

2018

## Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof

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### Bluebook Citation

Erin A. Penrod, *Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof*, 14 U. St. Thomas L.J. 207 (2018).

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## ARTICLE

# DISENFRANCHISEMENT 2.0: RECENT VOTER ID LAWS AND THE IMPLICATIONS THEREOF

ERIN A. PENROD\*

### ABSTRACT

*“Black lives don’t matter and neither do[ ] your votes”*—graffiti found in Durham, North Carolina on November 9, 2016, the day after Donald Trump was elected as the 45th President of the United States.

Disguised as a necessary measure to protect the integrity of elections and to avoid voter fraud, the latest form of voter suppression is requiring a person to provide state-issued identification to vote. While the rationales behind these laws have been largely derided as pretext, challenges to the laws have not been particularly successful. Recently, several challenges to voter ID laws have made their way through different federal courts with varying results. Three types of challenges have been consistently brought: (1) discriminatory purpose claims, (2) discriminatory effect claims, and (3) undue burden claims. This Article analyzes the claims brought in the recent voter ID cases and provides a legal roadmap for voter ID opponents by demonstrating that discriminatory effect claims are the most viable claims that can be brought. This article offers insight into more effective ways in which voter ID opponents can attack and undermine the rationales that have thus far been accepted as legitimate by the public and the Supreme Court.

### INTRODUCTION

Voter identification (“ID”) laws, in place in most states, require some form of identification for people to vote. Recently, several federal courts have ruled on the constitutionality of voter ID laws, all of which have arrived at varying results. The Fourth Circuit Court of Appeals found in North Carolina that the voter ID law was not in place to prevent voter fraud issues

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\* J.D. I would like to thank Professor Nancy Leong for her guidance and Professor Justin Pidot for his support. Thanks also to the editing team at the University of St. Thomas Law Journal for their dedication and assistance.

as the Republican-led state legislature had purported, but was unabashedly designed to prevent minority voters, who overwhelmingly vote Democrat, from voting. Yet, when reviewing the voter ID law in Virginia, the Fourth Circuit Court of Appeals found that the law was not enacted with discriminatory intent, nor did it have a discriminatory effect. Though the Fifth Circuit Court of Appeals did not find that the Texas legislature had a discriminatory intent when enacting its voter ID law, it did find that the law had a discriminatory effect in violation of the Voting Rights Act of 1965. Finally, the Seventh Circuit Court of Appeals found that Wisconsin's voter ID provision was not enacted with discriminatory intent nor did it have a discriminatory effect, while a later ruling of a district court found that a different provision of Wisconsin's voting-restriction laws was enacted with discriminatory intent and found other aspects had a discriminatory effect. The purported reasons for enacting these laws were the same in each of the cases: to prevent voter fraud and to protect the integrity of elections. The courts' inconsistent findings, despite the consistency of the stated purposes of the laws, reflect the law's varying harshness. And, when evaluating the laws relative to the individual states' histories and legislative actions, the decisions highlight the courts' skepticism.

Part I provides a brief history of minority disenfranchisement in the United States and the enactment of the Voting Rights Act of 1965 (the "VRA").<sup>1</sup> It then discusses the Supreme Court's later gutting of the VRA and how this decision paved the way for the proliferation of voter ID laws around the country. Part I will also describe other aspects of structural disenfranchisement, including voter dilution and mass incarceration's concomitant felon disenfranchisement laws. Part II delineates the rise of voter ID laws and their baseless rationales, the Supreme Court ruling which allows these rationales to flourish unchecked, and the real effects of the voter fraud myth. Part III presents a detailed overview of the four federal cases that have recently ruled on the legality of the voter ID laws in North Carolina, Texas, Wisconsin, and Virginia. Part III examines the three types of claims that have been brought: discriminatory purpose, discriminatory effect, and undue burden. Part IV considers the successes and failures of the analytical frameworks and concludes with lessons learned and a prediction of how these cases will affect various aspects of future voter ID law cases.

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10101, 10301 to 10702 (2012)).

## I. DISENFRANCHISEMENT IN AMERICA

A. *The Original Electorate, Reconstruction, and Jim Crow*

Black disenfranchisement in America began in 1619 when the first African slaves arrived in Virginia.<sup>2</sup> For the next 250 years, most black Americans were enslaved and therefore could not vote; neither could most freedmen.<sup>3</sup> The original Constitution did not affirmatively state who would comprise the electorate, leaving the question to the states to decide.<sup>4</sup> Most states relied on the existing English framework to determine voter eligibility, meaning property ownership was determinative: one had to be a “real landowner or possess at least 300 to 500 dollars in personal property” to vote.<sup>5</sup> Early state legislatures reasoned that because property owners felt the effects of state laws, they should be allowed to vote, and such men would be able to effectively represent those without property.<sup>6</sup> Under this scheme, voting was decidedly a privilege, not a right.

Following the Civil War, Congress passed the three Reconstruction amendments: the Thirteenth Amendment, which outlawed slavery; the Fourteenth Amendment, which defined citizenship to include blacks and prohibited states from passing laws that would “abridge the privileges or immunities” of citizens or deny them “equal protection of the laws”; and the Fifteenth Amendment, which explicitly prohibited the denial or abridgment of the right to vote on racial grounds.<sup>7</sup> Because these amendments “merely prohibited express racial discrimination commands and did not guarantee the right to vote,” states were left with enough leeway to create “socioeconomic and other barriers to the full and free exercise of the franchise.”<sup>8</sup>

The former Confederate states were the first to implement systematic voting restrictions as a way to disenfranchise black voters.<sup>9</sup> Southern states began adopting “poll taxes, cumulative poll taxes (demanding that past as well as current taxes be paid), literacy tests, secret-ballot laws, lengthy residence requirements, elaborate registration systems, [and] confusing multi-

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2. Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7 (Bernard N. Grofman & Chandler Davidson eds., 1992).

3. *Id.*

4. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 *DENV. L. REV.* 1023, 1037–1038 (2009).

5. *Id.* at 1038.

6. *Id.*

7. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 69, 71, 82 (rev. ed. 2009). The Reconstruction Act of 1867 required for readmission into the Union that confederate states ratify the Fourteenth Amendment and alter their state constitutions to extend black men the right to vote. *Id.* at 73; see also U.S. CONST. amends. XIII, XIV, XV.

8. Ellis, *supra* note 4, at 1040.

9. KEYSSAR, *supra* note 7, at 88.

ple voting-box arrangements.”<sup>10</sup> Though the intent of such laws were obviously discriminatory, the courts considered them neutral and therefore fair, as the laws did not explicitly discriminate against African Americans.<sup>11</sup> So long as the state legislatures gave a reasonable rationale for such laws, such as the “fair administration” of elections, courts considered them constitutionally sound.<sup>12</sup> This explanation, that such voting requirements were needed to protect the integrity of elections, continues to be used to justify voting restrictions today. Courts did not look at a state’s recent history or a law’s legislative history to detect racial animus for these laws; thus, white lawmakers were explicit in their goals of rewriting state constitutions or passing state statutes.<sup>13</sup> For example, at Virginia’s 1901 Constitutional Convention, R. L. Gordon declared, “I intend[ ] . . . to disfranchise every negro that I [can] disfranchise under the Constitution of the United States, and as few white people as possible.”<sup>14</sup> The voter suppression laws worked: in the South, post-Reconstruction voter-turnout levels of “60 to 85 percent fell to 50 percent for whites and single digits for blacks.”<sup>15</sup>

### B. *The Voting Rights Act*

Due to limited federal legislative action, changes to voting rights restrictions were accomplished on a piecemeal basis.<sup>16</sup> Though three civil rights acts were passed in 1957, 1960, and 1964, they were limited;<sup>17</sup> it was the violent repression of nonviolent civil-rights activists that kept black disenfranchisement at the forefront of the American consciousness.<sup>18</sup> On August 6, 1965, President Lyndon B. Johnson signed the VRA.

