

2017

Voting Rights in the Modern Era of Minority Disenfranchisement

Hilary McDaniel

Follow this and additional works at: <http://digitalcommons.law.msu.edu/king>

Recommended Citation

Hilary McDaniel, *Voting Rights in the Modern Era of Minority Disenfranchisement* (2017),
Available at: <http://digitalcommons.law.msu.edu/king/255>

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Student Scholarship by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

Voting Rights in the Modern Era of Minority Disenfranchisement
by
Hillary McDaniel

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Michael Lawrence
Spring, 2017

VOTING RIGHTS IN THE MODERN ERA OF MINORITY DISENFRANCHISEMENT

Hilary McDaniel

TABLE OF CONTENTS

INTRODUCTION.....	2
I. THE RISE OF THE VOTING RIGHTS ACT	
A. Minority Disenfranchisement before the Voting Rights Act.....	5
1. <i>Poll Taxes</i>	6
2. <i>“Voter Fraud” as Mere Pretext for Minority Discrimination</i>	6
B. The Key Provisions of the Voting Rights Act.....	8
II. THE FALL OF THE VOTING RIGHTS ACT	
A. The Ruling that Opened the Door to the Modern Era of Disenfranchisement.....	9
B. The Unfortunate Consequence of Shelby County.....	10
1. <i>The Emergence of Strict Voter ID Laws</i>	11
2. <i>Disparate Effect on Minority Voters</i>	12
3. <i>Empirical Evidence of Discriminatory Effect</i>	13
C. The Poll Tax of the 21 st Century: The Voter ID Law.....	15
1. <i>Affluence as an Electoral Standard</i>	15
2. <i>Voter ID Laws Favor the Republican Party</i>	16
3. <i>“Voter Fraud” as Mere Pretext for Minority Discrimination</i>	17
III. THE ILLEGALITY OF THE STRICT VOTER ID LAW	
A. Are Voter ID Laws Constitutional?.....	18
1. <i>The Modern Approach to Reviewing Voter ID Laws</i>	19
2. <i>No Rational Basis for Discriminatory Law that “Protects” Against a Non-Existent Threat</i>	21
3. <i>Crawford Leaves Open the Opportunity for “As-Applied” Challenges</i>	23
B. Strict Voter ID Laws Violate Section 2 of Voting Rights Act.....	23
1. <i>You can go Too Far With a Voter ID Law</i>	24
2. <i>Using Veasey v. Abbott Framework to Invalidate Strict Voter ID Laws</i>	27
VI. A NEW PRECLEARANCE FORMULA	
A. Justification for Voting Rights Act Amendment.....	28
B. The Original Section 4(b) Formula as a Model.....	29
1. <i>First Prong of the New Preclearance Formula</i>	29
2. <i>Second Prong of the New Preclearance Formula</i>	30
CONCLUSION.....	31

INTRODUCTION

On November 8, 2016, after an “unprecedented” election,¹ America elected a politically inexperienced billionaire TV star as its 45th President.² While political pundits grasp for answers as to how Donald Trump claimed his shocking victory,³ some argue that the answer is straightforward: restrictive voting regulations.⁴ Electing the first reality TV star is not the only fact about the 2016 election to make history; it was also the first presidential election in 50 years without the full protections of the Voting Rights Act of 1965 (“Voting Rights Act”).⁵

The Voting Rights Act, passed on August 6, 1965, was designed to combat cumbersome voting regulations that effectively denied voting rights to African Americans.⁶ During the Jim Crow era⁷, local and state governments enacted voting restrictions that “were facially neutral but practically discriminatory,” to prevent African American suffrage.⁸ One of the harshest tactics used in the South was the poll tax.⁹ As a prerequisite for voting, individuals were required to pay a fee, called a “poll tax.”¹⁰ That tactic suppressed minority votes because minority voters were

¹ Danielle Kurtzleben, *The Most ‘Unprecedented’ Election Ever?: 65 Ways it Has Been*, NPR (July 3, 2016), <http://www.npr.org/2016/07/03/484214413/the-most-unprecedented-election-ever-65-ways-it-has-been>.

² Andrew Buncombe, *President Donald Trump: Billionaire Reality TV Star Becomes the Most Powerful Person in the World*, INDEP. (Nov. 9, 2016), <http://www.independent.co.uk/news/world/americas/us-elections/donald-trump-president-wins-latest-us-election-2016-what-happened-a7406586.html>; Jeff Nesbit, *Donald Trump Is the First True Reality TV President*, TIME (Dec. 9, 2016), <http://time.com/4596770/donald-trump-reality-tv/>.

³ See Anthony J. Gaughan, *Explaining Donald Trump’s Shock Election Win: Five Factors Behind America’s Staggering Decision*, SCI. AM. (Nov. 9, 2016), <https://www.scientificamerican.com/article/explaining-donald-trump-s-shock-election-win/>.

⁴ Alice Ollstein & Kira Lerner, *Republicans Were Wildly Successful at Suppressing Voters in 2016*, THINKPROGRESS (Nov. 15, 2016), <https://thinkprogress.org/2016-a-case-study-in-voter-suppression-258b5f90ddcd#.bq9swngr4>.

⁵ *Id.*

⁶ Orville Vernon Burton, *Tempering Society’s Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 7 (2015).

⁷ Jim Crow laws segregated African Americans from white society. *Jim Crow Laws*, PBS, <http://www.pbs.org/wgbh/americanexperience/freedomriders/issues/jim-crow-laws> (last visited Mar. 22, 2017). Those laws “represented a formal, codified system of racial apartheid that dominated the American South” from the 1890s until the mid-1960s. *Id.*

⁸ Burton, *supra* note 6, at 10.

⁹ *Id.* at 14.

¹⁰ *Id.* at 14.

disproportionately poor and could not afford the tax.¹¹ Although “[t]he creation of the poll tax was justified as a means of preventing voter fraud,” fraud prevention was mere pretext to disenfranchise African Americans.¹² Poll taxes, and other discriminatory voting regulations had a devastating effect on minority suffrage. As of 1912, 42 years after the Constitution was amended to grant African Americans the right to vote, tactics like the poll tax prevented all but four percent of African Americans from voting in the South.¹³

The Voting Rights Act was exceptionally successful at enfranchising African Americans.¹⁴ For example, in Mississippi, “voter turnout among blacks increased from 6 percent in 1964 to 59 percent in 1969.”¹⁵ As such, the Act is considered “among the most far-reaching pieces of civil rights legislation in U.S. history.”¹⁶

Recent changes to the Voting Rights Act present a renewed threat to unrestrained minority suffrage. In 2013, the Supreme Court “gutted” one of its core provisions.¹⁷ In *Shelby County v. Holder*, the Court declared unconstitutional the section of the Voting Rights Act that required states with a history of voter discrimination to receive preclearance from the federal government before enacting a change to its voting law.¹⁸

In the wake of *Shelby County* new voting regulations have popped up across the country. One of the most popular forms of new restrictions include those that require voters to show a photo ID in order to vote, known as strict voter ID laws.¹⁹ In fact, just hours after the *Shelby*

¹¹ *Id.*

¹² *Id.* at 14-15.

¹³ *Id.* at 9-10 (2015).

¹⁴ See *Voting Rights Act*, HIST. (2009), <http://www.history.com/topics/black-history/voting-rights-act>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Richard L. Hasen, Opinion, *Turning the Tide on Voting Rights*, N.Y. TIMES (Aug. 2, 2016), https://www.nytimes.com/2016/08/02/opinion/campaign-stops/turning-the-tide-on-voting-rights.html?_r=0.

