Meiklejohn, *supra* note 255, at 522.
[352] Coyle, *supra* note 274, at 53.
[353] *Id*.
[354] *Id*.
[355] Coyle, *supra* note 274, at 59.
[356] *Id*.
[357] *Id*.
[358] *Id*.

Second, textual analysis introduces subjectivity into this study.[359] Even though this study explains free expression theory and values in the preceding pages, deciding which language fits in each category requires interpretation and judgment.[360] It is possible that another person who reads these cases would place language in other categories.[361] Recognizing this limit, the author carefully read a sample of cases and applied the value explications to each one in an attempt to minimize challenges to the consistent application of the values.[362]

[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.*

CHAPTER 6. ANALYSIS

This chapter first reviews state voter identification laws in effect in 2018.[363] Next, this chapter reviews the holdings and rationales of court opinions addressing voter ID laws challenged under state or federal constitutional law after the Supreme Court gave its nod of approval to Indiana's voter identification laws in *Crawford v. Marion County Election Board.*[364]

Sixteen states, including New Mexico and Pennsylvania, do not require any documentation to vote.[365] In the case analysis that follows, *ACLU of New Mexico v. Santillanes* did not involve a dispute over a statewide New Mexico ID law.[366] Instead, the issue of the case involved an ID requirement for voting in local Albuquerque elections.[367]

Pennsylvania, on the other hand, had a statewide photo ID law in effect in 2012, which was struck down by a state commonwealth court in *Applewhite v. Commonwealth of Pennsylvania* as violating the state's constitutionally-provided fundmental right to vote.[368] As noted in the literature, on the first review, the commonwealth court did not apply strict scrutiny and upheld the law.[369] After the Pennsylvania Supreme Court remanded the case back to the lower court, the court applied strict scrutiny and found the state had not adequately proven a compelling state interest for the ID law or the narrow tailoring to meet that interest, so the law struck down.[370] Since the 2012 *Applewhite* decision, Pennsylvania requires no documentation to cast a ballot.[371]

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[363] Underhill, *supra* note 325. Voter ID laws were identified from the National Council of State Legislatures' compilation. *Id.*
[364] *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[365] Underhill, *supra* note 325.
[366] *Id*. *See Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007).
[367] Underhill, *supra* note 325.
[368] *Id*. *See Applewhite v. Commonwealth of Pennsylvania.*, 2012 WL 3332376 (Pa. Commw. Ct. 2012).
[369] *Applewhite,* 2012 WL 3332376.
[370] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012).
[371] Underhill, *supra* note 325.

Thirty-four states require some form of identification to vote.[372] Based on the laws in effect in 2018, 17 states request some form of photo ID, such as a driver's license, state-issued ID card, military ID, or tribal ID.[373] The other 17 states accept non-photo IDs, such as bank statements or utility bills with the voter's name and address.[374]

The National Council of State Legislatures categorized state voter ID laws in two ways.[375] First, the council sorted laws by whether the state requires a photo ID or accepts a non-photo ID to vote.[376] Second, the council divided the laws as "strict" or "non-strict" based on subsequent actions required by voters to cast a ballot when voters lack a required ID. [377] Table 1 illustrates the classification of laws of all 34 states with voter ID laws in effects in 2018.

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[372] *Id*.

[373] *Id*. *See* GA. CODE §21-2-417 (2010); IND. CODE §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1 (2014); KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012); MISS. CODE §23-15-563 (2013); TENN. CODE §2-7-112(c) (2010); VA. CODE §24.2-643(b) (2016); WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014); ARK. CONST. amend. 51, § 13. ARK. CODE § 7-1-101,201, 305, 308, 324, 409, and 412 (2015); ALA. CODE §17-9-30 (2013); FLA. STAT. §101.043 (2016); HAW. REV. STAT. §11-136 (2014); IDAHO CODE §34-1106(2), 1113, and 1114 (2017); LA. REV. STAT. §18:562 (2011); MICH. COMP. LAWS §168.523 (2006); R.I. GEN. LAWS §17-19-24.2 (2015); S.D. CODIFIED LAWS §12-18-6.1 and 6.2 (2014); TEX. ELEC. CODE §63.001 et seq. (2017).

[374] Underhill, *supra* note 325. *See* ALASKA STAT. §15.15.225 (2016); COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); CONN. GEN. STAT. §9-261 (2012); DEL. CODE tit. 15, §4937 (2017); IOWA CODE §48A.7A, 48A.10A, 49.78, and 49.81 (2014); KY. REV. STAT. §117.227 (2014); MO. REV. STAT. §115-427 (2016); MONT. CODE §13-13-114 (2017); N.H. REV. STAT. §659:13 (2017); OKLA. STAT. tit. 26, § 7-114 (2016); S.C. CODE §7-13-710 (2014); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017); ARIZ. REV. STAT. §16-579(A) (2012); N.D. CENT. CODE §16.1-05-07 (2017); OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).

[375] Underhill, *supra* note 325.

[376] *Id*.

[377] *Id*.

Table 1. NCSL Classification of 34 States with Voter ID Laws in Effect in 2018

	Photo ID Required	**Non-Photo ID Accepted**
Strict (subsequent trips required for the provisional ballot to count)	Georgia Indiana Kansas Mississippi Tennessee Virginia Wisconsin[378]	Arizona North Dakota Ohio[379]
Non-Strict (no subsequent trips required for the provisional ballot to count)	Arkansas Alabama Florida Hawaii Idaho Louisiana Michigan Rhode Island South Dakota Texas[380]	Alaska Colorado Connecticut Delaware Iowa Kentucky Missouri Montana New Hampshire Oklahoma South Carolina Utah Washington West Virginia[381]

Then, the National Council of State Legislatures has further subdivided these 34 state laws based upon whether the law requires subsequent steps by the voter who does not possess the requisite identification.[382] The council labeled these state requirements as either "strict" or "non-strict."[383] In strict states, voters lacking an accepted ID may cast a provisional ballot but must

[378] GA. CODE §21-2-417 (2010); IND. CODE §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1 (2014); KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012); MISS. CODE §23-15-563 (2013); TENN. CODE §2-7-112(c) (2010); VA. CODE §24.2-643(b) (2016); WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014).
[379] ARIZ. REV. STAT. §16-579(A) (2012); N.D. CENT. CODE §16.1-05-07 (2017); OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).
[380] ARK. CONST. amend. 51, § 13. ARK. CODE § 7-1-101,201, 305, 308, 324, 409, and 412 (2015); ALA. CODE §17-9-30 (2013); FLA. STAT. §101.043 (2016); HAW. REV. STAT. §11-136 (2014); IDAHO CODE §34-1106(2), 1113, and 1114 (2017); LA. REV. STAT. §18:562 (2011); MICH. COMP. LAWS §168.523 (2006); R.I. GEN. LAWS §17-19-24.2 (2015); S.D. CODIFIED LAWS §12-18-6.1 and 6.2 (2014); TEX. ELEC. CODE §63.001 et seq. (2017).
[381] ALASKA STAT. §15.15.225 (2016); COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); CONN. GEN. STAT. §9-261 (2012); DEL. CODE tit. 15, §4937 (2017); IOWA CODE §48A.7A, 48A.10A, 49.78, and 49.81 (2014); KY. REV. STAT. §117.227 (2014); MO. REV. STAT. §115-427 (2016); MONT. CODE §13-13-114 (2017); N.H. REV. STAT. §659:13 (2017); OKLA. STAT. tit. 26, § 7-114 (2016); S.C. CODE §7-13-710 (2014); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017).
[382] Underhill, *supra* note 325.
[383] *Id*.

also take additional steps after the election for their vote to count, such as returning to the local election official within days of the election to present their required ID.[384] In non-strict states, voters lacking an ID may have the option to cast a provisional ballot to be counted without any further actions by the voter.[385] For example, in Colorado, Florida, Hawaii, Montana, Rhode Island, Utah, Washington, and West Virginia, voters lacking ID cast a provisional ballot, and later, election officials use signature matching to verify the voter's registration status.[386]

First, the National Council of State Legislatures has classified 17 state laws as photo-ID required, including states with voter ID laws reviewed by courts in the case analysis and denoted by an asterisk in the table below, such as Georgia, Indiana, Wisconsin, Alabama, and Texas.[387] The other states included are Kansas, Mississippi, Tennessee, Virginia, Arkansas, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, and South Dakota.[388] Table 2 and discussion that follows analyzed the relative "strictness" of the each of the state's photo ID requirements.[389] For example, the table denotes various types of ID accepted to vote for each state.[390] Then the discussion classifies some states as "stricter" than others if it accepted fewer types of IDs, and "less strict" if states accepted more forms of ID.[391]

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[384] *Id*.
[385] *Id*.
[386] *Id*. COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); FLA. STAT. §101.043 (2016); HAW. REV. STAT. §11-136 (2014); MONT. CODE §13-13-114 (2017); R.I. GEN. LAWS §17-19-24.2 (2015); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017).
[387] Underhill, *supra* note 325. *See* GA. CODE §21-2-417 (2010); IND. CODE §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1 (2014); WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014); ALA. CODE §17-9-30 (2013); TEX. ELEC. CODE §63.001 et seq. (2017).
[388] Underhill, *supra* note 325. *See* KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012); MISS. CODE §23-15-563 (2013); TENN. CODE §2-7-112(c) (2010); VA. CODE §24.2-643(b) (2016); ARK. CONST. amend. 51, § 13. ARK. CODE § 7-1-101,201, 305, 308, 324, 409, and 412 (2015); FLA. STAT. §101.043 (2016); HAW. REV. STAT. §11-136 (2014); IDAHO CODE §34-1106(2), 1113, and 1114 (2017); LA. REV. STAT. §18:562 (2011); MICH. COMP. LAWS §168.523 (2006); R.I. GEN. LAWS §17-19-24.2 (2015); S.D. CODIFIED LAWS §12-18-6.1 and 6.2 (2014)
[389] Underhill, *supra* note 325.
[390] *Id*.
[391] *Id*.

Table 2. Photo ID Required by State Law & Types of Photo IDs Accepted

State	Driver's License/State-issued ID / Free Voter ID Card	Government Employee ID / Employee ID	Passport/ Naturalization Certificate / Tribal ID	Student ID / Public Assistance Card	Military ID / Veteran ID / Gun Permit	Additional Information
Indiana*	DL, State, and Voter	Gov't	P			Must have Name, Photo, and Expiration
Georgia*	DL, even if expired, State, and Voter	Gov't	P and T		M	
Kansas	DL-any state	Gov't	P	S and PA	M and G	
Mississippi	DL, State, and Voter	Gov't	P	S	M and G	
Tennessee	DL and State		P		M and G	
Virginia	DL and State	Gov't and Employee	P and T	S		
Wisconsin*	DL and State		P, N, and T	S with expiration	M and V	May also need proof of residence
Arkansas	DL, State, and Voter		P	S and PA	M and G	Must have Name, Photo, and Expiration
Alabama*	DL, State, and Voter	Gov't	P and T	S	M	
Florida	DL and State	Gov't	P	S and PA	M, V, and G	Debit/Credit Card Ret./Neighborhood ID
Hawaii	DL and State					Utility Bill/Bank Statement/ Check
Idaho	DL and State	Gov't	P and T	S, even high school	G	
Louisiana	DL and State					Any other recognized ID
Michigan	DL and State - Expired I/S or current O/S	Gov't	P & T	S, even high school	M	
Rhode Island	DL and State		P	S, from any U.S. institution	M and G	Gov't medical card
South Dakota	DL and State	Gov't	P and T	S		
Texas*	DL, State, and Voter		P and N		M and G	All within 4 years of expiration, exc. Nat cert.

Georgia accepts the following seven forms of ID to vote, including expired Georgia driver's licenses, but not student IDs.[392] Overall, the state was found to be "medium" strict.[393]

Georgia was less strict than Indiana because Indiana requires name, expiration date, and photo issued only from the state or national government.[394] Georgia, however, was both less and more strict than the Kansas law.[395] Georgia was less strict than Kansas because Kansas only accepts expired IDs for people 65 and older.[396] In contrast, Georgia was stricter because Kansas accepts a broader range of IDs, including student IDs and public assistance IDs.[397] Georgia was also stricter than Mississippi because Mississippi accepts student IDs and firearms licenses.[398]

Georgia was both less and more strict than Wisconsin.[399] Georgia was stricter because Wisconsin accepts certificates of naturalization.[400] On the other hand, Wisconsin is stricter because Wisconsin also requires proof of residence if the ID presented does not indicate the voter's address.[401] Also, even though Wisconsin accepts student IDs, few IDs practically qualify under the state condition mandating a signature and expiration date.

In 2011, Texas enacted a voter ID law also accepting seven forms of ID, including a driver's license, concealed carry permit, or citizenship certificate.[402] All forms of ID, except for the citizenship certificate, may be presented within four years of expiration.[403] Overall, the state

[392] GA. CODE §21-2-417 (2010).
[393] *Id*.
[394] IND. CODE §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1 (2014).
[395] KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012).
[396] *Id*.
[397] *Id*.
[398] MISS. CODE §23-15-563 (2013).
[399] WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014).
[400] *Id*.
[401] *Id*.
[402] *Id*.
[403] *Id*.

was found to be "very" strict.[404] In fact, the law was struck down by a court in 2014 in *Veasey v. Perry*, but higher courts stayed the injunction and later allowed the law to be applied.[405]

The district judge in *Veasey* even cited a 2014 study by the National Council of State Legislatures to show that the Texas law is "comparatively the strictest law in the country."[406] Then, the court discussed safety net features, which Texas failed to adopt, "including soft rollouts (which Texas did not adopt), educational campaigns (which are lacking in Texas), the time frame during which an expired ID will be accepted (a matter on which Texas is relatively strict), the time frame in which provisional ballots may be cured (a matter on which Texas is arguably in the middle ground), and terms on which provisional ballots may be cured (where Texas's requirements that the voter still produce a qualified photo ID make it strict)."[407]

The Texas law was stricter than Hawaii, Idaho, Louisiana, and Rhode Island laws.[408] In fact, Hawaii does not even specify acceptable types of ID by law.[409] The Hawaii office of elections does provide examples, including even non-photo IDs that contain a voter's name and address.[410] Idaho allows tribal IDs and student IDs as alternatives.[411] Louisiana contains a catch-all provision "other generally recognized picture IDs."[412] Rhode Island accepts valid and current IDs from any U.S. educational institution.[413] On the other hand, Texas was less strict than South Dakota, which only accepts student IDs and tribal IDs as alternatives to state-issued IDs.[414]

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[404] Underhill, *supra* note 325.
[405] *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014).
[406] *Id.* at 643.
[407] *Id.*
[408] Underhill, *supra* note 325.
[409] *Id.*
[410] HAW. REV. STAT. §11-136 (2014).
[411] IDAHO CODE §34-1106(2), 1113, and 1114 (2017).
[412] LA. REV. STAT. §18:562 (2011).
[413] R.I. GEN. LAWS §17-19-24.2 (2015).
[414] S.D. CODIFIED LAWS §12-18-6.1 and 6.2 (2014).