Section 2 is a permanent feature of the VRA that prohibits the imposition of voting standards, practices, or procedures that deny or abridge any citizen’s right to vote on account of race or color.<sup>19</sup> In *City of Mobile v.*

10. *Id.* at 89. To still allow poor and illiterate whites to vote, however, state legislatures enacted grandfather clauses, which allowed those who could vote before 1867 and those whose father or grandfather could vote before 1867 to skip the tests and taxes. *Grandfather Clause*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/grandfather-clause>.

11. Ellis, *supra* note 4, at 1041.

12. *Id.* at 1043.

13. KEYSSAR, *supra* note 7, at 90. Years prior, rich whites would not have been concerned about disenfranchising poor whites along with blacks, but in southern states post-Civil War, it was imperative that political division did not occur along class lines, but rather along race lines to ensure that rich whites retained political, social, and economic control. *Id.* at 85.

14. *Id.* at 91.

15. *Id.* at 92.

16. *Id.* at 189–90 (noting that political efforts focused on eliminating the poll tax were largely failed, save for a few scattered victories).

17. *Id.* at 208–211.

18. *Id.* at 207.

19. Voting Rights Act § 2. Section 2 has since been revised to include certain language minority groups.

*Bolden*,<sup>20</sup> the Supreme Court held that Section 2 simply restated the Fifteenth Amendment and thus a plaintiff would need to prove that any standard, practice, or procedure was enacted or maintained in part by an invidious purpose.<sup>21</sup> However, Congress swiftly responded to the Court's holding in *Mobile* by enacting the 1982 amendments to the VRA, which made clear that a plaintiff could establish a violation of Section 2 if the "totality of the circumstances of the local electoral process" demonstrates that "the standard, practice, or procedure being challenged had the *result* of denying a racial or language minority an equal opportunity to participate in the political process."<sup>22</sup> Thus, a plaintiff challenging a voting-restriction law under Section 2 may bring two claims: (1) that the law was enacted with a racially discriminatory purpose,<sup>23</sup> or (2) that the law has a racially discriminatory effect.<sup>24</sup> At the same time, the Senate Committee on the Judiciary issued a report suggesting factors for courts to consider when determining whether a law has a racially discriminatory effect.<sup>25</sup> These factors (the "*Gingles* factors") were endorsed by the Supreme Court in *Thornburg v. Gingles*.<sup>26</sup>

Sections 4 through 9 of the VRA are special provisions that require congressional reauthorization every five years, which Congress had done consistently.<sup>27</sup> Section 4's coverage formula is used to make the statute ap-

20. 446 U.S. 55 (1980) (plurality opinion), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 135, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30, 35 (U.S. 1986).

21. *Id.* at 60–61.

22. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/section-2-voting-rights-act> (last updated Aug. 8, 2015) (emphasis added) (internal quotation marks omitted).

23. *Id.* Plaintiffs claiming that such laws were enacted with discriminatory purpose may also bring claims under the Fourteenth and Fifteenth Amendments.

24. *Id.*

25. S. Rep. No. 97-417, 97th Cong., 2d Sess., 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 186. These factors include: "(1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state [or] political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against [a] minority group, such as unusually large election districts, majority-voting requirements, and prohibitions against bullet voting; (4) the exclusion of members of [a] minority group from candidate-slating processes; (5) the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinders their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of [a] minority group have been elected to public office in the jurisdiction. *Id.* Two additional considerations are: (1) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (2) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* [hereinafter *Gingles* Factors]. These factors are not exhaustive and will not be relevant in every case, nor must a certain number of factors be proven or point one way or the other. *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. Rep. No. 97–417, at 29).

26. 478 U.S. at 44–45.

27. KEYSSAR, *supra* note 7, at 212.

plicable in instances where a state used any test or device<sup>28</sup> as a voting prerequisite and had a voter registration rate of less than fifty percent of the voting-age residents on November 1, 1964.<sup>29</sup> If triggered, the Act would immediately abolish any such tests or devices.<sup>30</sup> The day after the Act went into effect, tests were suspended in seven states entirely and in many individual counties elsewhere.<sup>31</sup> Under Section 5, changes in election practices or procedures were frozen in states or counties that were implicated by the coverage formula in Section 4.<sup>32</sup> Changes to the covered jurisdictions' voting laws could only go into effect after the U.S. Attorney General or the District Court for the District of Columbia determined that the changes had neither discriminatory purpose nor effect.<sup>33</sup>

In 2013, in *Shelby County v. Holder*<sup>34</sup> the United States Supreme Court held that it is unconstitutional to use the formula in Section 4 of the VRA to determine the jurisdictions subject to the preclearance requirement of Section 5.<sup>35</sup> The Court relied on the principle of "equal sovereignty," which holds that "by virtue of the sovereignty acquired through revolution against the Crown, . . . [each] State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission" into the United States.<sup>36</sup> The VRA, on its face, departs from this principle and the Court emphasized that such a departure can be justified only if there is a showing that a "statute's disparate geographic coverage is sufficiently re-

28. A "test or device" includes "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrates the ability to read, write, understand, or interpret any matter, (2) demonstrates any educational achievement of his knowledge of any particular subject, (3) possesses good moral character, or (4) proves his qualification by the voucher of registered voters or members of any other class." Voting Rights Act § 4(c). Note that this does not include poll taxes. The Twenty-Fourth Amendment, passed in 1964, declared poll taxes in federal elections unconstitutional, but there was still debate as to whether poll taxes were unconstitutional at the state level. Thus, though Congress did not include poll tax as a "device" in Section 4, Congress did permit the attorney general to challenge the constitutionality of state poll taxes. *Id.* at § 10. Poll taxes in state elections were declared unconstitutional by the United States Supreme Court in 1966. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

29. Voting Rights Act § 4.

30. *Id.*

31. Davidson, *supra* note 2, at 18.

32. *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Aug. 8, 2015). Sections 6, 7, and 8 gave the attorney general the power to appoint voting "examiners" that could be sent to covered jurisdictions to ensure that people eligible to vote could register and vote. Voting Rights Act §§ 6–8. Fifteen percent of the one million new minority citizens registered in the first ten years following the Act are directly attributed to the examiner program. Davidson, *supra* note 2, at 20.