¹⁸ *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013).

¹⁹ Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, FRONTLINE (June 26, 2013), <http://www.pbs.org/wgbh/frontline/article/with-voting-rights-act-out-states-push-voter-id-laws/>.

County decision, some states that had been required to receive preclearance under the Voting Rights Act began taking steps toward implementing voter ID laws.²⁰ Voting rights advocates argue that regulations which require voter ID “disproportionately affect poor and minority voters.”²¹ In response, proponents of voter ID laws echo an eerily similar justification to that of proponents of the poll tax: preventing voter fraud.²² Today, voter fraud is still “practically non-existent.”²³

Political scholars ponder whether these new restrictive voting regulations implemented in the wake of *Shelby County* had an effect on the outcome of the 2016 presidential election. But, perhaps the more important question is whether such regulations are even legal. The answer to the latter question could have an enduring effect on the future of voting rights in America.

This paper argues that strict voter ID laws are the poll tax of the 21st century and should be nationally recognized as illegal. Because strict voter ID laws unlawfully disenfranchise minorities, Congress should amend the Voting Rights Act to prohibit strict voter ID laws and include a new federal preclearance formula to protect the right to vote. Section I of this paper discusses the necessity of the Voting Rights Act. It explains the climate of voting rights before the Voting Rights Act was passed and analyzes key provisions of the Act. Section II covers the *Shelby County* decision and discusses its effect on the right to vote. Section III argues that strict voter ID laws are unconstitutional, and that such laws violate federal statutory law. Finally, Section IV proposes a solution to protect minority voters from modern era discriminatory voting regulations: a new preclearance formula based on modern data.

²⁰ *Id.*

²¹ Kara Brandeisky et al., *Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014), <https://www.propublica.org/article/voting-rights-by-state-map>.

²² Christopher Ingraham, *New Evidence That Voter ID Laws ‘Skew Democracy’ in Favor of White Republicans*, WASH. POST (Feb. 4, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/?utm_term=.fca32944ca71.

²³ *Id.*

I. THE RISE OF THE VOTING RIGHTS ACT

A. Minority Disenfranchisement before the Voting Rights Act

President Lyndon B. Johnson eloquently stated in his “We Shall Overcome Speech,” the founders of our country knew that, “[t]he most basic right of all was the right to choose your own leaders.”²⁴ President Johnson delivered his famous speech on March 15, 1965, in response to what is now known as “Bloody Sunday.”²⁵

After decades of struggle between those African Americans who simply sought to exercise their constitutional right and the white supremacists who sought to suppress those voices, racial and political tension peaked on March 7, 1965, “Bloody Sunday.” On that day hundreds of peaceful civil rights protestors were brutally attacked by Alabama state troopers as they attempted to march from Selma to Montgomery for voting rights.²⁶

The 15th Amendment of the Constitution was intended to protect African Americans’ right to vote, but white supremacists in the Jim Crow South were “tragically effective” in denying African Americans that right.²⁷ Following the ratification of the 15th Amendment, southern states enacted facially neutral voting regulations to disenfranchise minority voters.²⁸ Those regulations included requiring literacy tests, poll taxes, and the use of separate ballot boxes.²⁹ “By 1912, the South had virtually disenfranchised African Americans.”³⁰

²⁴ DONATHAN L. BROWN & MICHAEL L. CLEMONS, VOTING RIGHTS UNDER FIRE: THE CONTINUING STRUGGLE FOR PEOPLE OF COLOR 1 (Brian D. Behnken ed. 2015).

²⁵ *Id.*; Christopher Klein, *Remembering Selma’s “Bloody Sunday,”* HIST. (Mar. 6, 2015), <http://www.history.com/news/selmas-bloody-sunday-50-years-ago>.

²⁶ *Voting Rights Act*, *supra* note 14.

²⁷ Burton, *supra* note 6, at 16.

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ *Id.* at 9-10.

1. *Poll Taxes*

The poll tax can be described as “one of the great symbols of Southern racism.”³¹ In fact, the practice was eventually determined to be so reprehensible that it received its very own constitutional ban.³² The poll tax successfully disenfranchised African Americans as a class because African Americans were disproportionately poor.³³ Depending on the state, tax payments “ranged from \$ 1.00 to \$ 2.00 per year.”³⁴ In Texas, the required payment was “equivalent to \$15.48 in today's dollars.”³⁵ To some minority laborers, that meant choosing between spending a day’s wage and not voting.³⁶ To ensure that white voters were not disenfranchised, states created a series of loopholes to guarantee poor white voting while still suppressing African American votes.³⁷ For example, the poll tax was “optional”; tax assessors were not required to solicit payment of the poll tax.³⁸ The poll tax endured as an effective method of suppressing minority votes until it was banned in the 1960s.³⁹

2. *“Voter Fraud” as Mere Pretext for Minority Discrimination*

During the Jim Crow era, poll tax proponents argued that the tax prevented voter fraud.⁴⁰ A.W. Terrell, a lead advocate for poll taxes in Texas, claimed poll taxes would “protect the

³¹ Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U.L. REV. 63, 65 (2009).

³² See U.S. CONST. amend. XXIV § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.”).

³³ Burton, *supra* note 6, at 14.

³⁴ Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U.L. REV. 1023, 1041 (2009).

³⁵ Burton, *supra* note 6, at 14.

³⁶ *Id.*

³⁷ Ellis, *supra* note 34, at 1041.

³⁸ *Id.*

³⁹ *Id.* at 1043.

⁴⁰ Charles Postel, *Why Voter ID Laws are Like a Poll Tax*, POLITICO (Aug. 7, 2012, 12:26AM), <http://www.politico.com/story/2012/08/why-voter-id-laws-are-like-a-poll-tax-079416>.

citizen against machine politics, convention dictation, and corrupt methods at the polls .”⁴¹

Terrell argued, “because casting a ballot costs nothing, votes are quite cheap and were frequently sold for a trifle.”⁴² Thus, Terrell maintained that “[f]orcing each voter to pay a poll tax supposedly increased the ‘value’ of the vote and made ‘political machines’ . . . buying the votes of poor African American and Latino voters more difficult.”⁴³ Early reporting on the issue made it clear that “preventing fraud was a pretext for the true discriminatory purpose: to minimize the minority vote so to ensure the dominance of the Democratic Party in Texas.”⁴⁴ Thus, proponents of harsh voting regulations in the Jim Cross South used voter fraud as mere pretext to maintain political dominance.

The voter fraud rhetoric continued through the mid-1960s. Although white southerners “knew that the purpose of the poll tax was to disfranchise African Americans and other minorities, they continued to use the pretext of fraud to justify a poll tax.”⁴⁵ During the Civil Rights Movement, it finally became clear to the federal government that only federal intervention could eliminate the “insidious and pervasive evil which had been perpetuated in certain parts of our country.”⁴⁶

In November 1964, President Lyndon B. Johnson directed his White House aides and the Justice Department to design “a powerful and unprecedented measure to assure Negro voting rights.”⁴⁷ President Johnson advised his Attorney General, Nicholas Katzenbach, a key author of the Act, that he wanted “[the] bill completely legal,” so as to withstand any constitutional

⁴¹ Burton, *supra* note 6, at 14.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Writing for the Houston Daily Post in 1902, journalist and eventual Democratic Texas senator, E.G. Senter, reported a “weighty reason” for Texas to adopt a poll tax was “that it means the elimination of the race issue in politics... With two strong parties in Texas today, the negro would hold the balance of power.” *Id.* at 15.