Second, the National Council of State Legislatures classified 17 state laws as non-photo ID accepted, including Oklahoma's ID law endorsed by the state Supreme Court in *Gentges v. State Election Board* in 2018, denoted by an asterisk in the table below.[415] Other states included are Alaska, Colorado, Connecticut, Delaware, Iowa, Kentucky, Missouri, Montana, New Hampshire, South Carolina, Utah, Washington, West Virginia, Arizona, North Dakota, and Ohio.[416] The table below addressed the relative "strictness" of each state's ID law by noting the types of ID accepted.[417] Then, the discussion classified some states as "stricter" than others if they accepted fewer types of IDs, and "less strict" if the state accepted more forms of ID.[418]

[415] Underhill, *supra* note 325. *See* OKLA. STAT. tit. 26, § 7-114 (2016) and *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018).
[416] Underhill, *supra* note 325. *See* ALASKA STAT. §15.15.225 (2016); COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); CONN. GEN. STAT. §9-261 (2012); DEL. CODE tit. 15, §4937 (2017); IOWA CODE §48A.7A, 48A.10A, 49.78, and 49.81 (2014); KY. REV. STAT. §117.227 (2014); MO. REV. STAT. §115-427 (2016); MONT. CODE §13-13-114 (2017); N.H. REV. STAT. §659:13 (2017); S.C. CODE §7-13-710 (2014); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017); ARIZ. REV. STAT. §16-579(A) (2012); N.D. CENT. CODE §16.1-05-07 (2017); OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).
[417] Underhill, *supra* note 325.
[418] *Id*.

Table 3. Types of IDs Accepted, Including Non-Photo ID Accepted, by State Law

State	Driver's License/State-issued ID / Free Voter ID Card / Tribal ID	Utility Bill/ Bank Statement / Check / Debit Card / Credit Card	Passport/ Naturalization Certificate / Birth Certificate / Social Security Card	Student ID / Government Employee ID / Employee ID / Medicare or Medicaid ID	Military ID / Veteran ID / Gun Permit / Hunt License	Additional Information
Alaska	DL and Voter	U, B, and C	P and BC		H	
Colorado	DL	U, B, and C	N and BC	Gov't and Med.	M	Revenue ID Pilot License
Connecticut			SS			Any other with name and either address, signature, or photo
Delaware	DL and State	U and C				Any other with name and address
Iowa	DL, State, and Voter		P		M	
Kentucky	DL	CC	SS			
Missouri	DL and State – any state	U, B, and C		S		
Montana	DL and T	U, B, and C		S – even high school		
New Hampshire	DL – any state, State, and Voter		P	S	M	Any other ID accepted by election supervisors
Oklahoma*	DL, State, and T					Any other with name, photo, and expiration
South Carolina	DL, State, and Voter		P		M	Affidavit and reasonable impediment
Utah	DL, State, and T		P		M and G	2 forms of ID with name and address
Washington	DL, State, and T			S and E		
Virginia	DL, State, and T		P	S and E	M	
Arizona	DL, State, and T	U and B		Gov't		Other Unique Examples
North Dakota	DL, State, and T	U, B, and C				Requires Name, Address, and DOB
Ohio	DL and State	U, B, and C				Requires Name, Address, Photo, and Exp. Date

Oklahoma requires "proof of identity" showing one's name, a photograph, and expiration date, issued by either the federal government, state, or an Indian tribe.[419] The state also offers a non-photo voter registration card.[420] Overall, the state was found to be "medium" strict.[421]

Compared to Colorado and Washington, the Oklahoma law is less strict because both states provide specific lists of ID options.[422] Both Colorado and Washington, however, recently passed laws resulting in mostly voting by mail now, so the ID provision doesn't have as large of an impact in these states.[423] Compared to Delaware, Oklahoma was stricter because Delaware's broad catch-all provision allows "any government document with a voter's name and address."[424]

The Oklahoma law was less strict than the current Iowa law, but Iowa is transitioning to requiring a photo ID before voting.[425] Currently, Iowa provides a list of acceptable IDs, including non-photo ID cards, or sign an oath verifying identity to cast a regular ballot.[426] In 2019, voters will either produce an ID or cast a provisional ballot and show up after the election with an ID, so the National Council of State Legislatures might reclassify Iowa as a "strict, non-photo ID" state in 2019.[427] On the other hand, Oklahoma was stricter than New Hampshire because New Hampshire accepts driver's licenses from any state, even expired licenses.[428]

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[419] OKLA. STAT. tit. 26, § 7-114 (2016).
[420] *Id.*
[421] Underhill, *supra* note 325.
[422] COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); WASH. REV. CODE §29A.40.160(7)(a) (2017).
[423] Underhill, *supra* note 325.
[424] DEL. CODE tit. 15, §4937 (2017).
[425] Underhill, *supra* note 325.
[426] IOWA CODE §48A.7A, 48A.10A, 49.78, and 49.81 (2014).
[427] *Id.*
[428] N.H. REV. STAT. §659:13 (2017)

Arizona allows a broad, unique list of non-photo ID options, including a valid Arizona vehicle registration, vehicle insurance card, property tax statement or Indian census card.[429] Ohio was stricter because the photo option requires the ID be current and valid with the voter's name, address, photo, and expiration date.[430] Ohio's non-photo option is only a voter's current utility bill, bank statement, government check, or paycheck.[431] For a state that did not require any ID to cast a ballot until 2013, North Dakota is about as strict as Ohio's law.[432]

Third, the National Council of State Legislatures classifies ten states as strict because these state laws require voters to return to a local election offical with an ID within days of an election for their provisional ballot to count.[433] The states included are Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, Wisconsin, Arizona, North Dakota, and Ohio with an asterisk denoting states laws reviewed by courts in the case analysis.[434] Table 3 and following discussion ranks the additional steps required to cast a provisional ballot from least to most onerous.[435]

[429] ARIZ. REV. STAT. §16-579(A) (2012).
[430] OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).
[431] *Id.*
[432] Underhill, *supra* note 325.
[433] *Id.*
[434] *Id. See* GA. CODE §21-2-417 (2010); IND. CODE §3-5-2-40.5, 3-10-1-7.2 and 3-11-8-25.1 (2014); KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012); MISS. CODE §23-15-563 (2013); TENN. CODE §2-7-112(c) (2010); VA. CODE §24.2-643(b) (2016); WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014); ARIZ. REV. STAT. §16-579(A) (2012); N.D. CENT. CODE §16.1-05-07 (2017); OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).
[435] Underhill, *supra* note 325.

Table 4. Strict Provisional Voting by State Law & Subsequent Deadlines

State (ranked from least to most strict)	Return with ID Before Polls Close	Return with ID After Election	Affidavit	Other Options
Ohio – *has tiered options*		*Last option*: by the 10th day after Election Day	*2nd option*	*1st option*: Provide last four digits of social security number
Kansas		By meeting of the county board of canvassers		Submit a copy by mail or electronic means.
Virginia		By noon on the 3rd day after the election		Submit a copy of ID by fax, e-mail, or mail.
Arizona		By 5 pm on the 5th business day after the election		
Mississippi		Five days after the election		
Georgia*		Three days after the election		
Tennessee		By end of 2nd business day after the election		
Indiana*		By noon on Monday after the election		
North Dakota	X	By sixth day after the election.		
Wisconsin*	X	By 4pm on Friday after Election Day		

As per the "strict" classification, generally, all states required additional steps by the voter for their provisional ballot to count.[436] The least onerous state was Ohio's tiered system, which first requests a social security number to cast a provisional ballot.[437] If the voter lacks both ID and a social security number, then the voter may execute an affidavit to cast a provisional ballot.[438] If a voter declines to execute an affidavit, the state requires the voter return with proof of ID within ten days of the election.[439] Both Kansas and Virginia offered voters an option of

[436] *Id.*
[437] OHIO REV. CODE §3503.16(B)(1)(a) and 3505.18(A)(1) (2006).
[438] *Id.*
[439] *Id.*

submitting a copy of their ID via electronic means, such as fax or e-mail.[440] The most onerous state is Wisconsin, which requires voters to return with ID before the polls close, but also provides an alternative of no later than 4 p.m. on Friday following Election Day.[441]

In July 2016, a federal district court ruled that Wisconsin's voter ID law was unconstitutional in *One Wisconsin Institute, Inc. v. Thomsen*.[442] The opinion included an anecdotal account of Mrs. Smith who lived in Milwaukee since 2003, but was born in Missouri in 1916.[443] Like many older African Americans born in the South, she does not have a birth certificate.[444] Thus, the state did not issue her a Wisconsin ID, and she could not vote in the April 2016 primary.[445] The court found Mrs. Smith's compelling story to represent the experiences of about 100 qualified voters who tried to obtain a state ID before the 2016 primary.[446] The court stated that the state must allow an alternative for provisional voting, such as signing an affidavit.[447]

The district court also stated a need to reevaluate *Frank* and *Crawford* because this case casts doubt that voter ID laws foster integrity in elections.[448] The district court found Wisconsin to be preoccupied mostly with "phantom election fraud" leading to real disenfranchisement.[449] While rejecting the plaintiff's facial challenge as a whole citing *Frank* and *Crawford*, the judge

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[440] KAN. STAT. §25-2908, 25-1122, 25-3002, and 8-1324(g)(2) (2012); VA. CODE §24.2-643(b) (2016).
[441] WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014).
[442] *One Wisconsin Institute, Inc. v. Mark Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016). A footnote on the National Council of State Legislatures' website stated that Wisconsin's voter ID law was deemed unconstitutional by a federal court in July 2016. Using the Westlaw database, the researcher analyzed the case to determine that the court did not rule the entire law unconstitutional, but instead, only focused on the burdensome amount of supporting documents required to obtain a free state-issued photo ID. Underhill, *supra* note 325, n. 7.
[443] *One Wisconsin Institute, Inc. v. Mark Thomsen*, 198 F. Supp. 3d at 901.
[444] *Id.*
[445] *Id.*
[446] *Id.*
[447] *Id.*
[448] *Id.* at 903. *See Frank v. Walker*, 17 F.Supp.3d 837 (E.D. Wis. 2014) and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[449] *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d at 903.

indicated the disastrous effects of the state-issued ID provision, ironically intended by the state as a safety net.[450] If a voter lacks a birth certificate, it takes an average of five communications with the DMV after the initial application to get an ID.[451] This Wisconsin district court found the free ID provision to be unconstitutionally burdensome, but allowed the state to implement the law in 2016 as long as it pledged to provide temporary free IDs and publicize the law.[452]

Fourth, the National Council of State Legislatures classifies the largest cluster of 24 states as non-strict because these state ID laws offer on-site alternatives for in-person voters lacking an appropriate ID.[453] The states included are Arkansas, Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, South Dakota, Texas, Alaska, Colorado, Connecticut, Delaware, Iowa, Kentucky, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Utah, Washington, and West Virginia, with an asterisk in the table below denoting any ID law reviewed by courts in the subsequent case analysis.[454] Table 4 and the discussion that follows ranks the additional steps required to cast a provisional ballot from least to most onerous amongst the states.[455]

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[450] *Id*. *See Frank v. Walker*, 17 F.Supp.3d 837 (E.D. Wis. 2014) and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[451] *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d at 903.
[452] *Id.* at 903-04.
[453] Underhill, *supra* note 325.
[454] *Id*. *See* ARK. CONST. amend. 51, § 13. ARK. CODE § 7-1-101,201, 305, 308, 324, 409, and 412 (2015); ALA. CODE §17-9-30 (2013); FLA. STAT. §101.043 (2016); HAW. REV. STAT. §11-136 (2014); IDAHO CODE §34-1106(2), 1113, and 1114 (2017); LA. REV. STAT. §18:562 (2011); MICH. COMP. LAWS §168.523 (2006); R.I. GEN. LAWS §17-19-24.2 (2015); S.D. CODIFIED LAWS §12-18-6.1 and 6.2 (2014); TEX. ELEC. CODE §63.001 et seq. (2017); ALASKA STAT. §15.15.225 (2016); COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); CONN. GEN. STAT. §9-261 (2012); DEL. CODE tit. 15, §4937 (2017); IOWA CODE §48A.7A, 48A.10A, 49.78, and 49.81 (2014); KY. REV. STAT. §117.227 (2014); MO. REV. STAT. §115-427 (2016); MONT. CODE §13-13-114 (2017); N.H. REV. STAT. §659:13 (2017); OKLA. STAT. tit. 26, § 7-114 (2016); S.C. CODE §7-13-710 (2014); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017).
[455] Underhill, *supra* note 325.