33. Voting Rights Act § 5. Section 5 is frequently referred to as the "preclearance requirement."

34. 133 S. Ct. 2612 (2013) *abrogating* *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

35. *About Section 5 of the Voting Rights Act*, *supra* note 32. The previously covered jurisdictions no longer face preclearance requirements unless ordered by a court under Section 3(c). *Id.*

36. *United States v. Louisiana*, 363 U.S. 1, 16 (1960); *see also Shelby*, 133 S. Ct. at 2623.

lated to other problems it targets.”<sup>37</sup> The opinion, which began ominously by stating that the VRA “employed extraordinary measures to address an extraordinary problem,”<sup>38</sup> ended with the conclusion that now, nearly fifty years later, there is no extraordinary problem calling for extraordinary measures.<sup>39</sup> The Court found that in covered jurisdictions “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”<sup>40</sup> The Court found that the “current need [ ]” to ensure that state voting laws have neither a discriminatory purpose nor effect no longer justified the “current burdens” of the VRA.<sup>41</sup> Thus, the Court held that the Section 4 coverage formula is unconstitutional.<sup>42</sup> As a result, Section 5, which relied on Section 4’s coverage formula to subject states to preclearance requirements, became effectively void. Because Section 5 no longer blocks or deters discriminatory voting changes, several states immediately took action that otherwise likely would have been blocked by Section 5.<sup>43</sup> A common feature in this flurry of voter restriction legislation is a voter ID requirement.<sup>44</sup>

## C. Modern Forms of Disenfranchisement

### 1. Vote Dilution

Recent voter ID laws are modern iterations of historical disenfranchisement laws designed to prevent black and other minority Americans from voting. “There is more to the right to vote than the right to mark a piece of paper and drop it in a box. . . . The right to vote includes . . . the

37. *Shelby*, 133 S. Ct. at 2622 (citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

38. *Id.* at 2618.

39. *Id.* at 2625.

40. *Id.* (citing *Northwest Austin*, 557 U.S. at 202).

41. *Id.* at 2627.

42. *Id.*

43. Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <http://www.nytimes.com/2013/07/06/us/politics/after-Supreme-Court-ruling-states-rush-to-enact-voting-laws.html>.

44. Kim Chandler, *Alabama Photo Voter ID Law to be Used in 2014, State Officials Say*, AL.COM (June 26, 2013), [http://blog.al.com/wire/2013/06/alabama\\_photo\\_voter\\_id\\_law\\_to.html](http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html) (reporting that after the *Shelby* decision, Alabama moved ahead with the photo ID law that was passed in 2011 but was never submitted for preclearance to go into effect); *N.C. Lawmakers Back Voter ID Law*, POLITICO (July 26, 2013), <http://www.politico.com/story/2013/07/north-carolina-voter-id-094788> (reporting that shortly after the *Shelby* decision, the North Carolina legislature passed a law that imposed a strict photo ID requirement, among other things); Ed Pilkington, *Texas Rushes Ahead with Voter ID Law after Supreme Court Decision*, GUARDIAN (June 25, 2013), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> (reporting that officials in Texas vowed to immediately implement a new controversial voter ID law within hours of the United States Supreme Court’s decision in *Shelby*); *Voting Rights Act Ruling Clears Path for Mississippi Voter ID Use in 2014*, GULFLIVE.COM (June 25, 2013), [http://blog.gulflive.com/mississippi-press-news/2013/06/voting\\_rights\\_act\\_ruling\\_clear.html](http://blog.gulflive.com/mississippi-press-news/2013/06/voting_rights_act_ruling_clear.html).

right to have the vote counted at full value without dilution or discount.”<sup>45</sup> Vote dilution, the process by which election laws or practices “combine with systemic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group,”<sup>46</sup> is a form of disenfranchisement, distinct from outright vote denial, that persists to this day despite Section 2 of the VRA’s vote dilution cause of action.<sup>47</sup>

Vote dilution was especially visible in the recent presidential election, in which the president was elected by the Electoral College.<sup>48</sup> Most states provide that “the presidential candidate who wins the popular vote in the state claims all of its electoral votes.”<sup>49</sup> Under this system, the votes of minority voters who have a presidential preference that differs from the majority, as is frequently the case in Southern states, go virtually uncounted.<sup>50</sup> Thus, although Hillary Clinton won the popular vote of the 2016 presidential election by almost 3 million votes,<sup>51</sup> because she did not win the state-specific popular votes in enough states with high electoral-college votes, she will not be the president; the Electoral College scheme rendered the votes of those almost 3 million Americans meaningless. Like many “baroque constitutional apparatus,”<sup>52</sup> the inclusion of the Electoral College in the Constitution can be explained by slavery.<sup>53</sup>

## 2. *Mass Incarceration*

Another form of modern disenfranchisement is mass incarceration and “the larger web of laws, rules, policies, and customs that control those la-

45. *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (Douglas, J., dissenting)).

46. Davidson, *supra* note 2, at 24. Gerrymandering and multimember election systems are two of the most recognizable forms of voter dilution. *Id.*

47. Voting Rights Act § 2. Because Section 5 can only be applied to covered jurisdictions as defined by Section 4, it is unlikely that a voter dilution claim can be brought under Section 5.

48. Ed. O’Keefe, *With electoral college vote, Trump’s win is official*, WASH. POST (Dec. 19, 2016), [https://www.washingtonpost.com/politics/the-electoral-college-is-poised-to-pick-trump-despite-push-to-dump-him/2016/12/19/75265c16-c58f-11e6-85b5-76616a33048d\\_story.html](https://www.washingtonpost.com/politics/the-electoral-college-is-poised-to-pick-trump-despite-push-to-dump-him/2016/12/19/75265c16-c58f-11e6-85b5-76616a33048d_story.html).

49. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 936 (1996).

50. *Id.*; see also KEYSSAR, *supra* note 7, at 260 (referring to the 2000 presidential election, Keyssar notes that “Americans were reminded that, in presidential elections, the breadth of the right to vote did not mean that all votes counted equally and that, consequently, the candidate that received the largest number of votes would not necessarily gain office.”).

51. Nick Wing, *Final Popular Vote Total Shows Hillary Clinton Won Almost 3 Million More Ballots Than Donald Trump*, HUFFINGTON POST (Dec. 20, 2016, 5:31 PM), [http://www.huffingtonpost.com/entry/hillary-clinton-popular-vote\\_us\\_58599647e4b0eb58648446c6](http://www.huffingtonpost.com/entry/hillary-clinton-popular-vote_us_58599647e4b0eb58648446c6).

52. KEYSSAR, *supra* note 7, at 260.

53. Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Nov. 10, 2016, 2:19 PM) (explaining that at the Philadelphia convention, James Madison recognized that Southern states would not go for a direct national presidential election because the North would outnumber the South, whose many slaves could not vote; thus, James Madison instead proposed that slaves would count—not fully, of course—in computing the share of Electoral College votes), <http://time.com/4558510/electoral-college-history-slavery/>; see also Paul Finkelman, *The Pro-Slavery Origins of the Electoral College*, 23 *Cardozo L. Rev.* 1145 (2002).

beled criminals both in and out of prison.”<sup>54</sup> Upon release, former felons find themselves subject to “legal discrimination and permanent social exclusion” due to their status as felons—which affects voting, employment, housing, education, public benefits, and jury service.<sup>55</sup> Forty-eight states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense; thirty-three of those states extend voting restrictions past prison time to include parole, probation, or a post-sentence period.<sup>56</sup> As a result, an estimated 6.1 million Americans could not vote in 2016 due to voting restrictions based on their status as felons.<sup>57</sup> Research indicates that a large number of close elections would have yielded a different outcome if felons had been allowed to vote.<sup>58</sup> Felons are most frequently black and brown men, not because people of color commit more crimes, but because discrimination is endemic to the criminal-justice system—from stops, to arrests, to pleadings, to sentencing.<sup>59</sup> Felon disenfranchisement laws have been instrumental in developing what has been referred to as a “caste system”<sup>60</sup> or “tiered personhood”<sup>61</sup> with felons occupying the bottom rung.