⁴⁵ *Id.*

⁴⁶ *S.C. v. Katzenbach*, 383 US 301, 309 (1966).

⁴⁷ *Nation: Enforcing the 15th*, TIME (Mar. 26, 1965),

<http://content.time.com/time/subscriber/article/0,33009,841744-1,00.html>.

challenges by Southern congressmen.⁴⁸ Accordingly, drafters of the law considered only “reliable evidence of actual discrimination.”⁴⁹ Katzenbach specifically explained the premise behind the bill “[was] that the coincidence of low electoral participation and the use of tests and devices results from racial discrimination in the administration of the tests and devices.”⁵⁰ As such, the formula was “calculated to attack the most flagrant rights offenders.”⁵¹ On August 6, 1965, Lyndon B. Johnson signed the Voting Rights Act.

B. The Key Provisions of the Voting Rights Act

Section 2 of the Voting Rights Act broadly prohibits voting regulations that discriminate on “account of race or color.”⁵² Section 5 gives Section 2 teeth; it requires specially covered jurisdictions, as identified in Section 4(b), to receive federal preclearance before enacting a new voting regulation.⁵³ According to the Section 4(b) formula, a state or political subdivision was required to receive preclearance from the federal government if, (1) it maintained on November 1, 1964, a “test or device,” restricting the opportunity to register and vote, and (2) less than 50 percent of persons of voting age voted in the presidential election of November 1964.⁵⁴ In 1975 the Voting Rights Act was broadened to cover “voting discrimination against members of language minority groups.”⁵⁵ Before the preclearance formula was overruled, nine states were

⁴⁸ *Id.*

⁴⁹ Oluoma Kas-Osoka, *A New Preclearance Coverage Formula: Renewing the Promise of the Voting Rights Act*, 47 WASH. U. J. L. & POL’Y 151, 159 (2015) (quoting *S.C. v. Katzenbach*, 383 U.S. 301, 329 (1966)).

⁵⁰ *Nation: Enforcing the 15th*, *supra* note 47.

⁵¹ *Id.*

⁵² The Voting Right Act of 1965, Pub. L. No. 89-110 (1965).

⁵³ *Id.*

⁵⁴ *About Section 5 of The Voting Rights Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Aug. 8, 2015).

⁵⁵ *Id.* (internal quotation marks omitted).

covered in their entirety: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia.⁵⁶

Until 2013, Section 5 provided a federal check on states with a history of voting discrimination. It prevented such states from implementing voting procedure changes that would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁵⁷

Although the Voting Rights Act was only set to remain in place until 1970, Congress repeatedly approved of its renewal.⁵⁸ The Voting Rights Act, including the original preclearance formula, remained in place for 48 years.⁵⁹

II. THE FALL OF THE VOTING RIGHTS ACT

A. The Ruling that Opened the Door to the Modern Era of Disenfranchisement

On June 25, 2013, The Supreme Court issued an opinion that would jeopardize the unrestrained suffrage that African Americans had enjoyed for decades. In *Shelby County v. Holder*, Shelby County, Alabama challenged Section 4(b) and Section 5 of the Voting Rights Act as facially unconstitutional because those provisions required some, but not, all states to receive federal preclearance.⁶⁰ The 5-4 majority held that the Section 4(b) preclearance formula was unconstitutional and could “no longer be used as a basis for subjecting jurisdictions to preclearance” because it was based on outdated statistics and eradicated voting practices.⁶¹

⁵⁶ *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Aug. 6, 2015).

⁵⁷ *Beer v. United States*, 425 US 130, 141 (1976).

⁵⁸ *About Section 5 of The Voting Rights Act*, *supra* note 54.

⁵⁹ *Id.*

⁶⁰ 133 S. Ct. 2612, 2622-23 (2013).

⁶¹ *Id.* at 2631.

The Court reasoned that the Voting Rights Act “sharply departs” from the “fundamental principles of equal sovereignty” because the power to regulate elections is reserved to the States.⁶² The Voting Rights Act infringed upon state sovereignty by restricting nine states from making any changes to their voting laws without federal approval.⁶³ At the time the Voting Rights Act was enacted, however, interference in state sovereignty was justified by “exceptional conditions.”⁶⁴ The Court maintained that the low rate of African Americans registered to vote in the South, and the “variety of requirements and tests [enacted by several States] specifically designed to prevent African Americans from voting” justified the 1965 coverage formula.⁶⁵ The Court held that in the 50 years since the Voting Rights Act was enacted, however, “things have changed dramatically” and today, the racial disparity among voter registration and turnout no longer exists to justify for the coverage formula.⁶⁶

Although, the Court invalidated the preclearance formula, it did not declare Section 5 unconstitutional. In fact, the Court explicitly stated, “Congress may draft another formula based on current conditions.”⁶⁷ As of today, however, no formula exists, and therefore, no states are required to receive preclearance.

B. The Unfortunate Consequence of Shelby County

In her *Shelby County* dissent, Justice Ginsberg cautioned, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁶⁸ Her warning was well warranted.

⁶² *Id.* at 2623, 2624.

⁶³ *Id.* at 2624.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2624, 2627 (internal quotation marks omitted).

⁶⁶ *Id.* at 2625, 2627-28.

⁶⁷ *Id.* at 2631.

⁶⁸ *Id.* at 2650 (Ginsberg, J., dissenting).

Within just 24 hours of the *Shelby County* decision, five of the nine states that had been required to receive preclearance under the Voting Rights Act had “already mov[ed] ahead with voter ID laws, some of which had already been rejected as discriminatory under the Voting Rights Act.”⁶⁹ As of this writing, all nine of the states required to receive preclearance under Section 5 of the Voting Rights Act have enacted some form of voter ID law.⁷⁰ Four of those states now *require* voter ID as a prerequisite of voting, and the remaining five states now request IDs.⁷¹

1. The Emergence of Strict Voter ID Laws

Shelby County allows states with a history of voting discrimination to pass voter ID laws without receiving federal approval, but voter ID laws did exist before *Shelby County*. States that were not covered by Section 5 began to enact voter ID laws a few years before the Voting Rights Act was gutted. The first state to enact a voter ID law was South Dakota, in 2003.⁷² Beginning in 2006, Republican politicians began calling for voter ID laws as a means of preventing the threat of fraud. In 2006, Republican strategist, Karl Rove, warned of an “enormous and growing problem with elections in certain parts of America today.”⁷³

Although no state had ever required voter ID before 2003, today, 34 states have some degree of voter ID laws.⁷⁴ Since *Shelby County*, it is has become that much easier for southern state to enact voter ID laws.

⁶⁹ Childress, *supra* note 19.

⁷⁰ Jasmine C. Lee, *How States Moved Toward Stricter Voter ID Laws*, N.Y. TIMES (Nov. 3, 2016), https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html?_r=0.

⁷¹ *Id.*

⁷² Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, INST. FOR RACE & JUST. 1, 6 (2014), <https://today.law.harvard.edu/wp-content/uploads/2014/06/FullReportVoterIDJune20141.pdf>.

⁷³ *Id.* at 7.