Table 5. Non-Strict Provisional Voting by State Law & Subsequent Steps

State (ranked from least to most strict)	Signature matching / Verify Information / State's method unclear	Affidavit / Written Oath / Detailed Affidavit	Requires Supporting Documents	Option to Return with ID
Florida, Montana, Rhode Island, Washington, and West Virginia	Signature matching			
Hawaii	Verify DOB and address			
Alaska	Cast "questioned ballot"			
Colorado	Prelim verify by an election official			
Utah	County clerk verifies identity & residence			
Delaware, Idaho, Michigan, and South Dakota		Affidavit		
Iowa and Kentucky		Written Oath		
Connecticut		Write name, address, date of birth, and sign on state's form.		
Oklahoma*		Write name, address, birth date, and driver's license or social security number.		
New Hampshire		Challenged voter affidavit	The poll clerk takes a photo of the voter.	
Louisiana		Sign affidavit	Provide voter ID card, date of birth, or other information.	
Texas*		Reasonable Impediment	Present a form of "supporting ID."	
Missouri		2 election judges affirm identity.		
Arkansas	No county board challenges, **or**			By 12 pm Monday after the election
Alabama*		2 election officials affirm identity, **or**		By 5 pm on Friday after the election
South Carolina		Reasonable Impediment, **or**		By Thurs./Friday after the election

The least onerous states were Florida, Rhode Island, Montana, Washington, and West Virginia, which use signature matching.[456] Next, Alaska, Colorado, and Utah require no extra steps on the part of the voter, but are unclear as to what is involved after a provisional ballot is cast.[457] For example, county clerks in Utah verify a voter's ID "through some other means."[458]

New Hampshire offers a unique provisional ballot model that genuinely seeks to identify cases of voter fraud by allowing voters lacking ID to execute a "challenged voter affidavit" and immediately have their picture taken, absent a religious objection.[459] Then, within 90 days after the election, the secretary of state sends a non-forwardable letter to each voter who executed an affidavit and instructs the person to return the letter within 90 days as written confirmation of voting or to contact the attorney general if they did not vote, signaling the attorney general to investigate for voter fraud.[460]

Louisiana and Texas require supporting documents along with a voter affidavit.[461] In Texas, a voter must submit a supporting form of ID, such as a voter registration card, original birth certificate, utility bill, bank statement, government check, or paycheck.[462] In addition, the voter in Texas must execute a Reasonable Impediment Declaration, noting their impediment to obtaining photo identification.[463]

Arkansas, Alabama, and South Carolina are the most onerous states because they give voters the option of returning with appropriate identification.[464] Arkansas generally counts

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[456] FLA. STAT. §101.043 (2016); R.I. GEN. LAWS §17-19-24.2 (2015); MONT. CODE §13-13-114 (2017); WASH. REV. CODE §29A.40.160(7)(a) (2017); W. VA. CODE §3-1-34 (2017).
[457] ALASKA STAT. §15.15.225 (2016); COLO. REV. STAT. §1-1-104(19.5) and 1-7-110 (2017); UTAH CODE §20A-1-102(83) and 20A-3-104 (2010).
[458] UTAH CODE §20A-1-102(83) and 20A-3-104 (2010).
[459] N.H. REV. STAT. §659:13 (2017).
[460] *Id*.
[461] Underhill, *supra* note 325.
[462] TEX. ELEC. CODE §63.001 et seq. (2017).
[463] *Id*.
[464] Underhill, *supra* note 325.

provisional ballots unless the board of election commissioners determines it is invalid and should not count.[465] Alternatively, voters may return to the board with appropriate ID by noon on Monday following the election.[466] In 2017, the Arkansas legislature passed a statute allowing voters lacking an ID to sign an affidavit to be registered.[467] The law was struck down by a district court in April 2018, but the state supreme court allowed the law for the May 2018 primary, pending the outcome on appeal.[468] Alabama allows two poll workers to attest to a voter's identity or allows a voter to cast a provisional ballot if they return by Friday after the election with their ID.[469] Finally, South Carolina, like Texas, allows voters to execute a Reasonable Impediment Declaration or return with ID before certifying election results.[470]

As a cautionary tale, comparing any two ID laws creates false equivalences. For example, even though Georgia and Texas both accept seven forms of ID, the Georgia Supreme Court upheld the Georgia law in *Democratic Party of Georgia v. Perdue*, while a federal district court struck down the Texas law in *Veasey v. Perry*.[471] If presenting an ID is only about verification, Arizona offers a broad list of non-photo options with a voters' name and address.[472] Finally, the Wisconsin district court opinion of *One Wisconsin Institute v. Thomsen* demonstrates that free voter ID cards may not always be easily accessible, especially for African Americans born in the South in the early 1900s lacking any documentation of live birth.[473] Regarding provisional

[465] ARK. CONST. amend. 51, § 13. ARK. CODE § 7-1-101,201, 305, 308, 324, 409, and 412 (2015).
[466] *Id*.
[467] Underhill, *supra* note 325.
[468] *Id*.
[469] ALA. CODE §17-9-30 (2013).
[470] S.C. CODE §7-13-710 (2014).
[471] GA. CODE §21-2-417 (2010) and TEX. ELEC. CODE §63.001 et seq. (2017).
[472] ARIZ. REV. STAT. §16-579(A) (2012).
[473] *One Wisconsin Institute, Inc. v. Mark Thomsen*, 198 F. Supp. 3d 896, 901 (W.D. Wis. 2016).

ballots, only ten states require voters lacking ID to make an additional trip, while a majority have shifted to less onerous options.[474]

Finally, New Hampshire's provisional voting procedure seems to be the only law actively seeking to identify cases of fraud.[475] Any voter who lacks required ID executes a "challenged voter affidavit" and immediately has their picture taken.[476] Then, within 90 days of the election, the secretary of state sends a letter to each voter who completed an affidavit.[477] The letter instructs the recipient to either return the letter within 90 days to confirm voting or to contact the attorney general if they did not to initiate an investigation of voter fraud.[478]

U.S. Constitutional Challenges

Of the seven cases analyzed, only three raised challenges under the U.S. Constitution. Of those three, just a single case pre-dating *Crawford* raised a free expression argument, and on appeal, that law was ultimately held to be constitutional.[479] In fact, only one case found a voter ID law unconstitutional under the U.S. Constitution.[480] As for state constitutional challenges to voter ID laws, three of the four challenged laws were found constitutional.[481] Even if plaintiffs succeeded in showing a burden on voting rights, courts still found the states' interests in implementing the law outweighed the burden in a balancing test.[482] A state constitutional challenge, however, was the only case to convince a judge to review the law under the highest

[474] Underhill, *supra* note 325.
[475] N.H. REV. STAT. §659:13 (2017).
[476] *Id*.
[477] *Id*.
[478] *Id*.
[479] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008)
[480] *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014).
[481] *Democratic Party of Georgia v. Perdue*, 288 Ga. 720 (2011); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018).
[482] *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018).

level of judicial review, strict scrutiny.[483] For both U.S. and state constitution challenges, this section provides examples of ID laws deemed constitutional and unconstitutional by courts, noting any themes or unique points in the rationale.

Predating the 2008 U.S. Supreme Court case, *Crawford v. Marion County Election Board,*[484] a district court in New Mexico provided a pioneering in-depth analysis of a local law requiring voters required to present a current and valid photo identification card before voting in person.[485] In *American Civil Liberties Union of New Mexico v. Santillanes*, residents and voting organizations sued the Albuquerque city clerk alleging the voter-approved 2005 amendments to the local Election Code were unconstitutional.[486] *Santillanes* is the only case analyzed where the plaintiffs raised a separate First Amendment free expression argument from their Fourteenth Amendment claim.

Under the amendments, local election officials accepted various types of photo and non-photo IDs.[487] If the voter lacked an ID, then the voter completed an affidavit and cast a provisional ballot.[488] As in *Crawford*, the law mandated the voter return with an ID within ten days of the election for the ballot to count.[489] Finally, the city provided free photo IDs at any time, even on the day of the election.[490]

Both sides filed motions for summary judgment, wherein the judge applied the standard of no genuine issue of material fact based on the pleadings and supporting affidavits, and the

[483] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012).
[484] 553 U.S. 181 (2008).
[485] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d 598, 606 (D.N.M. 2007), rev'd sub nom. *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).
[486] *Id*.
[487] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313, 1316 (10th Cir. 2008).
[488] *Id*.
[489] *Id*.
[490] *Id*.

movant is entitled to judgment as a matter of law.[491] At the district court level, the plaintiffs succeeded with the Fourteenth Amendment Equal Protection claim, but the city prevailed in the alternate First Amendment free expression claims.[492]

The City argued that the new law advanced its interest in preventing voter fraud.[493] The plaintiffs suggested that the amendment imposed an unconstitutional burden on their right to vote.[494] Specifically, they objected to being subjected to more stringent identification requirements since they choose to vote in person, rather than absentee voting.[495] In addition, the plaintiffs contended that the amendment is subject to different and arbitrary interpretation by local election officials based on the vague phrase of "current and valid."[496]

First, the judge considered each of the various levels of judicial scrutiny.[497] The City argued that the Court should apply rational-basis scrutiny because plaintiffs failed to present evidence that the city enacted the new law with an "invidious discriminatory purpose, such as targeting a 'suspect class' of voters."[498] The Court dismissed this argument because the plaintiff's prospective challenge to the City's new photo identification requirement is based on a threatened injury since they have not yet participated in a municipal election yet.[499]

The plaintiffs contended that the Court should apply strict scrutiny because the amendment implicated their fundamental right to vote.[500] The defendants countered that strict scrutiny did not apply because the Constitution does not recognize a "fundamental right" to vote

[491] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 606.
[492] *Id*. at 607.
[493] *Id*. at 606.
[494] *Id*.
[495] *Id*.
[496] *Id*.
[497] *Id*. at 626.
[498] *Id*.
[499] *Id*.
[500] *Id*. at 627.

in person, as opposed to some other voting method such as absentee voting.[501] The defendants analogized to *Bush v. Gore* wherein the Supreme Court declared, "[t]he individual citizen has no federal constitutional right to vote for electors…unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members to the Electoral College."[502] The Court disagreed with the City.[503] Instead, the court asserted that the Supreme Court's recognition of voting as a fundamental right does not hinge on whether the Constitution itself mandates the city to allow citizens to vote in person at a polling place.[504] The Court did still recognize the fundamental right to vote, even when the source of that right lies in state or local law.[505] The court added the right to vote is more than the initial grant of the right, and so equal protection claims may also arise surrounding the logistical exercise of the right.[506]

On the other hand, the court followed the precedent from *Burdick v. Takushi* by not automatically applying strict scrutiny to the claims.[507] In *Burdick*, the Supreme Court mandated that a court determine the appropriate level of scrutiny based on the severity of the burden that the challenged law imposes on the right to vote.[508] Thus, to leave sufficient room for state and local government to orderly administer elections, recent precedent applies an intermediate level of scrutiny, which provides a flexible standard for reviewing constitutional claims to election laws.[509]

Applying the *Burdick* balancing test concerning the Equal Protection claim, the first step is to "ascertain 'the character and magnitude of the asserted injury of the rights protected by the

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[501] *Id*.
[502] *Id*. at 627. *See Bush v. Gore*, 531 U.S. 98, 104 (2000).
[503] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 627.
[504] *Id*. at 627-28.
[505] *Id*. at 628.
[506] *Id*. (citing *Bush v. Gore*, , 531 U.S. at 105).
[507] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 628.
[508] *Id*. *See Burdick v. Takushi*, 504 U.S. at 433-34.
[509] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 628.

First and Fourteenth Amendments.'"[510] The court focused on the claims asserting arbitrary or discriminatory enforcement of the law among similarly situated in-person voters.[511] The judge gave less emphasis to the more stringent identification required for in-person compared with absentee voting because the court acknowledged the practical differences required for each voting method.[512]

On the arbitrary enforcement claim, the new law did not set criteria for what qualified as "current" or "valid" identification cards.[513] Based on the deposition testimony of the City Clerk, defendant Millie Santillanes, she said that each election judge, or precinct worker, made this determination.[514] The court drew Equal Protection reasoning from early voting-rights cases.[515]

Under more similar facts in 2006, *Common Cause/Georgia v. Billups*, a district court reasoned that Georgia's photo identification law imposed an undue burden on the right to vote for voters who lacked the necessary requisite identification.[516] Plus, the court found that these

[510] *Id*. at 630.(quoting *Anderson*, 460 U.S. at 789).
[511] *Am.Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 631.
[512] *Id*.
[513] *Id*.
[514] *Id*.
[515] *Id*. In 2000, the Supreme Court announced in *Bush v. Gore* that one of the constitutional defects in Florida's recount method was that it required recount teams to determine "the intent of the voter" based upon ballot markings, but lacked statewide objective criteria for recount teams. *Id*. at 632. *See* 531 U.S. at 106. Similarly, in 1965, the Court struck down Louisiana's "interpretation test" in *Louisiana v. United States*. 380 U.S. 145, 149 (1965). The test required every voter applicant to "give a reasonable interpretation" of any section of the State or Federal Constitution to the satisfaction of the local registrar. *Id*. Again, the Court stated the problem with the test was that it gave registrars "virtually uncontrolled discretion." *Id*. at 150. Although *Louisiana* predated *Burdick* and *Bush* did not apply the balance test, both cases applied heightened scrutiny since the burden on voting rights was substantial. *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F.Supp.2d at 633.
The court then provided examples of the *Burdick* balancing test with a heightened level of scrutiny. *Id*. Although under different facts, *Buckley v. Am. Const. Law Found. Inc*., in 1999, dealt with a Colorado law requiring petition circulators to wear ID badges. *Id*. *See* 525 U.S. 182, 197–200 (1999). The U.S. Supreme Court found the badges to be a substantial obstacle on core political speech because the requirement has the effect of discouraging potential petitioners based on fear of retaliation or harassment. *Santillanes*, 506 F.Supp.2d at 633-34. The state's justification included helping the public to identify petition circulators, deter fraud, and diminish corruption. *Id.* at 634. While recognizing these important state interests, the Supreme Court struck down the badge requirement as not being carefully tailored because other less restrictive means were available to accomplish these goals. *Id.*
[516] *Am.Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 634. *See Common Cause/Georgia v. Billups*, 439 F.Supp.2d 1294, 1345–50 (N.D.Ga.2006).

voters would have insufficient time and resources to learn about this new requirement and make necessary arrangements before the next election.[517]

Comparing *Billups* to the present case, the *Santillanes* district court found the plaintiffs had more time than Georgia voters to prepare for the next election, but showed fewer efforts to educate city voters of new voting requirements.[518] Therefore, the court concluded that the 2005 amendment imposed a significant burden on the right to vote.[519] Plaintiff showed that confusion about the photo ID requirement was likely to result and could disenfranchise many voters.[520]