## II. THE ORIGINS AND RATIONALES OF VOTER ID LAWS

Voter ID laws, another form of modern disenfranchisement, require a person to produce a form of official ID to vote or register to vote. As of 2016, thirty-two states require a voter at a polling place to produce an identification document before casting a ballot,<sup>62</sup> yet as many as eleven percent of eligible voters do not have a government-issued photo ID,<sup>63</sup> a percentage

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54. MICHELLE ALEXANDER, *THE NEW JIM CROW* 13 (2010).

55. *Id.* at 13, 144–61.

56. Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (May 10, 2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

57. *Id.*

58. ALEXANDER, *supra* note 54, at 161 (citing Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIOLOGICAL REV. 777 (2002)).

59. *Id.* at 104–109.

60. *Id.* at 13.

61. Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463, 464 (2015).

62. ERIC A. FISCHER & R. SAM GARRETT, CONG. RESEARCH SERV., STATE VOTER IDENTIFICATION REQUIREMENTS: ANALYSIS, LEGAL ISSUES, AND POLICY CONSIDERATIONS 7 (Oct. 21, 2016), <https://fas.org/sgp/crs/misc/R42806.pdf>.

63. BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* 3 (Nov. 2006), [https://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf).

that is even higher for senior citizens,<sup>64</sup> low-income voters,<sup>65</sup> and people of color.<sup>66</sup>

Voter ID laws are overwhelmingly proposed and passed by Republican-majority legislatures,<sup>67</sup> who were spurred into action by the fiasco that was the 2000 presidential election and the Supreme Court's decision in *Bush v. Gore*.<sup>68</sup> Many politicians came to realize that “[i]n a very close election, the rules of the game matter.”<sup>69</sup> Efforts to enact voter ID laws increased in 2008,<sup>70</sup> though it is unclear whether the increase was in response to “the election of the first black president or the record levels of turnout of young voters and voters of color,”<sup>71</sup> who traditionally vote for Democrats,<sup>72</sup> or both. Republicans introduced state and federal legislation that would require voters to present valid government-issued IDs to prevent fraud and to protect the integrity of American elections.<sup>73</sup> Lawmakers pushed for these laws despite the fact that many states already had multiple ways in which voters could identify themselves on election day, including utility bills, paychecks, ID cards, and affidavits.<sup>74</sup> Republican politicians insisted, however, that this threadbare approach made voter fraud much too easy and much too tempting: “[a]n imposter could turn up at a polling place, pretend he was someone else, and cast a ballot . . . . Even more devious imposters could generate phony utility bills.”<sup>75</sup> Republicans maintained that photo IDs would solve this issue and restore confidence in American elections.

Pinpointing exactly what type of voter fraud the Republican legislators were concerned about is an important step in uncovering their actual motives for advocating for voter ID laws. Voter ID law proponents are concerned with imposters, whether that involves double voting, the impersonation of a dead person, or, as alleged this past presidential election

64. *Id.* (finding that eighteen percent of citizens over the age of sixty-five lack photo identification).

65. *Id.* (finding that fifteen percent of voting age citizens earning less than \$35,000 lack photo identification).

66. *Id.* (finding that twenty-five percent of African American voting age citizens lack photo identification).

67. Rhode Island is the sole state in which a voter ID law was passed by a Democratic legislature. Simon Van Zuylen-Wood, *Why Did Liberal African-Americans in Rhode Island Help Pass a Voter ID Law?*, NEW REPUBLIC (Feb. 6, 2012), <https://newrepublic.com/article/100429/rhode-island-voter-id-laws-hispanic>.

68. 531 U.S. 98 (2000).

69. Oliver Roeder, *Tighter Restrictions Are Losing in the Battle Over Voter ID Laws*, FIVETHIRTYEIGHT (Aug. 3, 2016, 11:56 AM) (quoting Richard Hansen, a professor of law and political science at the University of California, Irvine, who runs Election Law Blog), <http://fivethirtyeight.com/features/tighter-restrictions-are-losing-in-the-battle-over-voter-id-laws/>.

70. *Id.*

71. *Id.*

72. *Id.*

73. KEYSSAR, *supra* note 7, at 283.

74. *Id.*

75. *Id.* at 284.

cycle by the president himself, non-citizens impersonating citizens.<sup>76</sup> Voter ID laws are effective only in preventing in-person impersonation at the polls, an occurrence “more rare than getting struck by lightning.”<sup>77</sup> To attach an actual number to the problem, Justin Levitt’s research—as of August 2014—found exactly thirty-one cases of voter fraud in over a billion ballots cast since 2000—about 0.00003%, a statistically insignificant number.<sup>78</sup>

The second rationale voter ID law proponents put forth is that such laws will instill confidence in the fairness of the election process. However, a 2008 survey conducted by political scientists at MIT and Columbia found not only that public perception of voter fraud has no relationship to a person’s likelihood of voting, but also that a voter’s confidence in the election process does not increase if that voter is subject to stricter voter identification requirements.<sup>79</sup> Indeed, Republicans have so successfully perpetuated the voter fraud myth that a few supporters of the Republican candidate in the 2016 presidential election committed voter fraud to *combat* voter fraud.<sup>80</sup> Of course, Republican legislators have not limited voting restriction laws to voter ID laws exclusively; voter ID restrictions are usually one small part of a comprehensive voting-restriction law. As such, many states have also limited early voting or have imposed additional requirements for student voters.<sup>81</sup>

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76. Justin Levitt, *The Truth About Voter Fraud*, THE BRENNAN CTR. FOR JUSTICE 12–22 (2007), <https://www.brennancenter.org/publication/truth-about-voter-fraud> (addressing these “types” of voter fraud and more and outlining the non-frequency in which they are perpetuated); Donald J. Trump, (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=EN>. In fact, Justin Levitt asserts that most “voter fraud” can be traced back to a typographical error, clerical errors, or “matching” errors. *Id.* at 7–8.

77. *Id.* at 6.

78. 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=.Ce6b784302ce](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=.Ce6b784302ce); see also Trip Gabriel, *Donald Trump’s Call to Monitor Polls Raises Fears of Intimidation*, N.Y. TIMES (Oct. 18, 2016) (“the ability to commit fraud on a scale vast enough to swing a statewide election would require the coordination of scores of people, a possibility widely dismissed by experts”), [http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?\\_r=0](http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?_r=0).

79. Stephen Ansolabehere & 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, 1738 (2008).

80. Keegan Hamilton, “Stealing” an Election: Trump Voters Keep Committing Fraud at the Polls, VICE NEWS (Nov. 7, 2016), <https://news.vice.com/story/trump-supporters-keep-committing-voter-fraud>. (reporting that at least two Trump supporters committed voter fraud, one of whom declared that “[t]he polls are rigged,” echoing sentiments expressed by President-elect Trump both before and after the election).

81. Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATHOLIC UNIV. L. REV. 879, 881 (2014).

A. *Supreme Court Voter ID Precedent*

The Supreme Court gave a legal foundation upon which voter ID law advocates can build when, in *Crawford v. Marion County Election Board*, the Court upheld an Indiana law requiring voters to show photo ID.<sup>82</sup> In *Crawford*, plaintiffs brought a facial challenge to Indiana's voter ID law, alleging that the law imposed an undue burden on the right to vote and thus violated the First and Fourteenth Amendments.<sup>83</sup> The Court applied the *Anderson-Burdick* standard,<sup>84</sup> which was articulated in *Burdick v. Takushi*.