⁷⁴ *Voter Identification Requirements: Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (Mar. 28, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

Voter ID laws are characterized as strict or non-strict. A strict ID law is one where “voters without acceptable identification must vote on a provisional ballot and also take steps after Election Day for it to be counted.”⁷⁵ In other words, residents of states with a strict ID laws cannot vote on a regular ballot without presenting valid identification.

2. *Disparate Effect on Minority Voters*

To many Americans, producing ID before casting a vote is, at most, an inconvenience. Lawmakers in favor of voter ID laws argue that asking for an identification as a prerequisite to voting is reasonable because the same requirement exists for purchasing a plane ticket and full-strength Sudafed.⁷⁶ But eleven percent of United States citizens lack government-issued photo ID.⁷⁷ For minorities, an ID requirement presents an especially high barrier to voting access.⁷⁸ “Mandating a government issued photo ID for federal elections . . . disproportionately burdens low-income voters and minorities.”⁷⁹ About twenty-five percent of African American citizens do not have government-issued photo ID, compared to only eight percent of white citizens.⁸⁰

For individuals without the proper ID to vote, locating the documentation required to obtain government-issued ID can create an additional obstacle to voting access.⁸¹ For example, when Anthony Settles, an African American resident of Texas, sought to obtain a Texas photo ID in order to vote, he was unsuccessful because his name did not match his birth certificate.⁸²

⁷⁵ *Id.*

⁷⁶ See Sari Horwitz, *Getting a Photo ID so You Can Vote is Easy. Unless You're Poor, Black, Latino or Elderly.*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.10b5b20120fe

⁷⁷ *Oppose Voter ID Legislation: Fact Sheet*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (last visited Apr. 17, 2017).

⁷⁸ Horwitz, *supra* note 76.

⁷⁹ Ari Berman, *Voting Rights in the Age of Trump*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/22/opinion/voting-rights-in-the-age-of-trump.html>

⁸⁰ *Oppose Voter ID Legislation: Fact Sheet*, *supra* note 77.

⁸¹ See Horwitz, *supra* note 76.

⁸² *Id.*

Settles' mother changed Settles' last name when she was married in 1964.⁸³ Without the name-change certificate, Settles would have to pay \$250 for a court process that would establish his name change—a price that Settles was not willing to pay to vote.⁸⁴ The story of Anthony Settles is not an anomaly. Nefertiti Helem, an African American senior citizen, was unable to vote in the 2016 presidential election because she was unable to locate her birth certificate.⁸⁵ Although Helem “presented her Social Security card, proof of residence, and Illinois State ID, the [Wisconsin] DMV staff said it would take them at least three weeks to find and verify her birth certificate.”⁸⁶ Settles and Helem provide anecdotes of minorities on both ends of the country who have been disenfranchised because they lack proper documentation of their identity.

3. Empirical Evidence of Discriminatory Effect

Because voter ID laws are a relatively recent phenomenon, little empirical evidence exists on the actual consequences of voter ID laws.⁸⁷ Most of the existing studies have concluded that, despite the fact that minority voters disproportionately lack government-issued ID, the presence of voter ID laws have a minimal impact on overall voter turnout.⁸⁸ But, much of the existing research on the topic analyzed elections that occurred before the strictest voter ID laws were enacted.⁸⁹ A new study from researchers at the University of California San Diego is one of the first to analyze the interaction between race and presence of strict voter ID laws.⁹⁰

The University of California San Diego study explains that “[t]he key test is not whether

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Alice Miranda Ollstein, *This Is How Hard It Is To Get A Voter ID In Wisconsin*, THINKPROGRESS (Apr 2, 2016) <https://thinkprogress.org/this-is-how-hard-it-is-to-get-a-voter-id-in-wisconsin-8be821ef8a88>.

⁸⁶ *Id.*

⁸⁷ Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Voters* 3, <http://pages.ucsd.edu/~zhajnal/page5/documents/voterIDhajnaletal.pdf>.

⁸⁸ *Id.*

⁸⁹ *Id.* at 4.

⁹⁰ Vann R. Newkirk II, *How Voter ID Laws Discriminate*, ATLANTIC (Feb. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/>.

turnout is lower in strict voter ID states but instead whether the turnout gap between whites and non-whites is greater in strict voter ID states.”⁹¹ Accordingly, the study singled out states with strict voter ID laws.⁹² Using data from the Cooperative Congressional Election Study,⁹³ the University of California San Diego further singled out respondents “who self-identified as white, Black, Latino, Asian American, or indicated that they were multi-racial.”⁹⁴

Based on that data, the University of California San Diego model “reveal[ed] substantial drops in turnout for minorities under strict voter ID laws.”⁹⁵ Specifically, the study concluded that “voter participation dropped an average of 4.7 percentage points among self-identified Hispanics, blacks, Asian-Americans and mixed race individuals in general elections.”⁹⁶ Additionally, the impact of strict voter ID disproportionately suppressed minority voter turnout in relation to white voter turnout.⁹⁷ The predicted gap between Latino and white voters in general elections, “more than doubles from 4.9 points in states without strict ID laws to 13.5 points in states with strict photo ID laws.”⁹⁸ Additionally, “That gap increased by 2.2 points for African Americans and by 5 points for Asian Americans.”⁹⁹ The empirical evidence of discrimination provided by the novel University of California San Diego study proves the discriminatory effect of strict voter ID laws.

⁹¹ Zoltan Hajnal, et al., *supra* note 87, at 5.

⁹² *Id.* at 11.

⁹³ *Id.*

⁹⁴ *Id.* at 12.

⁹⁵ *Id.* at 16.

⁹⁶ Daniel Wheaton, *UCSD Researchers: Voter ID laws Suppress Dems, Minorities*, SAN DIEGO UNION-TRIB. (Feb. 10, 2016, 3:46 PM), <http://www.sandiegouniontribune.com/news/data-watch/sdut-voter-id-paper-2016feb10-story.html>.

⁹⁷ Scott Keyes, *Study Finds Republican Voter Suppression Is Even More Effective Than You Think*, THINKPROGRESS (Feb 2, 2016), <https://thinkprogress.org/study-finds-republican-voter-suppression-is-even-more-effective-than-you-think-3b2562ae2f52>.

⁹⁸ *Id.*

⁹⁹ *Id.*

C. The Poll Tax of the 21st Century: The Voter ID Law

The 24th Amendment prohibits Congress from conditioning the right to vote in federal elections on the payment of a “poll tax or other tax.”¹⁰⁰ The Supreme Court has held that state and local governments are also constitutionally prohibited from charging a poll tax. *Harper v. State Board of Elections* held that a state poll tax is unconstitutional because “it makes the affluence of the voter . . . an electoral standard.”¹⁰¹ At the 1964 ceremony celebrating the ratification of 24th Amendment, President Johnson said, “There can be no one too poor to vote.”¹⁰² Unfortunately, that sentiment is no longer true today.

Strict voter ID laws are poll tax of the 21st century because they make the wealth a voter an electoral standard, because proponents of the law are motivated by the prospect of maintaining political dominance, and because voter fraud is used as pretext to suppress minority votes.

1. Affluence as an Electoral Standard

In most states, individuals must pay a fee to receive a state photo identification card.¹⁰³ Thus, in states that require a voter ID, individuals who do not have a valid ID, must pay a fee before they can vote. As such, the affluence of the voter bears on his or her ability to vote. In most states, a state identification card costs about \$10.00 to \$25.00.¹⁰⁴ Controlling for inflation,

¹⁰⁰ Sobel, *supra* note 72, at 5.