Since the law significantly impaired voting rights, the burden of proof shifted to the City to show the voting obstacle was narrowly tailored to meet the government interest served.[521] The City claimed that preventing voter impersonation was the precise reasoning for initiating the identification requirement.[522] The court, however, found the amendment said nothing about fraud or irregularities in voter registration or absentee voting.[523] Further, the City put forth no admissible evidence of voter impersonation fraud in past municipal elections and only provided one alleged instance of voter impersonation that occurred in the 2004 presidential election.[524]

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[517] *Am.Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 634.
[518] *Id.* at 635.
[519] *Id.* at 636.
[520] *Id.*
[521] *Id.* Even though the district court stated it was applying intermediate scrutiny, the court seemed to review the law under strict scrutiny by mandating the state justify the law was "narrowly tailored" to meet the government interest. The only other case to review a voter ID under this exacting level of scrutiny was *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.*, 2012 WL 3332376 (Pa. Commw. Ct. 2012).
[522] *Am.Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 637.
[523] *Id.*
[524] *Id.* While the *Santillanes* district court case predates the Supreme Court's *Crawford* opinion, the lower court addressed the then, non-binding precedent from the Seventh Circuit Court of Appeals in *Crawford. Crawford v. Marion Cty. Election Bd*., 472 F.3d 949 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008). Although lacking specific evidence of voter fraud, the majority of the Seventh Circuit in *Crawford* pointed to voters possibly impersonating a deceased or non-existent voter. *Id*. at 953-54.In *Santillanes*, however, the court found this possibility reduced by two other laws. *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 637.First, the Help America Vote Act (HAVA) applies to voting requirements for elections to federal offices. *Id*. at 637.Second, the 2005 amendments to the New Mexico State Election Code, which allow voters statewide to identify themselves with unique identifiers such as their date of birth or the last four digits of their Social Security number. *Id*. The court found both laws strengthened requirements for maintaining accurate voter-registration rolls statewide. *Id.* Unlike Indiana election officials who admitted to being behind in federal election law compliance in *Crawford*, the City offered no proof

Another strike against the City was the exception made for absentee voters.[525] Defendants asserted that in-person and absentee voters were not similarly situated groups for an Equal Protection claim.[526] While not disputing this fact, the court determined that the absentee voter exception undermined the City's argument that the goal was to prevent future cases of voter impersonation.[527]

Finally, the court found the law aimed at preventing voter fraud at the polls seemed to lack stringency when issuing city-issued ID cards.[528] Under this new law, Albuquerque residents are required to show a current and valid photo ID to cast a ballot in-person.[529] Even for voters lacking an ID must provide their date of birth and the last four digits of their Social Security number to cast a provisional ballot, and then return to the City Clerk's office with an ID card within ten days the election for the ballot to count.[530] In contrast, to obtain a city-issued photo ID card, the city only required a person to provide one's name and to attest they were unable to provide the listed identification documents under the penalty of perjury.[531] Thus, the court concluded that the 2005 amendment lacked a "plausible, close-fitting relationship" to preventing voter fraud and less restrictive alternatives were available.[532] Thus, the amendment violated the Equal Protection Clause.[533]

The plaintiff's primary First Amendment claims relied on the "void for vagueness" doctrine because the law provided no clear definition of what criteria make a photo ID "current"

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that the State of New Mexico was behind in compliance with HAVA, the State Election Code, or any other election law. *Id*. at 638.

[525] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 638.

[526] *Id*.

[527] *Id*. at 639.

[528] *Id*.

[529] *Id*.

[530] *Id*.

[531] *Id*. *See* City Charter art. XIII, § 14.

[532] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 640.

[533] *Id*.

and "valid."[534] Citing *NAACP v. Button*, the plaintiffs explained that an impermissibly vague law under the First Amendment tends to have a chilling effect on the exercise of constitutionally protected expression.[535] The plaintiffs argued that when voting, they engaged in core political speech as a symbolic gesture like assembling for a protest or waving a picket sign.[536] The plaintiffs asserted that by appearing in-person to exercise the franchise, they conveyed a public message to the community about the importance of democracy under First Amendment theory.[537]

The court found that the plaintiff's First Amendment theory-based argument conflated voting in a non-public forum with core political speech that takes place in a traditional public forum.[538] The court noted that the Supreme Court has recognized that it is necessary to restrict speech in non-public forums to protect the right to vote.[539] For example, in *Burson v. Freeman*, a plurality of the Supreme Court upheld a Tennessee law that prohibited soliciting votes or displaying campaign materials within 100 feet of polling place entrances.[540] The rationale for the *Burson* decision was that although the Tennessee law presented an impediment to exercising the fundamental right to vote, the State had a sufficiently compelling interest in prohibiting expression to protect the right to vote.[541]

Also, since people vote secretly in a protected booth, the *Santillanes* district court questioned whether voting sends the symbolic message to community members that the plaintiffs

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[534] *Id.* at 642.
[535] *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).
[536] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 642.
[537] *Id.* Similarly, the dissenting opinion in *Democratic Party of Georgia v. Perdue* found an "inherent First Amendment interest" coupled with voting by showing up at one's polling place and openly exercising the right to participate in democracy. 288 Ga. at 730 (Benham, R., dissenting).
[538] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 642.
[539] *Id. See Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc*., 482 U.S. 569, 573, (1987); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc*., 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 177 (1983).
[540] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 642. *See Burson v. Freeman*, 504 U.S. 191, 193 (1992).
[541] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 642.

claimed.[542] The *Santillanes* court suggested that if plaintiffs wanted to make a public statement along with exercising the franchise, then they should hold a demonstration in a traditional public forum, such as a sidewalk or street the appropriate number of feet from their polling place.[543] Thus, the ID requirement placed no burden on plaintiff's public demonstration ability.[544]

The *Santillanes* district court held that the plaintiffs did not need to rely on a separate and distinct First Amendment theory to justify a heightened level of judicial scrutiny.[545] The "void for vagueness" doctrine was not limited to just their First Amendment claim, and plaintiffs could also raise the issue within their Equal Protection claim.[546] Therefore, the court granted summary judgment for the City concerning the Plaintiff's First Amendment "void for vagueness" claim.[547]

After the district court handed down *Santillanes*, but before oral arguments on appeal at the Tenth Circuit, the Supreme Court handed down the *Crawford* decision, which upheld the similarly crafted Indiana photo ID law against a facial equal protection challenge and created binding precedent for federal courts nationwide.[548] The Tenth Circuit appellate court reviewed the *Santillanes* court's grant of summary judgment on the equal protection claim de novo, with no deference given to the lower court.[549] The City asserted several errors on appeal, including that the voting law properly distinguished between in-person and absentee voters, the district court improperly applied heightened judicial scrutiny, and the photo ID law was not unconstitutionally vague.[550] The Tenth Circuit reviewed each in turn.[551]

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[542] *Id.* at 643.
[543] *Id.*
[544] *Id.*
[545] *Id.*
[546] *Id.*
[547] *Id.*
[548] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d at 1316-17. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[549] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d at 1317.
[550] *Id.* at 1317.
[551] *Id.*

First, the plaintiffs contended on appeal that the law created an arbitrary distinction between in-person and absentee voters since any Albuquerque voter may choose to vote absentee and not present an ID.[552] Further, the plaintiffs argued that the greater opportunity to absentee vote increased the chances for "mischief" and created a greater need to treat all voters alike.[553] This argument did not persuade the Tenth Circuit since the appeals court stated that absentee voting fundamentally differs from in-person voting with its own set of governing procedures.[554]

Second, after a lengthy discussion of the various levels of judicial scrutiny, the district court had applied intermediate scrutiny as established in *Burdick*.[555] The first prong of the balancing test is to identify the alleged infringement on the right to vote.[556] The lower court inappropriately focused on the city's failure to educate voters about the law and found its application would be confusing.[557] The appellate court found that in the absence of any indication of voter confusion, the law cannot be invalidated based on lack of education alone.[558]

The court stated, "Our task is not to mandate a perfect system-just one that meets constitutional requirements."[559] In *Crawford*, the Supreme Court concluded that the burdens imposed by the photo ID law did not substantially burden the right to vote.[560] The Court went on to provide the following examples to illustrate the minimal burden of the law:

> [A] voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising out of life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of [the photo identification law].[561]

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[552] *Id.* at 1320.
[553] *Id.*
[554] *Id.*
[555] *Id.* at 1321.
[556] *Id.*
[557] *Id.* at 1322.
[558] *Id.*
[559] *Id.*
[560] *Id.*
[561] *Crawford v. Marion County Election Board*, 553 U.S. at 197.

The second prong of the *Burdick* balance test required the court to balance the burdens imposed against the state's justifications for the law.[562] While the lower court required the City to present evidence of specific instances of voter fraud, the appellate court held this to be too high a burden on the City because the Supreme Court did not require Indiana to do so in *Crawford*.[563]

Finally, the *Santillanes* district court held the amendment to be vague because it left defining the meanings of "current" and "valid" to the discretion of local election judges.[564] The Tenth Circuit court examined the text of the amendment, including its non-exclusive list of acceptable identifications, including government-issued identification, student identification cards, credit or debit cards, insurance cards, union cards, and professional association cards without requiring cards include an address or expiration date.[565] Thus, the appeals court found the law to be even less restrictive than the Indiana law requiring an expiration date, which was upheld by the Supreme Court in *Crawford*.[566] Further, the Tenth Circuit found the words "current" and "valid" not to be vague because the federal HAVA statute uses those terms for all first-time voters in federal elections to present a "current and valid photo identification."[567]

Texas's voter ID law has been mired in litigation since its inception.[568] In *Veasey v. Perry*, a group of plaintiffs immediately challenged S.B. 14 under the First Amendment to the U.S. Constitution, alleging the law denied free speech and free association through voting and participation in elections.[569] They argued that strict scrutiny ought to be applied to analyze the

[562] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d at 1323.
[563] *Id.*
[564] *Id.*
[565] *Id.* at 1324.
[566] *Id.*
[567] *Id.* at 1324-25.
[568] *Veasey v. Perry*, 29 F.Supp.3d 896, 900 (S.D. Texas 2014).
[569] *Id.* at 901.

law.[570] The Texas district court stated that an individual's right to vote is implied in the First Amendment and protected as fundamental by the Fourteenth Amendment's Due Process and Equal Protection clauses.[571] Specifically, an equal protection claim applies either when a state "classifies voters in disparate ways, or places restrictions on the right to vote."[572] As did the district court in *Santillanes*, the *Veasey* district court applied intermediate scrutiny and balanced the burden on the plaintiff's right to vote against the legitimacy of the State's interests and the extent those state interests required imposing these burdens on the franchise.[573]

Before S.B. 14 went into effect, the only document required for a voter to cast a ballot was their voter registration certificate, which did not include a photograph.[574] Then, the court explains the challenged provisions of S.B. 14, effective on January 1, 2012, which dictated the only acceptable forms of ID were a driver's license, state-issued ID, concealed carry permit, military ID, citizenship certificate, or U.S. passport.[575] If a voter lacks an ID, then the person may obtain an election identification certificate from the Department of Public Safety upon presenting satisfactory proof of identity.[576] The court included a chart illustrating the acceptable forms of identification in Texas compared with other states to illustrate how comparatively S.B. 14 is among the strictest in the nation.[577]

The State filed a motion to dismiss on various grounds, including that the Supreme Court automatically approved voter ID laws in two prior cases, *Arizona v. Inter Tribal Council of*

[570] *Id*. The plaintiffs also argued that S.B. 14 violates Section 2 of the Voting Rights Act, the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Fifteenth Amendment, and the Twenty-Fourth Amendment alleging an unconstitutional poll tax. *Id*.
[571] *Veasey v. Perry*, 71 F.Supp.3d 627, 685 (S.D. Texas 2014).
[572] *Id*.
[573] *Id.* at 685-86.
[574] *Id*. at 639.
[575] *Id*. at 641. *See* SB 14, § 1, 9(c), 14-15, 17-18, 20, and 26 (2012).
[576] *Veasey v. Perry*, 71 F.Supp.3d at 641.
[577] *Id.* at 643.

Arizona, Inc. and *Crawford v. Marion County Election Board*.[578] In denying the state's motion at a preliminary hearing, the district court judge, Nelva Gonzales Ramos, found Texas overstated the Supreme Court's approval of ID laws.[579] Then, in a rare U.S. Constitutional challenge, the *Veasey* plaintiffs successfully produced sufficient evidence at trial to show the law significantly burdened voting rights. First, the district court again with Judge Ramos presiding described the state's history of racial disparity in voting.[580] Second, using legislative history, plaintiffs showed S.B. 14 was the Texas Legislature's fourth, increasingly strict attempt to enact a voter ID law.[581]

The State proffered two rationales for the increasing strictness of the law.[582] First, since the 2010 U.S. Census revealed a large increase in the Hispanic population in Texas, the proponents identified preventing voter fraud as a priority.[583] In 2011, proponents focused on proposed legislation addressing the dangers of illegal immigration, including redistricting, eliminating sanctuary cities, speaking English-only, and rolling back provisions of the Affordable Care Act.[584] Another rationale offered was increasing public confidence in elections and voter turnout.[585] The State, however, provided no evidence to support any of the following

[578] *Veasey v. Perry*, 29 F.Supp.3d at 912 (citing *Arizona v. Inter Tribal Council of Arizona, Inc*., 133 S.Ct. 2247, 2253-54 (2013) and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)).
[579] *Veasey v. Perry*, 29 F.Supp.3d at 912-24. First, *Inter Tribal* only addressed an Arizona state law requiring proof of citizenship for voter registration. *Id*. at 912.Second, the Indiana law in *Crawford* only survived a Fourteenth Amendment Equal Protection challenge. *Id*. at 913. The Court addressed no other constitutional violations, and the *Crawford* plaintiffs made no claims that the law discriminated based on race, ethnic origin, or sex. *Id*.
[580] *Veasey v. Perry*, 71 F.Supp.3d at 633-39. Even though plaintiffs produced documented evidence showing Alabama is another southern state with a history of denying the franchise based on race, the district court in *Greater Birmingham Ministries v. Merrill*, however, focused on how penalties for voter fraud existed since the 1850s while also referring to increased documented cases of absentee voter fraud in more recent history. *Cf. Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1257. (N.D. Ala. 2018).
[581] *Veasey v. Perry*, 71 F.Supp.3d at 645.
[582] *Id.*
[583] *Id.* at 653-54.
[584] *Id.* at 654.
[585]*Id.* at 655.