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. Under this standard, the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.<sup>85</sup>

The Court elaborated that when such rights are subjected to "severe" restrictions, the regulation must face strict scrutiny, "[b]ut when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."<sup>86</sup> "However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation."<sup>87</sup>

First, the Court addressed the "precise" state interests put forth by the Indiana legislature, which were, unsurprisingly, "detering and detecting voter fraud" and "safeguarding voter confidence."<sup>88</sup> Though the Court acknowledged that the record contained no evidence of in-person voter impersonation "actually occurring in Indiana at any time in its history," the Court found that the prevention of voter fraud and the assurance of election integrity are "neutral and nondiscriminatory [reasons] supporting the State's decision to require photo identification."<sup>89</sup>

Second, the Court addressed the burdens "imposed on persons who are eligible to vote but do not possess a current photo identification that com-

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82. 553 U.S. 181 (2008) (plurality opinion).

83. *Id.* at 187–88.

84. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *see also Burdick v. Takushi*, 504 U.S. 428 (1992).

85. *Burdick*, 504 U.S. at 434 (citations and quotation marks omitted).

86. *Id.* (citations omitted) (quoting *Anderson*, 460 U.S. at 788).

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

88. *Id.*

89. *Id.* at 194–97.

plies with the requirements of [the law].”<sup>90</sup> One small sentence in *Crawford*, approvingly quoted by several lower courts,<sup>91</sup> seems to have secured the longevity of voter ID laws: “the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph *surely does not qualify as a substantial burden on the right to vote*, or even represent a significant increase over the usual burdens of voting.”<sup>92</sup> The Court acknowledged that a “somewhat heavier burden may be placed on a limited number of persons” but found this burden to be mitigated due to the option provided by the Indiana voter ID law for voters without IDs to cast provisional ballots that will be counted if that person “travel[s] to the circuit court clerk’s office within 10 days to execute the required affidavit.”<sup>93</sup> The Court found the state of Indiana’s “interest in deterring voter fraud outweighed the plaintiffs’ speculative vote denial claims.”<sup>94</sup> The Court further determined that the fact that the Republicans unanimously supported the law and Democrats unanimously opposed it was ultimately inconsequential: “[i]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”<sup>95</sup>

### B. *The Real Effects of the Voter Fraud Myth*

Opponents of voter ID laws quickly pointed out the flawed rationale of the laws: voter fraud is virtually nonexistent.<sup>96</sup> It follows that if the purported reasons for a law are objectively and obviously flawed,<sup>97</sup> it is appropriate to ask whether there may be an ulterior motive behind such laws. It also follows that if legislators are unwilling to acknowledge the shakiness of the purported rationales, the real reason is likely unpopular, sinister, unconstitutional, or perhaps all three.

To find evidence of the actual reasons for the law, one must look to the actual effects: voter ID laws “effectively disenfranchise large numbers of

90. *Id.* at 198.

91. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 598 (4th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 745–746 (7th Cir. 2014) (en banc).

92. *Crawford*, 553 U.S. at 198 (emphasis added). Because Indiana law provides for free identification cards, the direct costs of the identification cards are not included in the Court’s burden analysis. *Id.*

93. *Id.* at 199.

94. Ellis, *supra* note 81, at 889.

95. *Crawford*, 553 U.S. at 204.

96. ACLU, *Fact Sheet on Voter ID Laws* (May 2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_voter\\_id\\_fact\\_sheet\\_-\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_voter_id_fact_sheet_-_final.pdf); Suevon Lee & Sarah Smith, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Mar. 9, 2016, 8:33 AM), <https://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

97. In addition, reasons put forth by Republican legislators call for expensive measures using taxpayer dollars, a solution that flies in the face of professed Republican ideals.

voters.”<sup>98</sup> The demographics of voters most likely to lack valid government-issued photo ID include senior citizens, people of color, people with disabilities, low-income voters, and students;<sup>99</sup> a cross-section of the population that overall is more likely to vote Democrat.<sup>100</sup> The voter fraud myth is similar to Michelle Alexander’s assertion that the era of colorblindness has allowed veiled racist rhetoric and falsities to shape policies to correct a non-existent problem: one cannot openly seek to disenfranchise people of color, but one can openly seek to disenfranchise criminals—which has paved the way for bipartisan support of policies like the drug war and mass incarceration.<sup>101</sup> So too have the veiled racist rhetoric and falsities of voter fraud shaped voter restriction laws. It does not seem coincidental that “this willingness to disfranchise in the name of the ‘purity of the ballot box,’ occurred, yet again, at a moment when African Americans were gaining some political power and immigration levels were at historic highs.”<sup>102</sup>

### 1. *The Voter Fraud Myth Leads to Voter Intimidation*

The perpetuation of the voter fraud myth has not only led to voter ID laws that disenfranchise minority voters, but it has also encouraged citizens to act as “‘voting vigilantes’ through so-called ‘grassroots efforts’ to police voting practices.”<sup>103</sup> In fact, the then Republican candidate for president actually urged voters to “go around and watch other polling places” in the months leading up to the 2016 election: “I hear these horror shows, and we have to make sure that this election is not stolen from us and is not taken away from us . . . . And everybody knows what I’m talking about.”<sup>104</sup>

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98. KEYSSAR, *supra* note 7, at 284.

99. *Voter ID*, BRENNAN CTR. FOR JUSTICE (Oct. 15, 2012), <https://www.brennancenter.org/analysis/voter-id>.

100. KEYSSAR, *supra* note 7, at 284 (“[M]en and women most likely to be adversely affected . . . [are] disproportionately young, elderly, poor, and African American—which mean[s], of course, that they [are] significantly more likely to vote Democratic than Republican.”); *see also* Chandler Davidson, *The Historical Context of Voter Photo-ID Laws*, 42 PS: POL. SCI. & POL. 93, 93–94 (2009) (stating that the elderly and African Americans are more likely to self-identify as Democrats); Jens Manuel Krogstad & Mark Hugo Lopez, *Hillary Clinton Won Latino Vote But Fell Below 2012 Support for Obama*, PEW RES. CTR. (Nov. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/11/29/hillary-clinton-wins-latino-vote-but-falls-below-2012-support-for-obama/> (stating that Hillary Clinton won sixty-six percent of Latino/a voters in the 2016 presidential election); Alec Tyson & Shiva Maniam, *Behind Trump’s Victory: Divisions by Race, Gender, Education*, PEW RES. CTR. (Nov. 9, 2016), <http://www.pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education/> (stating that young adults preferred Clinton over Trump by a wide fifty-five to thirty-seven percent margin in the 2016 presidential election).

101. ALEXANDER, *supra* note 54, at 104–109, 161.

102. KEYSSAR, *supra* note 7, at 287.

103. Ellis, *supra* note 81, at 882.

104. Trip Gabriel, *Donald Trump’s Call to Monitor Polls Raises Fears of Intimidation*, N.Y. TIMES (Oct. 18, 2016), [http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?\\_r=0](http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?_r=0).