¹⁰¹ 383 U.S. 663, 666 (1966).

¹⁰² Sobel, *supra* note 72, at 5.

¹⁰³ See *Non-Driver Identification*, N.H. DMV (2012) <https://www.nh.gov/safety/divisions/dmv/driver-licensing/non-driver-identification/>; see also *Obtaining an Identification Card*, VA. DMV (2017) https://www.dmv.virginia.gov/drivers/#id/get_id.asp; see also *Driver License Division Fees*, TEX. DEP’T PUB. SAFETY (2017) <https://www.dps.texas.gov/DriverLicense/fees.htm>; see also *Fees*, FLA. HIGHWAY SAFETY & MOTOR VEHICLES (2017) <http://www.flhsmv.gov/fees/>; see also *Driver License*, UTAH DEP’T PUB. SAFETY (2017) <https://dld.utah.gov/licensingid-cards/identification-card/>.

¹⁰⁴ *Id.*

the price for a state identification card today is equivalent to the cost of poll taxes during the Jim Crow era.¹⁰⁵

The Harvard Law School Institute for Race and Justice researched the cost of obtaining a “free” ID to vote.¹⁰⁶ That report found that even in states that offer “free” ID, “the expenses for documentation, travel, and waiting time are significant—especially for minority group and low-income voters—typically ranging from about \$75 to \$175.”¹⁰⁷ Further, “When legal fees are added to these numbers, the costs range as high as \$1,500.”¹⁰⁸ Like the poll tax in the Jim Crow South, voter ID laws prevent individuals without sufficient funds from voting.

2. Voter ID Laws Favor the Republican Party

Republican lawmakers in favor of voter ID laws, like poll tax proponents in the Jim Crow South, are motivated by political gain.¹⁰⁹ Voter ID laws disproportionately decrease Democratic voter turnout. The presence of strict voter ID laws decreases voter turnout among “strong liberals” by 7.9 percentage points.¹¹⁰ In contrast, strict voter ID laws actually increase “strong conservative” turnout by 4.8 percentage point.¹¹¹

Republican politicians admit leveraging voter ID laws for political advantage.¹¹² For example, Florida’s former Republican Party chairman acknowledged that Florida’s voter ID law was designed to suppress Democratic votes.¹¹³ Additionally, during a federal trial on Wisconsin’s voter ID law, “a former Republican staffer testified that GOP senators were ‘giddy’

¹⁰⁵ As mentioned above, the poll tax in Texas is “equivalent to \$15.48 in today's dollars.” Burton, *supra* note 6, at 14.

¹⁰⁶ See Sobel, *supra* note 72.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.*

¹⁰⁹ See Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html>.

¹¹⁰ Keyes, *supra* note 97.

¹¹¹ *Id.*

¹¹² See Wines, *supra* note 109.

¹¹³ *Id.*

about the idea that the state’s 2011 voter-ID law might keep Democrats, particularly minorities in Milwaukee, from voting and help them win at the polls.”¹¹⁴

Such tactics *appear* to have benefitted the Republican Party in the 2016 presidential election.¹¹⁵ According to Wisconsin records, approximately 300,000 Wisconsin residents lacked the proper ID to vote in the 2016 presidential election.¹¹⁶ Donald Trump, the Republican candidate, won that state by fewer than 30,000 votes.¹¹⁷

3. “Voter Fraud” as Mere Pretext for Minority Discrimination

Just as in the days of the Jim Crow South, voter fraud is still practically non-existent, yet, Republican lawmakers repeatedly cite fraud prevention as the rationale for voter ID laws.¹¹⁸ The incident rate of in-person voter fraud, the type of alleged fraud that voter ID laws protect against, ranges between 0.0003 percent and 0.0025 percent.¹¹⁹ Meaning that it is more likely that an American “will be struck by lightning than that he will impersonate another voter at the polls.”¹²⁰

Minorities overwhelmingly vote democratic. Compared to Republicans, “Democrats hold an 80%-11% advantage among blacks.”¹²¹ Therefore, disenfranchising minorities benefits the Republican Party. In fact, the Former Republican Chair of Florida admitted that the voter fraud justification was a “marketing ploy” to benefit the Republican Party.¹²² As noted above, poll tax

¹¹⁴ Horwitz, *supra* note 76.

¹¹⁵ Ingraham, *supra* note 22.

¹¹⁶ Ollstein & Lerner, *supra* note 4.

¹¹⁷ *Id.*

¹¹⁸ *See supra* Section II(B)(1).

¹¹⁹ *Debunking the Voter Fraud Myth*, BRENNAN CENTER FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>; *see also infra* Section III(A)(2).

¹²⁰ *Debunking the Voter Fraud Myth*, *supra* note 119.

¹²¹ *A Deep Dive Into Party Affiliation*, PEW RESEARCH CTR. (Apr. 7, 2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation/>.

¹²² *See* Michael Wines, *supra* note 109.

proponents used the “fraud prevention” rationale as pretext for the same underlying motivation: “to minimize the minority vote so as to ensure” continued political dominance.¹²³

Because poll taxes have been prohibited for decades, and because voter ID laws are the modern embodiment of the poll tax, it would seem that voter ID laws are per se unlawful. The nuanced state of election law jurisprudence, however, does not provide for such a clear-cut approach to the validity of voter ID laws.

III. THE ILLEGALITY OF THE STRICT VOTER ID LAW

A. Are Voter ID Laws Constitutional?

Over the last century, the Supreme Court has espoused a “dichotomy of approaches” to election law cases involving an individual’s eligibility to cast a vote.¹²⁴ During the late-1960’s, the Court consistently “construed the right to vote in the context of voter eligibility as a fundamental right.”¹²⁵ In *Harper v. State Board of Elections*, the Supreme Court maintained that the “the political franchise of voting” is a “fundamental political right.”¹²⁶ As such, the Court reasoned that any law that infringes upon a citizen’s right to vote must be “meticulously scrutinized.”¹²⁷ Therefore, in *Harper*, when the Court reviewed the constitutionality of Virginia’s poll tax, it applied strict scrutiny. As noted above, the Court held that the poll tax was unconstitutional because “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”¹²⁸

¹²³ Burton, *supra* note 6, at 15.

¹²⁴ Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 150 (2008) (“The Court first alluded to the right to vote as fundamental as far back as 1886. . .”).

¹²⁵ *Id.* at 151.

¹²⁶ 383 U.S. 663, 667 (1966).

¹²⁷ *Id.* at 667.

¹²⁸ *Id.* at 666 .

Today, the appropriate standard of review is not as clear. In 1992, in *Burdick v. Takushi*, the Supreme Court held that only those laws that create a “severe” burden on the right to vote must be subjected to strict scrutiny review.¹²⁹ The Court reasoned that “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”¹³⁰ Inconsistent Supreme Court decisions have created a “confused and muddled” electoral law doctrine.¹³¹

1. The Modern Approach to Reviewing Voter ID Laws

The Supreme Court ruled on the constitutionality of voter ID laws even before it overruled the preclearance formula of the Voting Rights Act. In *Crawford v. Marion County Election Board*, the Supreme Court upheld the constitutionality of Indiana’s 2005 voter ID law (“SEA 483”).¹³²

Indiana’s law required citizens who voted in person “to present photo identification issued by the government.”¹³³ Indiana voters who lacked the proper photo ID could cast a provisional ballot which would be counted if the voter brought the proper photo ID to a designated government within 10 days or if the voter signed a statement attesting they cannot afford one.¹³⁴

Despite the fact that voter ID laws, like SEA 483, infringe upon an individual’s right to vote, when the Court reviewed SEA 483, it did not apply strict scrutiny, as required by *Harper*.¹³⁵ Rather, the Court applied a balancing test. It stated that, when reviewing a

¹²⁹ Douglas, *supra* note 124, at 163.