claims: (a) voter turnout was low due to lack of confidence in elections, (b) a voter ID law would increase confidence, or (c) increased election confidence would increase voter turnout.[586]

Instead, the evidence showed that S.B. 14's discriminatory effect for various reasons.[587] First, the law specifically burdened Texans living in poverty, who are less likely to possess a qualified ID or be able to obtain one and more likely to be African Americans and Hispanic voters.[588] Relatedly, African Americans and Hispanics are more likely to live in poverty due to systemic barriers caused by decades of racial discrimination.[589]

The State argued that none of the individual plaintiffs would be disenfranchised or substantially burdened because those over age 65 and the disabled can vote by mail.[590] The court found, however, the evidence indicated that the absentee ballot system is not an appropriate alternative because a greater risk of voter fraud exists.[591] For example, campaign workers could harvest mail-in ballots by raiding mailboxes.[592] The court heard testimony from many people who prefer to vote in-person because they distrust mail-in ballots.[593] Especially within the African American community, in-person voting is a celebration of overcoming suffrage obstacles and implicitly evoking the free expression values of individual autonomy and self-realization.[594]

Second, the State suggested that any remaining plaintiffs can get a free qualified ID, but choose not to do so. The court chastised the state for failing to appreciate the realities of those living in poverty who are unable to pay costs associated with traveling and obtaining a "free"

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[586] *Id.*
[587] *Id.* at 664.
[588] *Id.*
[589] *Id.*
[590] *Id.* at 676.
[591] *Id.*
[592] *Id.*
[593] *Id.*
[594] *Id.* The court citied testimony from Reverend Johnson who said he considers appearing at the polls part of his freedom of expression, freedom of association, and freedom of speech. *Id.* at 676-77.

qualified ID.[595] The court said, "The poor should not be denied the right to vote because they have chosen to spend their money to feed their family."[596]

The district court also had to align the results of the case with existing jurisprudence, including *Crawford* and *Frank v. Walker*, wherein the Seventh Circuit upheld Wisconsin's ID law that is similar to the Texas S.B. 14.[597] The *Frank* trial court struck down the Wisconsin law because the court found the state's interests in preventing fraud and restoring public confidence to be weak.[598] The judge balanced the state's weak justifications against the same voting burdens placed upon Texas voters, which included understanding the requirements, obtaining supporting documents, traveling between residences and offices that issue election IDs, and possibly a lack of transportation.[599] The *Frank* court found enough voters could be potentially disenfranchised to sway elections.[600] Judge Lynn Adelman permanently enjoined the law, but on appeal, the Seventh Circuit reversed the lower court and upheld the law citing *Crawford*.[601]

Agreeing with the *Frank* trial court reasoning, the *Veasey* district court distinguished their facts from the *Frank* and *Crawford* cases.[602] First, the Texas plaintiffs presented evidence of attempts to overcome the obstacles required to obtain an election ID, such as finding a local office.[603] Next, the plaintiffs presented evidence of the cost to obtain the necessary documents to obtain a state-issued ID.[604] Third, the record contained historical evidence of discrimination in Texas and the extraordinary efforts of the Texas Legislature to pass S.B. 14.[605] Finally, the

[595] *Veasey v. Perry*, 71 F.Supp.3d at 676.
[596] *Id.*
[597] *Id.* at 681.
[598] *Id.*at 681. *See Frank v. Walker*, 17 F.Supp.3d 837 (E.D.Wisc.2014), rev'd, 768 F.3d 744 (7th Cir.2014).
[599] *Veasey v. Perry*, 71 F.Supp.3d at 682.
[600] *Id.*
[601] *Id.* at 682. *See Frank v. Walker*, 768 F.3d 744 (7th Cir.2014).
[602] *Veasey v. Perry*, 71 F.Supp.3d at 682.
[603] *Id.*
[604] *Id.*
[605] *Id*

Supreme Court holding in *Crawford*'s facial challenge left open the possibility for the plaintiffs to bring a successful as-applied challenged to S.B. 14.[606]

The *Veasey* district court found that the plaintiffs sustained their legal burden of showing a violation of First and Fourteenth Amendment rights because S.B. 14 substantially burdened the franchise, and the State failed to offset these burdens with an evidence-based justification.[607] The court stated, "It is too easy to think that everyone ought to have a photo ID when so many do, but the right to vote of good citizens of the State of Texas should not be substantially burdened simply because the hurdles might appear to be low."[608] As did the *Frank* lower court, the court issued a permanent injunction of the law and mandated Texas return to its prior ID provisions.[609]

State Constitutional Challenges

Amongst the state constitutional challenges, most courts under the *Burdick* balancing test found either the plaintiffs failed to meet their burden of proving impairment of voting rights or state interests outweighed any burden on voting.[610] Predating *Crawford*, the Georgia legislature passed the 2005 Photo ID Act regarding acceptable identification for in-person voting to protect against fraud.[611] The law required registered voters in Georgia who vote in person to show one of six forms of government issued photo ID.[612] If the voter lacked an ID, then the vote affirmed their identity and cast a provisional ballot.[613] More stringent than *Crawford*, the law mandated

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[606] *Id.*
[607] *Id.*at 693.
[608] *Id.*
[609] *Id.* at 707. The State filed an emergency stay of the injunction pending the appellate process, and the Fifth Circuit granted the stay. *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).The U.S. Supreme Court affirmed staying the enforcement of the injunction. *Veasey v. Perry*, 574 U. S. ____ (2014). In 2015, the Fifth Circuit granted the plaintiffs a rehearing. *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015). Since the same judicial relief was available under the discrimination claims in violation of the Voting Rights Act, the appellate court dismissed the plaintiff's First and Fourteenth Amendment claims per the constitutional avoidance doctrine. *Id.*
[610] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720 (2011).
[611] *Id.*
[612] *Id.* Prior law allowed Georgia voters to identify themselves presenting on of 17 forms of photographic or non-photographic identification to election officials. *Id.*
[613] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 720.

the voter return with an ID within two days of the election for the ballot to count.[614] Finally, the city only provided photo voter IDs for a fee.[615]

This case began when plaintiffs challenged the 2006 Act based upon violations to Georgia's Constitution, including Article II, Section I, Paragraphs II[616] and III[617] as an unauthorized qualification on the fundamental right to vote and denying equal protection of the law under Georgia's Equal Protection Clause.[618] The trial court found the 2006 law violated none of these provisions and granted summary judgment in favor of the State.[619]

On appeal, the Supreme Court of Georgia evaluated each claim in turn.[620] First, regarding the undue burden on the right to vote, the plaintiffs alleged that the Georgia Constitution expressly states the qualifications to vote, and this list is exclusive.[621] The court dismissed this argument stating the Act does not affect voter registration, which requires no photo identification.[622] The Act also does not impose a condition on voting because registered voters may choose a method of voting that requires no photo ID.[623] Finally, the requirement is not an impermissible qualification on voting either because the 2006 Act does not prevent any voter from casting a ballot since they may obtain a free photo ID at their county locations.[624]

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[614] *Id.* at 720-21.
[615] *Id.* at 721. In 2005, in *Common Cause/Ga. I*, a federal district court granted a preliminary injunction of the Act because it imposed a poll tax violating the Twenty-Fourth Amendment. *Id. See Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326, 1369–1370, 1377 (N.D.Ga.2005). While on appeal, the Legislature amended the law in 2006 and eliminated the fee charged for the voter ID card. *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 721.
[616] Art. II, Sec. I, Par. II provides: "Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors." *Id*. at 724.
[617] Art. II, Sec. I, Par. III provides that no person convicted of a felony involving moral turpitude or judicially determined to be mentally incompetent may vote. *Id*. at 727.
[618] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 723.
[619] *Id*. at 724.
[620] *Id*.
[621] *Id*.
[622] *Id*. at 725.
[623] *Id*. at 725.
[624] *Id*. at 726.

Regarding the equal protection claim, the plaintiffs argued the trial court failed to independently evaluate their claims under the Georgia Constitution because the state constitution provides greater protections under its equal protection clause than does the U.S. Constitution.[625] Again, the Georgia Supreme Court dismissed this claim because the court has repeatedly stated that the Georgia clause is "coextensive" and "substantially equivalent" to the federal clause.[626]

Then applying the *Burdick* balancing test, which the court called the *Anderson* balancing test, [627] the court identified a legitimate state's interest in eliminating the potential for voter fraud at the polls.[628] The plaintiffs, on the other hand, clearly failed to establish the law burdened voting rights because they only offered testimony of one voter who did not possess a requisite ID because of age and physical infirmities, but ultimately voted with an absentee ballot.[629]

To mitigate the alleged voting burdens, the state submitted evidence of a comprehensive education program since 2007 to inform election officials and voters of the new requirements.[630] Also, the new law was implemented in 15 elections during 2007 and 2008 without reported problems.[631] Thus, the Georgia Supreme Court found the 2006 Act to impose only a "minimal, reasonable, and non-discriminatory restriction."[632]

Justice Robert Benham began his dissenting opinion by discussing the nation's extensive history of denying the franchise to various groups of citizens.[633] He acknowledged that while requiring government-issued photo identification may seem reasonable in the twenty-first

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[625] *Id*. at 728.
[626] *Id*.
[627] The balancing test used by the courts is interchangeably referred to as the *Burdick* test, *Anderson* test, or *Anderson-Burdick* test.
[628] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 729.
[629] *Id*.
[630] *Id*.
[631] *Id*. at 729-30.
[632] *Id*. at 730.
[633] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 730 (Benham, R., dissenting).

century, the qualification is quite burdensome on those citizens living at "the margins of our society (i.e., the poor, infirm, and elderly)."[634] Plus, Justice Benham pointed out that cases of voting fraud have not been proven to occur at any significant rates.[635]

His main issue was the majority assertion that the 2006 Act does not burden citizens since they may obtain a voter ID card "free of charge."[636] Benham pointed out that obtaining the free voter ID card is more burdensome than registering to vote.[637] In addition, while absentee voting may be preferable for the physically immobile, Justice Benham took issue with the majority presenting it as an option that mitigates all of the difficulties of the in-person photo ID requirement.[638]

A challenge to Oklahoma's ID law presented a rare plaintiff, a single registered voter, bringing a state constitutional claim in *Gentges v. State Election Board* in 2018.[639] Before the law, each voter only had to announce his name to the precinct judge to verify the person's name in the precinct registry.[640] As addressed in *Santillanes*, Oklahoma voters in 2010 approved the following Voter ID Act, which required in-person voters to present a government- or tribal-issued photo ID containing the voter's name and an expiration date.[641] As an alternative, a person may present a voter ID card.[642] If a person is unable to produce an ID, the state allows the voter to sign a statement swearing to their identity and cast a provisional ballot.[643] The plaintiff brought

[634] *Id*. at 731. This contrast with the district court ruling in Applewhite where the court found the ID requirement to reasonable given the broad context of photo ID usage in daily life. *Cf. Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012, *29 (Pa. Commw. Ct. 2012).
[635] *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 731 (Benham, R., dissenting).
[636] *Id*. at 732.
[637] *Id*.
[638] *Id*.
[639] *Gentges v. State Election Bd*., 2018 OK 39,*1 (Okla. 2018).
[640] *Id*.
[641] *Id*. at *2. *See* Okla. Stat. tit. 26, § 7-114 (2010).
[642] *Gentges v. State Election Bd*., 2018 OK at *2.
[643] *Id*.

this action against the State Election Board claiming that the law is a condition on the right to vote in violation of the Oklahoma Constitution.[644]

The district court found the voter ID law not to violate the state constitution.[645] Even with the mass of evidence below, the district court ruled that the plaintiff failed to meet the burden of proof that the law impinged unconstitutionally on the free exercise of suffrage rights.[646] Although the plaintiff presented evidence that a quarter of the state's population lacked a driver's license or state-issued ID, the percentage was deemed inaccurate by the court because it did not subtract the portion of the population under age 18.[647] Second, State Senator Judy McIntyre testified that Oklahoma ranks 44th in the nation regarding people living in poverty.[648] McIntyre noted that transportation is a cost-prohibitive issue for many people living in poverty who are unable to pay someone to take them to obtain a driver's license or state ID.[649] Finally, the plaintiff presented statistical evidence showing the insufficiency of provisional ballots as an alternative.[650] For example, in the November 2010 election, voters cast 700 provisional ballots, but the state ultimately counted only 117.[651]

On appeal, the Oklahoma Supreme Court reviewed the case *de novo*, or without deference to the lower court.[652] Assuming the plaintiffs demonstrated a burden on voting rights, the reviewing court began its analysis by considering the intent of the law.[653] The State argued

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[644] *Id*. The Oklahoma Constitution provides that elections should be free and equal and that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right." *Id.* at *4. *See* Okla. Const. art. 2, § 4, art. 3, § 5. The Constitution also grants the Legislature power to "prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections." *Gentges v. State Election Bd*., 2018 OK at *4. *See* Okla. Const. art. 3, § 4.
[645] *Gentges v. State Election Bd*., 2018 OK at *4.
[646] *Id*. at *4.
[647] *Id*. at *2.
[648] *Id*. at *3.
[649] *Id*.
[650] *Id*.
[651] *Id*.
[652] *Id*. at *4.
[653] *Id*. at *6.

that the law was intended to prevent future cases of fraud, even with no evidence provided of prior in-person voter fraud.[654] Accepting the State's rationale, the court found the Oklahoma law analogous to the Indiana law in *Crawford*.[655] Based on the State's attempt to prevent voter fraud as outweighing any burden on voting rights, the Oklahoma Supreme Court declared the lack of evidence of in-person fraud in the state was not a barrier to reasonable preventative legislation.[656]

Then, the court used *Crawford* as a baseline for deciding the case and engaged in a point-by-point comparison between the Oklahoma and Indiana law to show the Oklahoma law is not as harsh as the previously-approved Indiana law.[657] While Oklahoma does not provide free photo identification cards for voters as Indiana does, the state does provide free paper voter ID cards, which voters may use in lieu of a photo ID.[658] Also, a voter with no identification can vote by provisional ballot at a polling location with no further trips required.[659] In contrast, Indiana voters are required to make a second trip to prove their identity before the circuit court clerk within ten days of the election.[660] Since the Oklahoma Voter ID Act selected provisions appeared less stringent than Indiana, the law procedurally ensures voters meet exiting qualifications, and the court found no direct cost to vote, the state Supreme Court considered it constitutional.[661]