When this sentiment is directed at large crowd of nearly all white people<sup>105</sup> by a candidate who was endorsed by former Ku Klux Klan leader David Duke,<sup>106</sup> the rhetoric takes on a particularly menacing tone. Indeed, this language exacerbated “fears of intimidation of minorities inside polling places, where their qualifications to vote could be challenged.”<sup>107</sup> When Donald Trump speaks about citizens who threaten democracy by “stealing elections” (and who, therefore, are citizens unworthy of participating in the democratic system), “[you] know *what* I’m talking about,” becomes “you know *who* I’m taking about”: those who have been historically excluded—African Americans and other racial and ethnic minority voters.<sup>108</sup> Voting vigilante groups, like Truth to Vote and Stop the Steal<sup>109</sup> specifically direct their policing efforts “toward minority and economically suppressed districts.”<sup>110</sup> Furthermore, as voter fraud is so rare, it would be virtually impossible for a “poll watcher” to catch voter fraud in the act; what is more likely to occur is that their presence will convince the people most likely to be questioned or harassed—people of color—to stay home.<sup>111</sup>

## 2. Voter ID Laws Have Led to Voter Misinformation

The fates of many voter ID laws were decided in the months leading up to the 2016 election, creating confusion as to what was required to vote in some states. Even individuals tasked with providing information to citizens, such as poll workers and county clerks, incorrectly informed citizens about these requirements. For example, a complaint filed by the Texas Civil Rights Project alleged that poll workers in major cities across Texas were telling voters that they could not vote without a government-issued photo ID when, in fact, it had been determined earlier that year by a district court judge on remand from the Fifth Circuit Court of Appeals that voters without a photo ID could use other forms of identification, such as a paycheck or a

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105. *Id.*

106. Evan Osnos, *Donald Trump and the Ku Klux Klan: A History*, NEW YORKER (Feb. 29, 2016), <https://www.newyorker.com/news/news-desk/donald-trump-and-the-ku-klux-klan-a-history>.

107. Trip Gabriel, *Donald Trump’s Call to Monitor Polls Raises Fears of Intimidation*, N.Y. TIMES (Oct. 18, 2016), [http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?\\_r=0](http://www.nytimes.com/2016/10/19/us/politics/donald-trump-voting-election-rigging.html?_r=0).

108. At another rally Donald Trump reminded voters that it is “so important that you watch other communities, because we don’t want this election stolen from us.” *Id.*

109. See TRUTH TO VOTE, <http://truethevote.org> (last visited Jan 13, 2018); STOP THE STEAL, <https://stopthesteal.org> (last visited Dec. 8, 2016) (stopthesteal.org no longer exists—it redirects the user to Roger Stone’s website <https://stonecoldtruth.com/> (last visited Jan. 13, 2018)).

110. Ellis, *supra* note 81, at 901.

111. Emma Green, *The Disturbing Details of Trump’s Alleged Voter-Intimidation Efforts*, ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/poll-monitoring-voter-intimidation-lawsuits/506078/>.

utility bill.<sup>112</sup> In Detroit, the ACLU of Michigan accused Detroit City Clerk Janice Winfrey of carrying out a “misinformation campaign” by “repeatedly telling residents incorrectly that they must have an ID to vote.”<sup>113</sup> It is difficult to determine whether such misinformation is intentional or unintentional or if the misinformation occurred at the individual level or was a failure higher up within the election system. Voter misinformation was relayed via a statewide campaign in Texas, where a federal district judge found that Texas’s voter education campaign used “misleading language that could discourage eligible voters from going to the polls.”<sup>114</sup> Some voter ID laws provide multiple options for what to do when a voter cannot present valid ID, use vague or yet-undefined language, or use forms of statutory construction that give poll workers wide latitude in their decision-making with no check on their discretionary powers.<sup>115</sup> Discretion allows for unconscious (and conscious) biases to flourish and for history to repeat.<sup>116</sup> Room for discretion allows for “the stereotype of criminalizing certain voters by forcing some citizens, but not all, to bear the burden of proving that they are legitimate voters.”<sup>117</sup>

### III. RECENT FEDERAL CASES CONCERNING VOTER ID LAWS

Four major pending cases bring challenges to voter ID laws in North Carolina, Texas, Wisconsin, and Virginia.<sup>118</sup> Though plaintiffs in these cases have brought a number of claims, this section will focus roughly on

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112. Andrew Schneider, *Confusion Over Voter ID Spreads as Early Voting Continues*, HOUSTON PUB. MEDIA (Oct. 27, 2016, 4:54 PM), [jhttps://www.houstonpublicmedia.org/articles/news/2016/10/27/175203/confusion-over-voter-id-spreads-as-early-voting-continues/](https://www.houstonpublicmedia.org/articles/news/2016/10/27/175203/confusion-over-voter-id-spreads-as-early-voting-continues/).

113. Allan Lengel, *ACLU Accuses Detroit Clerk of Misinformation Campaign on Voter ID*, DETROIT DEADLINE (Nov. 7, 2016, 12:42 PM), [http://www.deadlinedetroit.com/articles/16160/aclu\\_accuses\\_detroit\\_clerk\\_of\\_misinformation\\_campaign\\_regarding\\_voter\\_id#.WEh4HKIrLeQ](http://www.deadlinedetroit.com/articles/16160/aclu_accuses_detroit_clerk_of_misinformation_campaign_regarding_voter_id#.WEh4HKIrLeQ).

114. Andrew Schneider, *Judge Rules Texas Defied Court Order on Voter ID Law*, HOUSTON PUB. MEDIA (Sept. 20, 2016, 5:59 AM), <https://www.houstonpublicmedia.org/articles/news/2016/09/20/168854/judge-rules-texas-defied-court-order-on-voter-id-law/>.

115. MONT. CODE ANN. § 13-13-114 (if the ID presented is “insufficient” to verify the voter’s identity, the poll worker may request the voter to undergo additional steps); R.I. GEN. LAWS §17-19-24.2 (a voter’s provisional ballot will only count if the local board, at a later date, decides the signatures match); UTAH CODE ANN. §§ 20A-3-105, 20A-4-107 (if a voter cannot provide a valid voter ID, a county clerk may verify the identity and residence of a voter “through some other means.”).

116. KEYSSAR, *supra* note 7, at 89 ([In the post-Reconstructionist South], “[m]any of the disenfranchising laws were designed expressly to be administered in a discriminatory fashion, permitting whites to vote while barring blacks. Small errors in registration procedures or marking ballots might or might not be ignored at the whim of the election officials; taxes might be paid easily or only with difficulty; tax receipts might or might not be issued.”).