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

¹³¹ Douglas, *supra* note 124, at 163.

¹³² 553 U.S. 181, 204 (2008)

¹³³ *Id.* at 185.

¹³⁴ *Burton*, *supra* note 6, at 7.

¹³⁵ *Harper v. State Board of Elections* 383 U.S. 663, 667 (1966)

constitutional challenge to an election regulation, the Court should “weigh the asserted injury to the right to vote against the precise interests put forward by the State as justifications for the burden imposed by its rule.”¹³⁶

Those State interests included “deterring and detecting voter fraud.”¹³⁷ Despite the fact that the record contained “no evidence of any such fraud actually occurring in Indiana at any time in its history,”¹³⁸ and despite the fact that the Court acknowledged that partisan interests “played a significant role in the decision to enact SEA 483,” the Court concluded that “[t]he state interests identified as justifications for SEA 483 are both neutral and sufficiently strong” to uphold the statute.¹³⁹

Crawford was mistakenly decided.¹⁴⁰ The Supreme Court misconstrued *Harper* precedent from the outset of *Crawford*.¹⁴¹ It reasoned, “as *Harper* demonstrates, [the burden a state law imposes on the voter] must be justified by *relevant and legitimate state interests* sufficiently weighty to justify the limitation.”¹⁴² The phrase “relevant and legitimate state interests” does not appear in *Harper*, however.¹⁴³ Therefore, *Crawford* erred when implied that *Harper* did not call for strict scrutiny review of laws that infringe upon the right to vote.¹⁴⁴ Rather, *Crawford* suggested that *Harper* applied a standard of review closer to rational basis review.¹⁴⁵

¹³⁶ *Crawford*, 553 U.S. at 190 (internal quotation marks omitted).

¹³⁷ *Id.* at 191.

¹³⁸ *Id.* at 194.

¹³⁹ *Id.* at 204.

¹⁴⁰ Interestingly, Appellate Judge Richard Posner, author of the Seventh Circuit *Crawford* decision, which was upheld by the Supreme Court, now reflects that he got the decision wrong. Jon Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>. Today, he regards the Indiana law as “a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.” *Id.*

¹⁴¹ Douglas, *supra* note 124, at 154.

¹⁴² *Crawford*, 553 U.S. at 191 (emphasis added) (internal quotation marks omitted).

¹⁴³ See generally *Harper v. State Board of Elections*, 383 U.S. 663 (1966); see also Douglas, *supra* note 124, at 154.

¹⁴⁴ As noted above, *Harper* held that laws that infringe upon the fundamental right to vote must be “must be closely scrutinized.” *Harper* at 383 U.S. at 670.

¹⁴⁵ Douglas, *supra* note 124, at 154.

2. No Rational Basis for Discriminatory Law that “Protects” Against a Non-Existent Threat

Even when analyzed under rational basis, the most relaxed standard of review, voter ID laws are unconstitutional. To satisfy rational basis review, a law must be rationally related to a legitimate state interest.¹⁴⁶ Ordinarily, a statute is upheld under rational basis review, so long as the government “could rationally have decided that [the classification] might foster” a legitimate state purpose.¹⁴⁷ But when the government argues that a law “prevents fraud” as mere pretext to suppress a particular group, the law does not even satisfy rational basis review.¹⁴⁸

In *US Department of Agriculture v. Moreno*, the Government used fraud as a justification for the Food Stamp Act; a statute that precluded households containing unrelated individuals from receiving federal food stamps.¹⁴⁹ The Government claimed that “the challenged classification should . . . be upheld as rationally related to the *clearly legitimate governmental interest in minimizing fraud* in the administration of the food stamp program.”¹⁵⁰ Despite the government’s claimed interest, the Court found that the Food Stamp Act “simply d[id] not operate so as rationally to further the prevention of fraud.”¹⁵¹ According to the Act’s legislative history, the Court found that the true purpose was “to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program,” not fraud prevention.¹⁵²

Like the Food Stamp Act at issue in *Moreno*, voter ID laws are not rationally related to a legitimate government interest. Despite holding that “deterring and detecting fraud” is a sufficiently strong state interest in enacting voter ID laws, *Crawford* acknowledged that there

¹⁴⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

¹⁴⁷ Raphael Holoszyk-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U L. REV. 2070, 2074-75 (2015) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

¹⁴⁸ See *U.S. Dep’t of Agric. v. Moreno*, 413 US 528 (1973).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 528.

¹⁵¹ *Id.* at 537.

¹⁵² *Id.* at 534.

was not actually any evidence of fraud. In fact, “[v]oter fraud is . . . practically nonexistent.”¹⁵³ Additionally, voter ID laws only protect against a limited form of alleged voter fraud.¹⁵⁴ They do not protect against mail-in fraud, or fake registration forms, or buying votes, or ballot stuffing by election officials.¹⁵⁵ Voter ID laws only protect against “people showing up at the polls pretending to be somebody else in order to each cast one incremental fake ballot.”¹⁵⁶ This “slow, clunky” way of stealing votes rarely happens.¹⁵⁷ More 135 million Americans voted in the 2016 presidential election.¹⁵⁸ Of those votes, there are only two documented instances of in-person voter fraud.¹⁵⁹

Furthermore, as discussed above, some Republican lawmakers have admitted that the purpose for voter ID laws is to dampen Democratic voter turnout. For example, in a 2013 interview for Comedy Central’s “The Daily Show,” a North Carolina Republican Party county precinct chairman stated that North Carolina’s voter ID law would “kick the Democrats in the butt.”¹⁶⁰ Additionally, as previously noted, Republican senators in Wisconsin were “giddy” about the idea that its voter ID law might “keep Democrats, particularly minorities in Milwaukee, from voting.”¹⁶¹ These statements reveal that, like the Food Stamp Act, the true motivation behind voter ID laws is not fraud prevention. Rather, republican politicians are motivated by a desire to prevent minorities from participating in the Democratic process. Alleging that voter ID laws

¹⁵³ Ingraham, *supra* note 22.

¹⁵⁴ Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.e6c739110a3a.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.f6fcae08c35f.

¹⁵⁹ *Id.*

¹⁶⁰ Wines, *supra* note 109.

¹⁶¹ Horwitz, *supra* note 76.

“prevent fraud,” when there is little evidence of actual fraud, does not satisfy rational basis review under these circumstances.

3. Crawford Leaves Open the Opportunity for “As-Applied” Challenges

Despite the improper standard applied by *Crawford*, the decision did “raise[] the issue of the burden created by voter ID requirements as a potential basis for future ‘as-applied’ challenges.”¹⁶² As such, despite upholding the constitutionality of the Indiana law, the Supreme Court may still declare a voter ID law unconstitutional “as applied to the particular facts that their case presents.”¹⁶³ In order to declare the Indiana law facially unconstitutional, *Crawford* demanded stronger evidence that the strict voter ID law severely burdened an individual’s right to vote.¹⁶⁴ Specifically, *Crawford* affirmed that “the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute.”¹⁶⁵ However, as noted above, the evidence that exists today,¹⁶⁶ establishes that strict voter ID laws, as applied to minority voters, do severely burden the right to vote. Thus, strict voter ID laws should be declared unconstitutional even by *Crawford*’s standard.