Finally, Pennsylvania's law presented the lone constitutional challenge wherein a court subjected a voter ID law to strict scrutiny. In October 2012, plaintiffs challenged Pennsylvania's Act 18 requirement of an acceptable form of photo identification containing a name, photograph,

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[654] *Id*.
[655] *Id*. at *7.
[656] *Id*.
[657] *Id*. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[658] *Gentges v. State Election Bd*., 2018 OK at *7.
[659] *Id*.
[660] *Id*. at *6.
[661] *Id*. at *7. Given the nuanced differences of ID laws, as seen in the earlier state-by-state comparison, this type of analysis can minimize actual impacts on subsets of the population in any given state.

and expiration date for in-person voting.[662] In *Applewhite v. Commonwealth of Pennsylvania*, among their arguments, plaintiffs alleged that the law would disenfranchise or deter qualified voters from exercising their fundamental right to vote.[663] The Pennsylvania Constitution explicitly provides the right to vote in Article I, Section 5.[664]

Before enactment of the ID law, the only photo ID requirements applied to first-time voters as per the federal Help America Vote Act, which sets voting requirements for federal elections.[665] As an alternative to a photo ID, prior law allowed voters to present one of several forms of non-photo ID containing their names and addresses, such as a utility bill.[666]

Act 18 also provided for a list of acceptable "alternate IDs" available for voting, including student IDs, care facility IDs, and military IDS.[667] Voters could also obtain a secure, non-driver ID without a fee from a Department of Transportation office.[668] Since the state deemed the ID as secure, lots of supporting documents were required, and the Pennsylvania Supreme Court declared the ID did not allow for liberal voter access compelled by the statute.[669]

To address the ruling, Pennsylvania created the Department of State ID, or DOS ID, which is valid for ten years and used only for voting.[670] Unlike the Pennsylvania Department of Transportation ID, the only supporting documents required for the DOS ID are that an applicant

[662] *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.,* 2012 WL 3332376, *1 (Pa. Commw. Ct. 2012).
[663] *Id*.
[664] *Id*. "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id*. at 9. *See* Pa. Const. art. I, § 5.
[665] *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.,* No. 330 MD 2012, *2 (Pa. Commw. Ct. 2012)
[666] *Id*.
[667] *Id*.
[668] *Id*.
[669] *Id*. at *3.
[670] *Id*.

completes an application with their social security number and signs an affirmation form.[671] The Department of State then confirms the applicant is a registered voter in the statewide database.[672]

Initially, the Commonwealth Court, analogous to a state appellate court, denied the plaintiffs' request to enjoin the state law for the November election.[673] The Court explained that a citizen's "equal right to vote" is not absolute, but competes with the state's interest in preserving the integrity of its elections.[674] Then, employing the federal "flexible" *Burdick* balancing standard as discussed in *Crawford*, the court reached the same conclusion the U.S. Supreme Court did on the similar Indiana law.[675] The court found the photo ID requirement to be a reasonable, non-discriminatory, and non-severe burden on the franchise given the broad context of photo ID usage in daily life.[676] Also, the court deemed the State's interest in protecting public trust in elections legitimately sufficient to outweigh the burden on individual rights.[677]

Upon appeal to the Pennsylvania Supreme Court, the lower court ruling was vacated and remanded.[678] The majority opinion agreed with the plaintiffs that the statute seemed to violate constitutional norms in the short term.[679] The court added that the current facial challenge might be sustainable even if the State may validly enforce the statute in the long-term.[680]

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[671] *Id*.
[672] *Id*.
[673] *Applewhite v. Commonwealth of Pennsylvania,* 2012 WL at *29.
[674] *Id*. at *22.
[675] *Id*. at *29.
[676] *Id*.
[677] *Id*.
[678] *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.,* 54 A.3d 1, 5 (Pa. 2012). The dissenting opinion primarily took issue with the majority remanding the case and giving the state another opportunity to defend the law, instead of reversing the lower court and granting the injunction themselves. *Id*. at 6. The dissent stated, "Forty-nine days before a Presidential election, the question is no longer whether the Commonwealth can constitutionally implement this law, but whether it has constitutionally implemented it." *Id*. The judge added that despite the majority's acknowledging that the "most judicious remedy" would be to grant the injunction. *Id*. Instead, the majority "ignore[s] the election clock" and gives Pennsylvania another opportunity to justify the rushed application of the law. *Id*.
[679] *Id*. at 5-6.
[680] *Id*. at 6.

On remand, a different district judge, Judge Bernard McGinley, granted the preliminary injunction and enjoined enforcing the ID law for the 2012 Presidential election.[681] This time, the Commonwealth Court explained that a law is facially unconstitutional when "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[682] The Court finds Act 18 failed to pass the facial challenge test because the State failed to provide a compliant photo ID for all qualified electors.[683] The court says, "Like a house of cards, everything rises and falls upon the legitimacy of the DOS ID."[684] The court added the Department of State ID is an unauthorized agency creation that is difficult to obtain.[685]

The Commonwealth Court found the voter ID law violated the fundamental state constitutional right to vote.[686] The court cited Pennsylvania precedent that forbids regulating the right to vote when the law denies the franchise, or "make[s] it so difficult as to amount to a denial."[687] Thousands of Pennsylvania electors lack a compliant photo ID, and the alternate IDs do not remedy this situation since Department of State IDs are only available to registered electors, not all qualified voters.[688] Also, the State subjects voters to additional burdens in

[681] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *1.
[682] *Id*. at *17.
[683] *Id*. at *18.
[684] *Id*.
[685] *Id*.
[686] *Id*. Pennsylvania was one of the original thirteen colonies. *Id.*
[687] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *19. *See Winston v. Moore* 244 Pa. 447, 457 (1914).
[688]*Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *19. The Pennsylvania Constitution provides for the following "Qualifications of electors": "Every citizen twenty-one years of age [lowered to 18 years of age by the twenty-sixth amendment to the U.S. Constitution], possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
1. He or she shall have been a citizen of the United States at least one month.
2. He or she shall have resided in the State ninety (90) days immediately preceding the election.
3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election." *Id*. *See* Pa. Const. art. I, § 5. Article VII, Section 1.

obtaining a Department of State ID at limited locations, during limited times, and run the risk of improper denial due to database issues.[689]

To provide context for the subjectivity of judges' views on the availability of a free ID option, an Alabama district court in 2018 found the availability of a free ID to mitigate any burdens on voting rights.[690] The court stated that these IDs are available during regular business hours at various locations, including Secretary Merrill's office at the Capitol, any county Board of Registrar's Office, or wherever the Secretary's mobile ID unit is visiting on a given day.[691] Moreover, the court held that "the individual plaintiffs' situations demonstrate that people who want a photo ID can get one."[692] Finally, Judge Scott Coogler viewed the voter ID law by stating, "The impact of the law should not be measured by how many people lack a given ID at a given point in time, but by whether someone without an ID can easily get one."[693]

Given the magnitude of these burdens implemented for the first-time on Pennsylvania voters, *Applewhite* provides a rare example wherein a court subjected the ID law to strict scrutiny.[694] Under this level of analysis, the state first bears the burden of proof at showing a compelling state interest in implementing the law in the upcoming election.[695] The state

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[689] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *20.
[690] *Cf. Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d at 1275. Another case not involving a voter ID challenge, instead challenged a law that decreased the time political parties had to gather nomination signatures from 21 months to about seven months. In the reasoning, the judge contrasted ballot-access cases, to voting-access cases, in that ballot-access cases require no balancing test since the burden imposed and the state's purpose are the same. The law is designed to create the burden, which in turn has the effect of limiting the voters' selections to candidates who can make "some preliminary showing of a significant modicum of support before printing the name" on the ballot. *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 32 (1st Cir. 2016).
[691] *Greater Birmingham Ministries v. Merrill,* 284 F. Supp. 3d at 1275.
[692] *Id*. at 1277.
[693] *Id*.
[694] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *20. Similarly, in *League of Women Voters v. Walker*, dissenting Justice Shirley Abrahamson stated the right to vote is "a sacred right of the highest character." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 357 Wis.2d 360, 393 (Wis. 2014) (Abrahamson, S., dissenting). Accordingly, the franchise should be the most protected of rights "because [it is] preservative of all rights." *Id.* at 394.While the State may require a voter to identify their identity, Abrahamson wrote that Act 23 severely restricts the forms of identification that enable a qualified voter to cast a ballot, which justifies strict scrutiny. *Id.* at 399-422.
[695] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *20.

identified election integrity and ensuring public confidence in the election system as the state interest.[696] Although *Crawford* acknowledged these as important interests, Pennsylvania did not support these interests in implementing the voter ID law with evidence.[697]

Under the second prong of strict scrutiny, the state also had to show the law was narrowly tailored to meet the state interest of maintaining election integrity.[698] Given prior elections accepted various types of ID, the burdens of the new ID law appeared unnecessary and not narrowly tailored.[699] The court also found the law to unreasonably restrict the acceptable forms of photo IDs.[700] For example, employee IDs for school districts, welfare cards, bus passes with a picture, gun permits, and drivers' licenses from another state were all deemed unacceptable.[701]

The court found the few accepted alternate IDs not to be "a sufficient bandage" to repair the obstacles of the voter ID law since the state only accepts IDs from discrete groups, such as the elderly and college students.[702] Further, many university student IDs do not comply because they lack an expiration date, and many long-term care facilities do not issue photo IDs.[703]

Also, the State claimed the Department of State ID provides for liberal access to an acceptable ID.[704] Since this option is only available to registered voters, unlike in other states, Pennsylvania failed to provide a "safety net" for other qualified voters to access a ballot.[705] The court highlighted options from other states, such as Kansas and Georgia allowing voters to

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[696] *Id*.
[697] *Id*.
[698] *Id*. at *21.
[699] *Id*.
[700] *Id*.
[701] *Id*. As noted in the Conclusion, strict scrutiny analysis does not require a state to accept all forms of ID. Instead, it requires states to engage in a good-faith analysis of alternatives available and provide reasons justifying deeming certain types of ID as unacceptable.
[702] *Applewhite v. Commonwealth of Pennsylvania,* No. 330 MD at *21.
[703] *Id*. at *21-22.
[704] *Id*. at *22.
[705] *Id*. at *22-23.

present expired drivers' licenses.[706] Alabama, Florida, Idaho, Kansas, Michigan, Rhode Island, South Dakota, and Wisconsin have allowed voters to present student IDs without an expiration date.[707] Even Indiana has allowed voters to affirm they are registered voters at their polling place and cast a ballot based only on their affirmation to prevent disenfranchisement.[708] The court found that Act 18 unconstitutionally disenfranchised thousands of qualified voters who lacked a compliant photo ID and violated the state constitution's fundamental right to vote.[709]

In conclusion, the *Santillanes* plaintiffs argued an inherent First Amendment interest exists with exercising the franchise in front of their peers, echoed by dissenting opinions.[710] In *Veasey*, a district court striking down Texas's ID law, recognized the mistrust of alternative modes of voting for historically disenfranchised groups, like African Americans.[711] The *Veasey* judge even quotes Reverend Johnson's testimony about how many African Americans celebrate voting as part of their "freedom of expression, freedom of association, and freedom of speech," and implying that in-person voting evokes the individual autonomy and self-realization values.[712]

Two cases, however, found that the plaintiffs failed to meet their burden of proof, such as the testimony of one lone voter in *Perdue*.[713] Alternatively, three courts found that the states' interests in preventing fraud and protecting election integrity were sufficient to justify any burden on voting rights without requiring proof of how the laws promoted these interests.[714]

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[706] *Id*. at *23.
[707] *Id*.
[708] *Id*.
[709] *Id*. at *24.
[710] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 606.
[711] *Veasey v. Perry*, 71 F.Supp.3d at 676-77.
[712] *Id*.
[713] *Democratic Party of Georgia v. Perdue*, 288 Ga. 720 (2011) and *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d 1253 (N.D. Ala. 2018).
[714] *Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018).

Finally, in *Applewhite*, the Pennsylvania Supreme Court subjected the ID law to strict scrutiny.[715] As noted in the Conclusion, strict scrutiny is not always fatal to a state ID law, but requires states to provide good-faith reasons for not accepting specific types of ID.[716]

[715] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012).
[716] Douglas, *supra* note 139, at 186.

CHAPTER 7. DISCUSSION AND CONCLUSION

This thesis found few examples in which courts explicitly used First Amendment rationales and any associated free expression values when addressing voter ID laws. More commonly, courts applied the *Burdick* balancing test for upholding the ID law and identified two common rationales: either the plaintiff did not meet their burden of proof or the state interests outweighed any burden on voting rights. A few courts even engaged in comparative analysis between state laws as a justification for upholding certain laws. This thesis, however, recommends that courts review all voter ID laws under a strict scrutiny analytical framework, as the court did in *Applewhite*.[717] The "narrowly tailored" prong requires states to justify deeming certain types of identification as unacceptable.[718]

Out of the seven cases analyzed, three presented U.S. Constitutional challenges and four were based on state constitutional challenges. Of the three U.S. Constitutional challenges, courts deemed two voter ID laws constitutional.[719] The district court in the southern district of Texas in *Veasey v. Perry*, however, declared Texas' law unconstitutionally violated the First and Fourteenth Amendments.[720] Of the four state constitutional challenges, courts deemed three laws constitutional.[721] Only a district court struck down the Pennsylvania law as unconstitutionally burdening the state's explicit provision providing a fundamental right to vote.[722]

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[717] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012).
[718] The highest level of judicial scrutiny is strict scrutiny, where the burden of proof lies upon the government to show a compelling state interest and that the law is narrowly tailored to meet that interest. Douglas, *supra* note 139, at 190. A state would only lose an election law case on the compelling state interest prong if the state fails to support with evidence that enacting the law was about combatting fraud or promoting election integrity. *Id*. The narrowly tailored inquiry does not require states to exhaust every conceivable form of ID, but does mandate a good faith consideration of workable alternatives and weighing the costs and benefits of accepting each type. *Id*. at 192-93.
[719] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008) and *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d 1253 (N.D. Ala. 2018).
[720] *Veasey v. Perry*, 71 F.Supp.3d 627, 693 (S.D. Texas 2014).
[721] *Democratic Party of Georgia v. Perdue*, 288 Ga. 720 (2011); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39.
[722] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012).