117. Ellis, *supra* note 81, at 901.

118. See N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016), *appeal filed*, No. 16-3083 (7th Cir. Aug. 2, 2016); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016). Election Law at Mortiz also lists Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) as an ongoing voter ID case, but at this stage in the litigation process, the case has little to do with voter ID and thus will not be

three types of claims that may arise: (1) discriminatory purpose claims, which can be brought under the Equal Protection Clause, the Fifteenth Amendment, or Section 2 of the VRA; (2) discriminatory effect claims, which can be brought under Section 2 of the VRA; and (3) undue burden claims, which can be brought under the First and Fourteenth Amendments.<sup>119</sup>

The basic rubric for determining whether a law that denies the right to vote has a discriminatory purpose is essentially the same whether it is brought under the Equal Protection Clause, the Fifteenth Amendment, or Section 2 of the VRA. Though there are different formulations in various circuits, courts typically consider the five non-exhaustive factors originally set out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*<sup>120</sup>: (1) the historical background of the challenged law, (2) the specific sequence of events leading up to the challenged law, (3) departures from normal procedural sequence, (4) legislative history, and (5) the disproportionate racial impact of the challenged law.<sup>121</sup> Discriminatory intent need not be the “sole” or “primary” reason for enacting the law, but it must be a “motivating factor.”<sup>122</sup> Should the plaintiffs establish racial discrimination to be a motivating factor, the burden shifts to the state to demonstrate that the law would have been enacted even if the legislators’ motives had been pure.<sup>123</sup> At this point in the analysis, judicial deference “is no longer justified.”<sup>124</sup>

To prove discriminatory effect under Section 2 of the VRA in a vote-denial claim, the plaintiffs must show under the totality of the circumstances: (1) that “the challenged standard, practice, or procedure imposes 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) “that burden must be in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.”<sup>125</sup> Courts typically consider the *Gingles* factors to determine whether there is a sufficient causal link

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discussed. *Major Pending Election Cases*, ELECTION LAW AT MORITZ, <http://moritzlaw.osu.edu/election-law/major-pending-cases/> (last visited Dec. 8, 2016).

119. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion). The test and analysis for an undue burden claim is described in Section II.A.

120. 429 U.S. 252 (1977).

121. *Id.* at 266–268. Some courts phrase these factors differently. Compare *Veasey*, 830 F.3d at 231, with *McCrory*, 831 F.3d at 221–223 (considering additional factors when specifically considering the Voting Rights Act § 2 discriminatory intent claim).

122. *Arlington Heights*, 429 U.S. at 265–266.

123. *Id.* at 271 n.21.

124. *Id.* at 265–266.

125. *League of Women Voters v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (citations and quotation marks omitted); see also *Veasey*, 830 F.3d at 244.

between the disparate burden imposed by state voting law and social and historical conditions produced by that discrimination.<sup>126</sup>

### A. *North Carolina*

Within a month of the Supreme Court's decision in *Shelby*, which effectively dismantled the portion of the VRA that required certain states, including North Carolina, to obtain advanced approval before they could make any changes to voting laws, the Republican-controlled legislature of North Carolina passed "a strict photo-ID requirement, shaved a week off of early voting, and cut same-day registration, preregistration, and out-of-precinct voting."<sup>127</sup> The NAACP challenged the law and a panel of the Fourth Circuit Court of Appeals unanimously struck down the law.<sup>128</sup> The court determined that the North Carolina General Assembly relied on racial data to enact legislation that "restrict[ed] all—and only—practices disproportionately used by African Americans,"<sup>129</sup> who "overwhelmingly vote for the Democratic Party."<sup>130</sup> Because the Fourth Circuit Court of Appeals held that the challenged provisions of the law were enacted with a racially discriminatory intent in violation of the Equal Protection Clause and Section 2 of the VRA, the court did not consider the plaintiffs' remaining claims.<sup>131</sup>

As the Section 2 of the VRA and Equal Protection Clause's discriminatory-intent analyses are largely the same, courts typically do not examine them individually, but the court did so in this case.<sup>132</sup> The court specifically noted that when addressing Section 2 discriminatory-intent claims, "one of the critical background facts of which a court must take notice is whether voting is racially polarized."<sup>133</sup> Racially polarized voting alone is not evidence of racial discrimination, but it may motivate politicians to "entrench

126. See *Gingles* Factors, *supra* note 25.

127. Sarah Smith, *2016 Election Lawsuit Tracker: The New Election Laws and the Suits Challenging Them*, PRO PUBLICA (Nov. 7, 2016, 4:39 PM), <https://www.propublica.org/article/2016-election-lawsuit-tracker-new-election-laws-suits-challenging-them>; see also *N.C. Lawmakers Back Voter ID Law*, POLITICO (July 26, 2013) <http://www.politico.com/story/2013/07/north-carolina-voter-id-094788>.

128. *McCrorry*, 831 F.3d 204 (4th Cir. 2016).

129. *Id.* at 230.

130. Robert Barnes & Ann E. Marimow, *Appeals Court Strikes Down North Carolina's Voter-ID Law*, WASH. POST (July 29, 2016), [https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583\\_story.html](https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html).

131. *McCrorry*, 831 F.3d at 219. The other claims included a Fifteenth Amendment discriminatory-purpose claim, a Section 2 of the VRA discriminatory-effect claim, a First and Fourteenth Amendment undue-burden claim, and a Twenty-Sixth Amendment claim. *Id.* at 214.

132. *Id.* at 219–233.

133. *Id.* at 221. "Racial polarization refers to the situation where different races . . . vote in blocs for different candidates [than white voters]." *Id.* at 222 (citing *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986)).

themselves by targeting groups unlikely to vote for them.”<sup>134</sup> The court stated:

Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.<sup>135</sup>

To determine whether a facially neutral law is motivated by discriminatory intent,<sup>136</sup> the Fourth Circuit Court of Appeals looked to the factors listed in *Arlington Heights*.<sup>137</sup> The court noted that: (1) North Carolina has a “long history of race discrimination . . . and race-based vote suppression;”<sup>138</sup> (2) the law was enacted in the “immediate aftermath of unprecedented African American voter participation”<sup>139</sup> and within a month of being free from federal oversight that had been in effect for fifty years;<sup>140</sup> (3) the legislature “rushed” the law through the legislative process; and (4) though no minutes of the meetings about the law exist,<sup>141</sup> the court could glean discriminatory intent from the fact the legislators requested and received racial voting data and then enacted legislation “restricting all—and only—practices disproportionately used by African Americans.”<sup>142</sup> Not only did the court find that the law restricted the voting practices used disproportionately by African Americans, but it also found that African Americans were more likely to experience socioeconomic factors that may hinder their political participation.<sup>143</sup>

134. *Id.* at 214.

135. *Id.* at 222–223.

136. *Id.* at 220 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). “Challengers need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor.” *Id.* (quotation marks omitted) (citing *Arlington Heights*, 429 U.S. at 265–266). Should a discriminatory purpose be found to be a motivating factor, the burden shifts to the State to prove that even without the motivating factor, it would have enacted the law anyway. *Id.* at 233 (citing *Arlington Heights*, 429 U.S. at 265–266).

137. 429 U.S. at 266–268. The factors are: (1) the historical background of the challenged law, (2) the specific sequence of events leading up to the challenged law, (3) departures from normal procedural sequence, (4) the legislative history, and (5) the disproportionate racial impact of the challenged decision. *Id.*

138. *McCrorry*, 831 F.3d at 223.

139. *Id.* at 226.

140. *Id.* at 227.

141. *Id.* at 229 (“[T]estimony as to the purpose of challenged legislation ‘frequently will be barred by [legislative] privilege.’”) (quoting *Arlington Heights*, 429 U.S. at 268)).

142. *Id.* at 230.

143. *Id.* at 218.