B. Strict Voter ID Laws Violate Section 2 of Voting Rights Act

Even if the Supreme Court continues to apply a less than strict standard of review to voter ID laws and continues to recognize voter fraud as a legitimate state interest, strict voter ID laws violate what’s left of the Voting Rights Act. Section 2 of the Voting Rights Act is still the law of

¹⁶² Sobel, *supra* note 72, at 6.

¹⁶³ Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359, 360 (1998).

¹⁶⁴ *Crawford v. Marion Cty Election Bd.*, 553 U.S. 181, 198-99 (2008).

¹⁶⁵ *Id.* at 189.

¹⁶⁶ *See supra* Section II(B).

the land. As such, states are prohibited from enacting voting regulations that discriminate on “account of race or color.”¹⁶⁷

1. You can go Too Far With a Voter ID Law

On July 20, 2016, the Fifth Circuit Court of Appeals—considered the most conservative appeals court in the country—essentially ruled, “you can go too far with a voter ID law.”¹⁶⁸ Texas enacted its strict voter ID law, which required “individuals to present one of several forms of photo identification in order to vote,”¹⁶⁹ just two hours after *Shelby County* invalidated the federal preclearance formula.¹⁷⁰ In *Veasey v. Abbott*, the Fifth Circuit reviewed Texas’s strict voter ID law, *en banc*.¹⁷¹ The court held, 9-6, that Texas’s law violated Section 2 of the Voting Rights Act.¹⁷²

Because the Fifth Circuit could invalidate the law under Section 2, it declined to address the constitutionality of the law.¹⁷³ Nevertheless, *Veasey* expressly rejected “the argument that *Crawford* mandates upholding [the law] simply because the State expressed legitimate justifications for passing the law.”¹⁷⁴ *Veasey* specifically distinguished the amount of factual findings on the present record from the facial challenge presented in *Crawford*.¹⁷⁵ That distinction further suggests that voter ID laws can be found unconstitutional on an “as-applied” basis.

¹⁶⁷ The Voting Right Act of 1965, Pub. L. No. 89-110 (1965).

¹⁶⁸ Manny Fernandez and Erik Eckholm, *Federal Court Rules Texas’ ID Law Violates Voting Rights Act*, N.Y. TIMES (July 20, 2016), https://www.nytimes.com/2016/07/21/us/federal-court-rules-texas-id-law-violates-voting-rights-act.html?_r=0 (quoting Richard L. Hasen, law professor at University of California, Irvine).

¹⁶⁹ *Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016).

¹⁷⁰ Kas-Osoka, *supra* note 49, at 166.

¹⁷¹ Ian Millhiser, *BREAKING: Texas’ Voter ID Law Struck Down By An Extraordinarily Conservative Appeals Court*, THINKPROGRESS (Jul. 20, 2016), <https://thinkprogress.org/breaking-texas-voter-id-law-struck-down-by-an-extraordinarily-conservative-appeals-court-48bc0293f55b>.

¹⁷² *Veasey*, 830 F.3d at 272.

¹⁷³ *Id.* at 265.

¹⁷⁴ *Id.* at 248.

¹⁷⁵ *Id.* at 249.

To evaluate whether the Texas law violated Section 2 of the Voting Rights Act, the Fifth Circuit adopted “the two-part framework employed by the Fourth and Sixth Circuits.”¹⁷⁶ The framework has two elements:

[1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and] [2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.¹⁷⁷

According to the first prong of the test, the Fifth Circuit affirmed the lower court’s finding of “a stark, racial disparity between those who possess or have access to [proper] ID, and those who do not.”¹⁷⁸ The record established that the Texas voter ID law had “a discriminatory effect under Section 2 of the Voting Rights Act.”¹⁷⁹

The “copious evidence”¹⁸⁰ in the record included an expert report that “Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than” white registered voters to lack the proper ID to vote.¹⁸¹ The expert concluded that the disparity was “statistically significant and highly unlikely to have arisen by chance.”¹⁸²

Additionally, the evidence established that the Texas law “disproportionately impacts the poor,

¹⁷⁶ *Id.* at 244.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 264.

¹⁷⁹ *Id.* at 265.

¹⁸⁰ *Id.* at 249.

¹⁸¹ *Id.* at 250.

¹⁸² *Id.*

who are disproportionately minorities.”¹⁸³ Specifically, “21.4% of eligible voters earning less than \$20,000 per year lack [proper voter] ID, compared to only 2.6% of voters earning between \$100,000 and \$150,000 per year.”¹⁸⁴

To determine whether the Texas law violated the second prong, the court considered several factors known as “the *Gingles* factors.” In a report accompanying the 1982 amendments to the Voting Rights Act, Congress set forth the *Gingles* factors to determine whether the discriminatory impact of a voting regulation “is a product of current or historical conditions of discrimination such that it violates Section 2.”¹⁸⁵ In other words, the *Gingles* factors are used to determine causality. The Fifth Circuit determined that “the two-part framework and *Gingles* factors together serve as a sufficient and familiar way to limit courts' interference with ‘neutral’ election laws to those that truly have a discriminatory impact under Section 2 of the Voting Rights Act.”¹⁸⁶

The *Gingles* factors considered by the Fifth Circuit, included, but are not limited to: (1) history of official discrimination,¹⁸⁷ (2) racially polarized voting,¹⁸⁸ (3) effects of past discrimination,¹⁸⁹ (4) responsiveness to minority needs,¹⁹⁰ and (5) tenuousness of policies underlying the law.¹⁹¹ In accordance with that framework, the Fifth Circuit affirmed “that [the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 244; *Election Law—Voting Rights Act—Fifth Circuit Strikes Down Voter ID Law Based on Disparate Impact*, 129 HARV. L. REV. 1128, 1130 (2016).

¹⁸⁶ Veasey 830 F.3d at 246-47.

¹⁸⁷ *Id.* at 257-58.

¹⁸⁸ *Id.* at 258.

¹⁸⁹ *Id.* at 258-61

¹⁹⁰ *Id.* at 261-62

¹⁹¹ *Id.* at 262-64. Additional *Gingles* factors include: “3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; . . . 6. whether political campaigns have been characterized by overt or subtle racial appeals; . . .” *Id.* at, 245.

Texas law] worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result.”¹⁹²

Veasey concluded that the law violated Section 2 of the Voting Rights Act, in part, because the “drafters and proponents of [the Texas law] were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact.”¹⁹³ Accordingly, the Fifth Circuit instructed the lower court to come up with a remedy that would “disrupt[] voter identification rules for the 2016 election season as little as possible, yet eliminate[] the Section 2 discriminatory effect violation.”¹⁹⁴

2. Using *Veasey v. Abbott* Framework to Invalidate Strict Voter ID Laws

Veasey establishes that the Voting Rights Act still protects against voting regulations that disenfranchise minority voters when there is sufficient evidence of actual discriminatory effect. Strict voter ID laws enacted across the country fail the two-part framework adopted in *Veasey*. Empirical evidence proves that strict voter ID laws disproportionately effect minority voters. Nationally, minorities disproportionately lack government-issued identification.¹⁹⁵ Strict voter ID laws, therefore, have a discriminatory effect under the first prong of the *Veasey* framework.¹⁹⁶

Additionally, under the second prong of the *Veasey* framework, the discriminatory effect of strict voter ID laws are linked to historical conditions or current conditions that produce discrimination. For example, many states that have enacted strict voter ID laws, have a history of past discrimination, and/or are plagued by the effects of past discrimination.¹⁹⁷

¹⁹² *Id.* at 264-65.