Regarding research question one, only a single court opinion analyzed for this thesis analyzed whether a voter ID law infringed on First Amendment free expression as a separate claim from the Fourteenth Amendment equal protection claim. In *Santillanes*, a district court opinion that predates *Crawford*, the ACLU of New Mexico, unsuccessfully argued that voters engaged in "core political speech" when they go to the polls to exercise the franchise in front of their peers.[723] They argued that voting was a symbolic gesture like waving a picket sign in the street, which conveys a public message about the importance of democracy or representative government.[724] This argument implicitly invokes Meiklejohn's self-governance value, a societal value for free expression.[725] The Court, however, found that the plaintiffs conflated voting with "core political speech" in a traditional public forum.[726] The Supreme Court has long held that polling places are a limited public forum where states may place reasonable restrictions to protect voting.[727]

Relating back research question two, the opinions do not explicitly discuss any societal expression values when addressing challenges to voter identification laws. One court, the *Veasey v. Perry* district court, however, implicitly evoked the individual values of autonomy and self-realization.[728] The district court elaborately described Texas's history concerning racial disparity in voting.[729] The judge even quotes Reverend Johnson's testimony attesting to how many

[723] *ACLU of New Mexico v. Santillanes*, 506 F.Supp.2d at 642.
[724] *Id*. The dissent in *Perdue* made a similar argument about an inherent First Amendment interest coupled with the franchise, which the judge described as the right to be among one's fellow citizens a the polling precinct and to openly exercise their right to participate in democracy. *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 733 (Benham, R., dissenting).
[725] Meiklejohn, *supra* note 236, at 3.
[726] *ACLU of New Mexico v. Santillanes*, 506 F.Supp.2d at 642
[727] *Id*.
[728] *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014).
[729] *Id*. at 633.

African Americans celebrated voting as part of their "freedom of expression, freedom of association, and freedom of speech."[730]

Regarding Emerson's description of autonomy,[731] black people fought throughout history to be able to express their ideas at the ballot box, without fear of censorship.[732] As previously discussed in the literature, Emerson articulated four key values of freedom of expression in *The System of Freedom of Expression*.[733] Emerson's four values include: 1) encouraging self-realization, 2) attaining truth, 3) participating in political decision-making, and 4) promoting orderly change within society.[734] The fight of African Americans to obtain the vote and the ability to exercise the franchise freely allows fulfillment of these values.[735]

Relating to Baker's self-realization value, Texas' history of voter discrimination violates the principle of "dignity and equal worth" of individual members of the community.[736] Baker advocated for a broad "liberty model," or system of individual free expression.[737] Baker's model required the community to respect "the dignity and equal worth" of individual members, which could be applied to provide equal access to the ballot box.[738]

More often, the five court opinions upholding voter ID laws followed *Crawford*'s mandate and applied the *Burdick* balancing test. Two lines of themes exist in the rationales for upholding the laws. Either the plaintiffs failed to produce sufficient evidence to demonstrate a significant burden on voting rights, or given the burden on voting rights, the state justifications for the law outweighed the individual burdens.

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[730] *Id*. at 677.
[731] Coyle, *supra* note 274, at 25.
[732] *Veasey v. Perry*, 71 F.Supp.3d at 676-77.
[733] Coyle, *supra* note 274, at 25.
[734] *Id*. at 25-26.
[735] *Veasey v. Perry*, 71 F.Supp.3d at 633.
[736] Coyle, *supra* note 274, at 24.
[737] *Id*.
[738] *Id*.

The plaintiffs failed to meet their burden of proof in two of the five cases, *Perdue* and *Greater Birmingham Ministries*.[739] From these cases, the researcher noted what insufficient proof of burdening voting rights and what sufficient proof has been considered. First, in *Perdue*, the judge discounted the testimony of one voter with disabilities who ultimately voted with an absentee ballot.[740] The Georgia Supreme Court also found the burden of the law mitigated by the state's education efforts and the duration the law had been in effect.[741]

Second, an Oklahoma district court did not accept statistics about the percentage of the population lacking required photo ID without properly identifying impacts on specific demographic subgroups.[742] The Oklahoma court also did not rely on only expert testimony about how transportation costs are cost-prohibitive for individuals living in poverty or the insufficiency of alternative voting methods.[743] Instead, the court preferred actual, individual accounts of voter hardship. Finally, an Alabama district court ruled a state's history of voter discrimination standing alone as insufficient to show a burden on voting rights.[744]

On the other hand, *Veasey v. Perry*, is the only case that successfully challenged a law under the U.S. Constitution under the *Burdick* balancing test.[745] To demonstrate a burden on voting rights, the plaintiffs provided a wealth of evidence, including historical evidence of Texas' pattern of voter discrimination along with specific legislative history surrounding the voter ID law itself.[746] For example, this was the Texas legislature's fourth attempt at passing an

[739] *Democratic Party of Georgia v. Perdue*, 288 Ga. 720 (2011) and *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d 1253 (N.D. Ala. 2018).
[740] *Democratic Party of Georgia v. Perdue*, 288 Ga. at 729.
[741] *Id*.
[742] *Gentges v. State Election Board*, 2018 OK at *2.
[743] *Id*. at *3.
[744] *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d at 1272.
[745] *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014).
[746] *Id*. at 633-45.

ID law, and each time, the bill was increasingly strict.[747] Also, the plaintiffs presented testimony from actual voters who tried to overcome the obstacles of the law to obtain an ID and failed, along with the associated specific costs of obtaining the supporting documents for a state-ID.[748]

Even when plaintiffs demonstrated a burden on voting rights, three of the five cases ruled that state justifications for ID laws outweighed the burden on voting rights.[749] Citing *Crawford*, the *Santillanes, League of Women Voters,* and *Gentges* courts stated that preventing voter fraud, modernizing election procedures, and restoring public trust in elections were sufficiently important reasons to justify burdening voting rights.[750] Even given Alabama's documented history of voter discrimination, Judge Scott Coogler found in *Merrill* further support for the law by stating that Alabama did not act on its own in enacting an ID law, but just joined in a growing national trend.[751] Overall, courts were deferential to the alleged state interests for enacting ID laws. The 2018 *Gentges* district court best expressed this deference to combatting voter fraud, "While there is no evidence of prior in-person voter fraud in Oklahoma, the Voter ID Act was intended as a procedural regulation to prevent future in-person voter fraud."[752] The lack of evidence was not a barrier to reasonable preventative legislation.[753]

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[747] *Id*. at 645.
[748] *Id*. at 682.
[749] *Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39.
[750]*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018). Specifically, in *Crawford*, the Court held that the state interest in preventing actual or perceived fraud justified the ID law, and stated that the lack of evidence of past instances of voter fraud in Indiana was unimportant in justifying the law. *Crawford*, 553. U.S. at 192-97. Drawing from campaign finance cases recognizing the state interest in combatting the perception of corruption, Justice Stevens found that voter confidence further justified the law. *Id*.
[751]*Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d at 1273.
[752] *Gentges v. State Election Board*, 2018 OK at *7.
[753] *Id*.

The reasoning of these courts, however, contradicts recent literature regarding voter fraud. In fact, in an article published in the *Harvard Law Review* the same week as the *Crawford* decision,[754] A Harvard government professor, Stephen Ansolabehere, and a Stanford law professor, Nathaniel Persily, found that a large share of the public perceived voter impersonation occurs very often (9 percent) or somewhat often (32 percent).[755] On the other hand, respondents who perceive greater voter fraud are no less likely to turn out to vote.[756] The researchers also did not observe any difference in perceptions of fraud based on whether the respondent lived in a state with a strict voter law or not.[757] Regardless, *Crawford* continues as the reigning precedent for the next generation of ID laws, such as requiring proof of citizenship to combat noncitizen voting.[758]

In response to research question three, cases analyzed under state constitutions had more explicit provisions for plaintiffs to argue the right to vote was a fundamental right.[759] In *Applewhite*, the Pennsylvania Supreme Court held elections are "free and equal" under the state

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[754] Persily, *supra* note 101, at 126. *See* Stephen Ansolabehere and Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV.1737 (2008). Researchers, Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathon Mummolo, and Clayton Nall, note the general problems with available election data in their 2018 article, *Obstacles to Estimating Voter ID Laws' Effect on Turnout*. Justin Grimmer et al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. *1 (2018). Such problems include burdensome request procedures for administrative records and inconsistent data collection from state-to-state. *Id.* For example, the researchers replicated a 2017 study that found voter ID laws decreased turnout among minorities and showed their results were a product of inaccuracies in national survey data used. *Id*. (citing Hajnal, *supra* note 2.)

[755] Persily, *supra* note 101, at 126.

[756] *Id.* at 126.

[757] *Id.* Since *Crawford*, the voter fraud controversy became more intensely political following the aftermath of the 2008 ACORN voter registration drives fraught with errors. *Id.*

[758] Persily, *supra* note 101, at 126. A federal judge struck down on Monday a provision of Kansas's 2011 law, known as the Secure and Fair Elections Act, which required proof of U.S. citizenship to register to vote. Even though the decision will likely be appealed, the ruling could make voter registration easier and bring Kansas into alignment with § 5 of the National Voter Registration Act, which provides that voter registration applications can only require the minimum amount of information necessary for a state to determine a voter's eligibility. *Fish v. Kobach*, 2018 WL 3017768, *1 (D. Kan. June 18, 2018)

[759] *Applewhite, et al. v. Commonwealth of Pennsylvania, et al.*, 54 A.3d 1, 18-20 (Pa. 2012). According to a professor of law, Joshua Douglas, forty-nine states provide a state constitutional right to vote, and the only state that does not include explicit language granting the right to vote is Arizona. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 n. 73 (2014).

constitution when elections are public and open to all qualified electors alike.[760] Similarly, the dissenting opinion in *League of Women Voters v. Walker* declared that the right to vote was "a sacred right of the highest character."[761] Wisconsin Supreme Court Justice Shirley Abrahamson added that the state explicitly confers the right to vote upon all qualified individuals in Article III, Section 1 of the state constitution.[762]

The state constitutional challenges also provided courts with greater justification for analyzing ID laws under the highest level of judicial scrutiny, strict scrutiny. In *Applewhite*, the district court hinged assessing the burden of the law on the availability of a free state-issued ID.[763] The court found the ID was only available to registered electors, not all qualified ones, and that the state only offered the ID at limited times and locations.[764] Thus, the court found the law imposed a severe burden on the right to vote and thus invoked strict scrutiny.[765] This same argument failed in a U.S. Constitutional challenge because, in *Greater Birmingham Ministries*, the court found that the free state-issued ID mitigated any burden on individual voting rights.[766]

Under a strict scrutiny analysis, the burden shifts to the government to show both a compelling state interest for the law and the law is narrowly tailored to meet that interest.[767] While citing *Crawford* and acknowledging preventing fraud and protecting the integrity of elections as important state interests, the *Applewhite* district court on remand required evidence

[760] *Id*. at 18-19. *See* Pa. Const. art. I, § 5. Article VII, Section 1 for the exclusive list of elector qualifications.
[761] *League of Women Voters v. Walker*, 357 Wis.2d at 393 (Abrahamson, S., dissenting).
[762] *Id*. *See* Wis. Const. art. III, § 1 for the list of elector qualifications. The majority circumvented this argument by qualifying the ID law under the legislature's constitutional authority to provide for "registration of electors" under Article III, Section 2.[762] *League of Women Voters v. Walker*, 357 Wis.2d at 305 (majority opinion). *See* Wis. Const. art. III, § 2 for a list of permissible election law the Wisconsin legislature may enact.
[763] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *18.
[764] *Id.* at *19-20.
[765] *Id.* at *20.
[766] *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d at 1275.
[767] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *20.

of how the law promoted these interests.[768] In contrast, the *Santillanes, League of Women Voters,* and *Gentges* courts applied lower levels of judicial scrutiny and readily accepted the state interests without demanding documentation. Thus, a professor of law, Joshua Douglas, said that a state would only lose an election law case on this prong of strict scrutiny if the state fails to support with evidence that the law combats voter fraud or promotes election integrity.[769]

Strict scrutiny also required the state to show the law was narrowly tailored to promote the compelling state interest.[770] Although the Supreme Court has not provided a detailed discussion of the narrowly tailored prong in election law cases, the *Applewhite* district court analysis provides an example since this prong was at the "meat" of the controversy.[771] The court found the state failed to justify the law as narrowly tailored because the state deemed various forms of ID, such as employee IDs, welfare cards, and bus passes with photos, as unacceptable.[772]

Professor Douglas explained that narrow tailoring does not require the state to exhaust every conceivable alternative form of ID, but does mandate a good faith consideration of workable alternatives.[773] The court added that narrow tailoring does mandate weighing the costs and benefits of accepting certain types of ID with any practical alternatives.[774] In *Applewhite,* Pennsylvania never explained why the above forms of ID were deemed unacceptable.[775] While strict scrutiny has given plaintiffs the highest chances of success, the literature states that if

[768] *Id.*
[769] Douglas, *supra* note 139, at 190.
[770] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *21.
[771] Douglas, *supra* note 139, at 191. *See Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *21.
[772] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *21.
[773] Douglas, *supra* note 139, at 192.
[774] *Id.* at 192-93.
[775] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *21.

courts reviewed all election law challenges under strict scrutiny and gave states "a limited degree of leeway" to regulate elections, many of the decisions would yield the same result.[776]

Professor Peter Rubin described three purposes served by the narrowly tailored analysis.[777] First, this prong ensures the stated purpose of the law matches the actual purpose and "smoke[s] out" any illegitimate purposes.[778] Second, this analysis checks stereotyped thinking and biases.[779] Third, even when some genuine distinction exists between two groups, this inquiry assures that the distinction will only be used to the degree necessary for achieving the government purpose.[780]

Another trend in cases, like *Gentges v. State Election Board*, is where the court initially engaged in the prescribed *Burdick* balancing test and then reinforced upholding the law with a point-by-point relative comparison of select provisions of the Indiana ID law approved in *Crawford*.[781] In upholding the Oklahoma law, the court found that although Oklahoma did not provide a free photo ID, the state did provide a free voter ID card that voters could use at the polls.[782] Also, if an Oklahoma voter showed up without an ID, the law permitted the voter to cast a provisional ballot without any subsequent trips to verify identification.[783] Since the law was found to be less strict than the Indiana law, the Oklahoma Supreme Court upheld the law.[784] In contrast, when the district court struck down Pennsylvania's law in *Applewhite*, the court found

[776] Douglas, *supra* note 139, at 186.
[777] *Id*. at 192. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 10 (2000).
[778] Douglas, *supra* note 139, at 192.
[779] *Id.* at 192.
[780] *Id.*
[781] *Gentges v. State Election Bd*., 2018 OK at *7. *See Crawford v. Marion County Election Board,* 553 U.S. 181 (2008).
[782] *Gentges v. State Election Bd*., 2018 OK at *7
[783] *Id.*
[784] *Id.*

the state failed to provide a "safety net" for qualified voters who lacked even a free state ID, such as states like Kansas and Georgia that allow voters to use expired driver's license to vote.[785]

When the Supreme Court in *Crawford* examined the nuances of the Indiana law, they had little other evidence in the record than just the provisions of the ID law. In fact, Justice Scalia warned in his concurring opinion that the lead opinion's record-based resolution of the case provides no certainty for future cases.[786] Case certainty, however, is not the only consideration. Since election law is a state power, *Burdick* dictates that courts balance both the burden on voters' rights and the state interests in each case with record-based evidence on both sides. Scholarship presents *Crawford* as dictating to lower courts that their primary job will be to carve out exceptions for disadvantaged individuals and groups by voting laws.[787] Courts have a governmental obligation to serve as a voice for oppressed minority voters and should avoid engaging in a relative comparative analysis with other states.