¹⁹³ *Id.* at 236.

¹⁹⁴ *Id.* at 272.

¹⁹⁵ *See supra* Section II(B)

¹⁹⁶ *Id.*

¹⁹⁷ Four of the states that were previously required to receive federal preclearance, because of a history of discrimination, now have strict voter ID laws. Lee, *supra* note 70.

Furthermore, discriminatory impact may be linked to the discriminatory conditions even in states that do not have a history of discrimination. As noted above, one *Gingles* factor to be considered under the second prong of the *Veasey* framework is the “tenuousness of policies underlying the law.” *Veasey* explained, “a tenuous fit between the expressed policy and the provisions of the law bolsters the conclusion that minorities are not able to equally participate in the political process.”¹⁹⁸ *Veasey* instructed that simply articulating a legitimate interest “is not a magic incantation a state can utter to avoid a finding of disparate impact.”¹⁹⁹ The policy of requiring ID to vote is only tenuously related to preventing voter fraud.²⁰⁰ Voter fraud is practically non-existent, and voter ID laws only protect against narrow form of voter fraud.²⁰¹ These facts “bolsters the conclusion” that minorities are disparately impacted by voter ID laws.²⁰²

Under the *Veasey* two-part framework, all strict voter ID laws violate Section 2 of the Voting Rights Act. Therefore, even if the Supreme Court refuses to declare strict voter ID laws unconstitutional, such laws should be nationally prohibited because they are contrary to federal law.

VI. A NEW PRECLEARANCE FORMULA

A. Justification for Voting Rights Act Amendment

The prevalence of unlawful strict voter ID laws, enacted with ease since *Shelby County*, demonstrates the need for federal preclearance. Although *Shelby County* declared the previous preclearance formula unconstitutional because it is based on “decades-old data and eradicated

¹⁹⁸ *Veasey*, 830 F3d at 262-63.

¹⁹⁹ *Id.* at 262.

²⁰⁰ *See supra* Section III(A)(2).

²⁰¹ *Id.*

²⁰² *See Veasey*, 830 F3d at 262.

practices,” it did not overrule the Section 5 preclearance requirement.²⁰³ In fact, *Shelby County* acknowledged, “voting discrimination still exists.”²⁰⁴ Strict voter ID laws confirm that fact. Therefore, Congress should enact a new preclearance formula based on data regarding current voter discrimination. Additionally, for the reasons stated above, any amendment made to the Voting Rights Act should include a national prohibition on strict voter ID laws.

B. The Original Section 4(b) Formula as a Model

As Congress drafts a new preclearance formula, it should use the strategy employed by the original drafters of the Voting Rights Act: it should calculate a formula to “attack the most flagrant rights offenders” and, in doing so, it should ensure that the formula is completely lawful by referencing reliable evidence of actual discrimination.²⁰⁵ To target states with the most obvious incidents of voting discrimination, Congress should retain the two-part test structure utilized in the original Section 4(b) formula (“the original formula”).

1. First Prong of the New Preclearance Formula

Just as the first prong of the original formula targeted states that employed a restrictive “test or device,” the first prong of the new formula should flag states that exhibit signs of discriminatory voting practices. Initially, Congress must come up with a method of identifying such states

For the aforementioned reasons, the presence of a voter ID law in a state suggests that state is engaged in discriminatory voting practices. Therefore, states that have introduced or maintained a strict voter ID law should be flagged as potentially discriminating against minority

²⁰³ *Shelby County v. Holder*, 133 S. Ct. 2612, 2627-28 (2013).

²⁰⁴ *Id.* at 2619.

²⁰⁵ *Nation: Enforcing the 15th*, *supra* note 47.

voters. Those states include: Arizona, Georgia, Indiana, Kansas, Mississippi, North Carolina, Ohio, Tennessee, Texas, Virginia, and Wisconsin.²⁰⁶

Although this paper has focused on voter ID laws, such tactic is not the only discriminatory voting practice that exists today. Therefore, states that have committed a “voting rights violation” should also be flagged. Congressmen in favor of a new preclearance formula define a “voting rights violation” as one that “occurs when in a final judgment which has not been reversed on appeal, any court of the United States determines a denial or abridgement of any right of any citizen to vote occurred.”²⁰⁷ Congress should narrow its results to some non-arbitrary period of time. Perhaps Congress should target states that have committed a voting right violation between the 2012 and 2016 presidential election, or since the 2013 *Shelby County* decision.

2. Second Prong of the New Preclearance Formula

The second prong of the new formula should sort out which states targeted under the first prong actually depressed minority voter turnout. Only those states whose laws disparately effected minority voters should be required to receive federal preclearance.

The second prong of the original formula limited federal preclearance coverage to those states that maintained a “test or device” *and* had less than fifty percent of their total voting age population vote in the 1964 election. Today, aggregate voter turnout rates may not be the most precise measure of discriminatory impact. The University of California San Diego study reported that the most important factor to consider in determining whether a voting regulation had a discriminatory effect is not the state’s overall voter turn out rate, but rather the turnout gap

²⁰⁶ Lee, *supra* note 70.

²⁰⁷ Kas-Osoka, *supra* note 49, at 168.

between white and minority voters.²⁰⁸ Therefore, the second prong of the new formula should sort out those states whose suspect voting regulation increased the gap between white and minority voter turnout. Exactly what amount of increase establishes discriminatory effect is yet to be determined.

As noted above, the presence of strict voter ID laws increased the gap between white and African American voters by 2.2 percent.²⁰⁹ The University of California San Diego study did not provide results on how strict voter ID laws effected the gap between white voters and all minorities. Congress should direct further research into the effect of strict voter ID laws on the gap between white voters and all voters who identify as a member of a minority class. Additionally, Congress should research at what point the increase in turnout gap is so statistically significant that it is highly unlikely to have arisen by chance. That figure could represent the threshold amount used in the new federal preclearance formula. In other words, under the second prong of the new formula, Congress could require states, whose turnout gap between white and minority voters increased by that statistically significant amount, to receive federal preclearance.

According to formula outlined above, states would be required to receive federal preclearance if (1) they have employed a strict voter ID law or committed some other voting rights violation, and if (2) that violation had a discriminatory effect such that it increased the voter turnout gap between white and minority voters by some threshold yet to be determined.

CONCLUSION

While there is no way to know if the existence of strict voter ID laws actually propelled Donald Trump to claim his shocking victory, there is no question that such laws are illegal.

²⁰⁸ Hajnal, et al., *supra* note 87, at 5.

²⁰⁹ Keyes, *supra* note 97.

Modern data proves that voter ID laws disproportionately restrain minority suffrage.

Accordingly, strict voter ID laws represent constitutional and statutory violations.

Although *Shelby County* dissolved valuable protections afforded by the Voting Rights Act, it preserved and emphasized Congress's power to protect against unlawful discriminatory voting practices. By amending the Voting Rights Act, to prohibit strict voter ID laws and declare a new federal preclearance formula, Congress has the power to end the modern era of disenfranchisement.