While most voter identification law opinions analyzed for this thesis engaged in the *Burdick* balancing test as prescribed in the *Crawford* decision, they are inconsistent in their approach.[788] The opinions identify the subgroups affected by a given law, and most judges have required actual evidence of hardship. As discussed earlier in *Veasey v. Perry*, plaintiffs should err on the side of providing the court with a variety of specific information about the burdens of the voting law and actual testimony of disenfranchised voters.[789] As the appellate court stated in *Santillanes* when rejecting the lower court's conjectural instances of voter disenfranchisement, "The court deals in probabilities, not possibilities."[790] Relative comparisons between states

[785] *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD at *22-23.
[786] *Crawford*, 553 U.S. at 208 (Scalia, A., concurring).
[787] Persily, *supra* note 101, at 127.
[788] *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).
[789] *Veasey v. Perry*, 71 F.Supp.3d at 682.
[790] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d at 1325.

minimize the burdens experienced by voters because types of accepted ID can vary greatly from state to state, and each ID not accepted can impact a unique subset of that state's population. Then, judges decide whether this burden on voting rights is substantial or not.

On the other hand, most courts readily accepted the state's interests of preventing voter fraud and improving elections integrity as legitimate state interests without requiring any further evidentiary support. Without adequate evidence on the other side of the equation, the cases used varying levels of judicial scrutiny in cases with similar facts. Two ID cases stated they were applying intermediate scrutiny, and only one applied strict scrutiny.[791] Although the other four cases did not explicitly state the level of scrutiny applied, the courts analyzed each law with great deference to the state alleged interests.[792]

Since courts have no predetermined test for determining a standard of review, Justice Breyer recommended a test in his dissent in *Crawford*.[793] Breyer stated that a severe burden on voting rights and a weak threat of fraud justifies heightened or strict scrutiny.[794] As stated earlier, plaintiffs have a better chance of proving a severe burden on voting rights if the state constitution explicitly provides a fundamental right to vote.[795]

Breyer added that less extreme cases call for some form of intermediate scrutiny, requiring the state to show its statute substantially relates to an important government interest.[796] Here, most courts tend to conflate facial challenges, as in *Crawford*, where the law can only be

[791] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d 598, 606 (D.N.M. 2007) and *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014) applied intermediate scrutiny. *Applewhite v. Commonwealth of Pennsylvania*, No. 330 MD 2012 (Pa. Commw. Ct. 2012) applied strict scrutiny.
[792] *Democratic Party of Georgia v. Perdue*, 288 Ga. 720 (2011); *League of Women Voters of Wisconsin Educ. Network v. Walker*, 357 Wis.2d 360 (Wis. 2014); *Gentges v. State Election Board*, 2018 OK 39 (Okla. 2018); *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d 1253 (N.D. Ala. 2018).
[793] *Crawford*, 553 U.S. at 237-39 (Breyer, S., dissenting).
[794] *Id.*
[795] Douglas, *supra* note 759, at 101 n. 73.
[796] *Id.*

struck down if it is unconstitutional in all of its applications with the as-applied standard, which depends on a plaintiff's unique circumstances.[797] On a facial challenge, the standard is very high for plaintiffs to show the law is unconstitutional in all applications, so the Court accepted government interests of preventing voter fraud and protecting election integrity without more.[798] Of all the cases analyzed, only two applied intermediate scrutiny, and only the district court in *Santillanes* required evidence of voter impersonation and fraud.[799] That court stated the city put forth no past allegations of voter fraud in municipal elections and only one alleged instance in the 2004 presidential election, which the court deemed insufficient and struck down the law.[800]

Since the Indiana law was not yet in effect, the *Crawford* court indicated that the law should be upheld on its face because the true extent of the constitutional burden remained unknown at the time of litigation.[801] The Court added, when the burden of the law could be better understood, a proper as-applied challenge may lie.[802] Now, as more of these laws have been in effect in 34 states, voter ID laws disenfranchise voters in each election, which is a constitutional injury, and as-applied cases are now ripe.[803] For courts to properly assess the burden on unique subsets of the voter population, such as Ms. Smith, a Wisconsin voter born in Missouri in 1916 without a birth certificate, the courts also need to understand the full extent of the problem the state seeks to combat with the statute.[804] For future as-applied challenges, it is incumbent upon courts to seek evidence-based justification for these important state interests, such as voter fraud,

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[797] Persily, *supra* note 101, at 96.
[798] *Crawford*, 553. U.S. at 192-97.
[799] *Veasey v. Perry*, 71 F.Supp.3d 627 (S.D. Texas 2014) and *Am. Civil Liberties Union of N.M. v. Santillane*s, 506 F.Supp.2d 598 (D.N.M. 2007), rev'd sub nom, *The Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).
[800] *Am. Civil Liberties Union of N.M. v. Santillane*s, 506 F.Supp.2d at 637.
[801] Persily, *supra* note 101, at 96.
[802] *Id.*
[803] *Id.* at 97-98.
[804] O*ne Wisconsin Institute v. Thomsen*, 198 F. Supp. 3d at 901.

and explanations for not accepting various forms of ID for many of the reasons stated by Professor Rubin, such as smoking out illegitimate purposes, stereotypes, and biases.[805]

If courts fail to properly balance burdens on voting rights and specific state issues, such as voter fraud, then literature suggests a myriad of legislative options. The first group of suggestions does not replace voter ID laws, but instead provide supplemental provisions to enhance voter access, which some states have adopted.[806] First, states could provide a free state-issued photo ID option as Indiana does.[807] Second, states could distribute photo IDs using mobile buses to visit isolated rural areas and low socioeconomic areas, as Alabama does.[808] Third, states may hold provisional ballots for a few days following an election until a voter returns with a photo ID, as Wisconsin and Georgia do.[809] Most expansively, states can follow fourteen states that allow Election Day registration and immediately let the newly registered person vote.[810]

Literature also suggests alternatives for voters who lack photo ID when the cost of obtaining supportive documentation may be cost-prohibitive.[811] First, states should provide and accept free non-photo voter ID cards, as Oklahoma does.[812] Second, if a voter lacks acceptable ID, the state could allow the voter to cast a provisional ballot and verify their identity using signature matching, as Florida and Washington do.[813] Similarly, states could require voters to

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[805] Douglas, *supra* note 139, at 192.
[806] Overton, *supra* note 66, at 674-77.
[807] *Crawford v. Marion County Election Bd.*, 553 U.S. at 186.
[808] *Greater Birmingham Ministries v. Merrill*, 284 F.Supp.3d at 1275.
[809] WIS. STAT. §5.02(6m) and 6.79(2)(a) (2014) and GA. CODE ANN. §21-2-417 (2010).
[810] *Automatic Voter Registration and Modernization in the States*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/analysis/voter-registration-modernization-states (last visited June 11, 2018). 14 states — California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maine, Minnesota, Montana, New Hampshire, Vermont, Wisconsin, and Wyoming — plus the District of Columbia, currently or will soon permit Election Day registration, which allows voters to register or update their existing registration on Election Day. *Id*.
[811] Overton, *supra* note 66, at 678-79.
[812] *Gentges v. State Election Bd*., 2018 OK at *7
[813] FLA. STAT. §101.043 (2016) and WASH. REV. CODE §29A.40.160(7)(a) (2017).

complete an affidavit affirming their identity before casting a provisional ballot, as Delaware and Idaho do.[814]

More practically, states should mandate a potential voter present photo identification at registration to verify identity and eligibility, instead of when voters reach the polls.[815] Given rapid technological advances, a voter registrar could take a photo of each voter during registration and cross-reference photo database from the state's motor vehicle office to create a digital picture polling book for precinct workers to quickly verify a voter's identity, when voters have images in the state's motor vehicle office databases.[816] In the near future, debate regarding privacy concerns will likely arise surrounding the possibility of creating a biometric or thumbprint voter verification databases.[817]

In addition, literature recommends that states implement better election administration practices.[818] Following the federal Help America Vote Act mandate, states already should have statewide voter registration databases.[819] Now, states should pass mandates for voter registrars to coordinate with other agencies to ensure removal of voters who die, move, or receive felony convictions.[820] By regularly updating voter rolls, states will also be able to regularly collect data on voter fraud issues to re-evaluate the effectiveness of voter ID laws.[821] Finally, antifraud legislation should also focus on government officials, especially partisan ones, who administer elections and have more opportunity than voters to determine election outcomes.[822]

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[814] DEL. CODE ANN. tit. 15, §4937 (2017) and IDAHO CODE ANN. §34-1106(2), 1113, and 1114 (2017).
[815] Overton, *supra* note 66, at 678.
[816] *Id.* at 679.
[817] *Id.*
[818] *Id.* at 680.
[819] *Id.*
[820] *Id.*
[821] *Id.*
[822] *Id.*

Finally, a nationwide photo ID requirement could be the most streamlined option, if properly implemented.[823] First, a nationwide ID law would provide an effective solution to concerns about voter fraud, both real and imagined.[824] Second, one consolidated law would eliminate confusion among voters and elections officials about acceptable forms of ID.[825]

Regardless of any reforms adopted, states should still engage in active voter education campaigns to educate the public about the acceptable forms of ID required to cast a ballot. Although the *Santillanes* district court ruling predates *Crawford*, the New Mexico district court in *Santillanes* found the city's lack of educational efforts regarding the ID law imposed a significant burden on voting rights.[826] The Tenth Circuit, however, after *Crawford*, noted that an ID law could not be struck down based on lack of educational efforts alone.[827] In post-*Crawford* case law, the Georgia Supreme Court in *Perdue* stated that voter education campaigns mitigated any burden of voter ID laws on voting rights.[828] Thus, even if a law cannot be struck down for lack of voter education, states may still benefit in the *Burdick* balancing test if voter education is part of the statutory rollout.

This thesis found few cases where courts found that voting implicated First Amendment freedom of expression rights, except for two opinions discussing an inherent "First Amendment interest" coupled with the franchise, described as the right to be among one's fellow citizens at the polling precinct and to openly participate in democracy.[829] More commonly, courts applied the *Burdick* balancing test when assessing ID laws and upheld most laws showing deference to

[823] *Developments in the Law: Voting and Democracy Source*, 119 HARV. L. REV. 1127, 1154 (2006).
[824] *Id.*
[825] *Id.*
[826] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 635-36.
[827] *The Am. Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d at 1322.
[828] *Democratic Party of Georgia v. Perdue*, 288 Ga. at 729
[829] *Am. Civil Liberties Union of N.M. v. Santillanes*, 506 F. Supp. 2d at 642 and *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. at 733 (Benham, R., dissenting).

the states' interest in preventing voter fraud and protecting election integrity. From these cases, plaintiffs should provide courts with a wealth of evidence to demonstrate the burden of the ID law on voting rights, including the state's history of discrimination, legislative history, actual testimony from disenfranchised voters, and actual costs to obtain supporting documents.

Also, for courts to properly balance interests, the *Burdick* test mandates states prove the important state interests addressed by the voter ID law. Without such, courts are unable to apply the appropriate level of judicial scrutiny. Literature suggests that even with 34 states having voter ID laws, the public perception of voter fraud is unwavering. Likewise, courts cannot address the effectiveness of these laws without complete information about the problem.

The cases analyzed for this thesis indicated that plaintiffs have a greater chance of receiving strict scrutiny analysis from a court if the state constitution explicitly provides for a fundamental right to vote. Literature suggests that even if courts applied strict scrutiny in all election law cases, the holdings in most cases would be the same.

Strict scrutiny analysis places the burden of proof on the government to show two things: a compelling state interest and how the law is narrowly tailored to meet this interest. While Crawford acknowledged voter fraud and election integrity as important state interests, the compelling state interest prong mandates proof of how the law addresses these interests. Then courts have required states to engage in good-faith consideration of alternative forms of ID and give justifications for deeming certain forms of ID as unacceptable under the narrowly tailored prong of the analysis.

This research area could benefit from future quantitative research studies to generalize the minimal level of proof courts accept to show significant burdens on voting. More analysis could also focus upon state constitutional challenges, possibly on a longer-timescale starting

before *Crawford* in 2008 to examine the impact of the ruling on how courts examine ID laws against state constitutional provisions. Finally, a study could examine the analytical framework courts utilize when examining laws regarding ballot-access for political candidates and compare this analysis with voting-access cases.

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