The data upon which the legislature relied revealed that African Americans disproportionately: (1) lack a state-issued ID, (2) vote provisionally and those who vote provisionally do so outside of their resident precinct, (3) use preregistration, and (4) used early voting in both 2008 and 2012.<sup>144</sup> In a reverse mirror image, the North Carolina legislature required state-issued ID and in-precinct voting and they limited preregistration and the number of days a person could vote early from seventeen to ten.<sup>145</sup> By limiting the early-voting days, the North Carolina legislature did away with one of two Sundays, a particularly important day of voting for the African American community as “church congregations go together [to vote] after services in what is called ‘souls to the polls.’”<sup>146</sup> When it elaborated on its justifications for limiting early voting, the state explained that counties with Sunday voting were “disproportionately black” and “disproportionately Democratic.”<sup>147</sup> The court referred to this portion of the record as the closest thing to a “smoking gun that we are likely to see in modern times,”<sup>148</sup> as the state’s justification for the law “hinges explicitly on . . . its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”<sup>149</sup> The Court found that the law targeted African Americans “with almost surgical precision” to “cure[ ] problems that did not exist.”<sup>150</sup>

As the court was able to establish that race was a motivating factor by considering the *Arlington Heights* factors, the burden shifted to the state to demonstrate that the law would have been enacted regardless of the discriminatory taint.<sup>151</sup> Here, the court found the state’s justifications for the law (“to combat voter fraud and promote public confidence in the electoral system”) were meager and pretextual.<sup>152</sup> The court did not even address the “voter confidence” justification but noted that the “photo ID requirement . . . is both too restrictive and not restrictive enough to effectively prevent voter fraud.”<sup>153</sup> In-person voter fraud is the only fraud the law addresses, but there was no evidence that in-person voter fraud had ever occurred in North Carolina.<sup>154</sup> In fact, the only voter fraud of which there was any evi-

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144. *McCrary*, 831 F.3d at 216–218. The Court of Appeals relied on the fact-finding of the district court, which despite the evidence, “entered judgment against the Plaintiffs on all of their claims as to all of the challenged provisions.” *Id.* at 219. The standard to reverse a lower court’s finding of fact is “clearly erroneous,” an exceptionally high standard. *Id.* at 219–220.

145. *Id.* at 216–217.

146. Amy Goodman & Denis Moynihan, *The Voting Rights Acts in the Era of Jim Crow 2.0*, DEMOCRACYNOW! (Aug. 4, 2016), [http://www.democracynow.org/2016/8/4/the\\_voting\\_rights\\_acts\\_in\\_the](http://www.democracynow.org/2016/8/4/the_voting_rights_acts_in_the).

147. *McCrary*, 831 F.3d at 226.

148. *Id.*

149. *Id.*

150. *Id.* at 214.

151. *Id.* at 233.

152. *Id.* at 235.

153. *McCrary*, 831 F.3d at 235.

154. *Id.*

dence was absentee voting fraud, but absentee voting was exempted from the voter ID requirement as the legislature learned that whites, not blacks, disproportionately use absentee voting in North Carolina.<sup>155</sup> Though the North Carolina Attorney General (a Democrat) did not appeal the ruling, North Carolina's Republican governor filed an emergency stay request with the Supreme Court; the Court denied the request.<sup>156</sup> This law is not the only discriminatory action North Carolina has taken; the state violated the National Voter Registration Act by purging voter rolls before ninety days after an election, therefore violating the Motor Voter Act by failing to consistently add voters who registered through the North Carolina Division of Motor Vehicles to the voter rolls.<sup>157</sup>

### B. Texas

Texas's voter ID law was originally passed in 2011,<sup>158</sup> but since Texas was one of the states subjected to federal scrutiny under Section 4 of the VRA, the law did not receive preclearance.<sup>159</sup> Yet, within hours of the Supreme Court's *Shelby* decision, which had essentially voided the preclearance requirement, Texas officials vowed to immediately implement the 2011 voter ID law.<sup>160</sup> The voter ID law limited the forms of acceptable ID. All forms of ID must: (1) include a photograph, (2) not be expired for more than sixty days, (3) and if not federally issued, must be an ID issued by Texas's Department of Public Safety.<sup>161</sup> If a voter does not provide a proper photo ID, the voter may execute an affidavit affirming that he or she is a registered voter and then cast a provisional ballot, which is only counted if the voter goes to the county registrar within six days of the election with proper ID.<sup>162</sup> A person may vote by provisional ballot without a photo ID if he or she files an affidavit asserting either a religious objection to being photographed or that his or her ID was lost or destroyed as a result of a natural disaster that occurred within forty-five days of casting a ballot.<sup>163</sup>

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155. *Id.* at 230.

156. *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 27 (2016).

157. Smith, *supra* note 127.

158. See Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

159. *Texas v. Holder*, 888 F. Supp. 2d 113, 138 (D.D.C. 2012), *vacated* 133 S.Ct. 2886 (2013); see also Letter from Thomas E. Perez, Asst. Atty. Gen., to Keith Ingram, Tex. Dir. of Elections, at 5 (Mar. 12, 2012); Jim Malewitz, *Texas Voter ID Law Violates Voting Rights Act, Court Rules*, TEXAS TRIB. (July 20, 2016, 1:51 PM), <https://www.texastribune.org/2016/07/20/appeals-court-rules-texas-voter-id/> (see graphic following the text of the article).

160. Ed Pilkington, *Texas Rushes Ahead with Voter ID Law after Supreme Court Decision*, GUARDIAN (June 25, 2013), <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision>.

161. *Veasey*, 830 F.3d at 225–226.

162. *Id.* at 226.

163. *Id.*

The law has had a tumultuous and protracted time in court, which, as of April 2016, has cost the state of Texas 3.5 million dollars.<sup>164</sup> An *en banc* panel of the Fifth Circuit Court of Appeals found the voter ID law has a discriminatory effect under Section 2 of the VRA.<sup>165</sup> The Fifth Circuit Court of Appeals remanded the case to the district court to reweigh the discriminatory intent factors under the Equal Protection Clause and under Section 2 of the VRA, because the court found that the district court, using the *Arlington Heights* factors,<sup>166</sup> relied on some “infirm evidence” in concluding that the law was enacted with discriminatory intent.<sup>167</sup> The Court found that the district court: (1) disproportionately relied upon the long-ago legislative history of Texas’s discriminatory laws;<sup>168</sup> (2) disproportionately assigned the reprehensible actions of a few county officials to Texas’s entire legislative body;<sup>169</sup> (3) inappropriately relied upon contemporary examples of two redistricting cases as evidence of statewide discrimination (as the courts in the redistricting cases did not find the legislature intentionally discriminated);<sup>170</sup> and (4) disproportionately relied upon stray post-enactment comments by state legislators.<sup>171</sup> However, the Court of Appeals found that there was substantial evidence that the district court *could* use to conclude that the law was enacted with discriminatory purpose.<sup>172</sup> Therefore, the court remanded, asking the district court to evaluate: (1) evidence that the law’s proponents likely knew of the disparate impact of the law but enacted it anyway without considering any ameliorative measures;<sup>173</sup> (2) the numerous departures from typical procedures;<sup>174</sup> (3) the fact that the law is only tenuously related to the stated purpose of preventing voter

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164. Malewitz, *supra* note 159 (see graphic following the conclusion of the article).

165. *Veasey*, 830 F.3d at 234–243, 265. The court also found that the voter ID law does not impose a poll tax in violation of the Twenty-Fourth Amendment as the plaintiffs argued. *Id.* at 265–268.

166. Articulating them as “(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially where there are contemporary statements by members of the decision-making body.” *Id.* at 231 (citations omitted).

167. *Id.* at 234–243.

168. *Id.* at 231 (finding the district court reached too far back in looking at Texas legislative history of all-white primaries, literacy tests and secret ballots, and poll taxes, the most recent of which was abolished in 1966).

169. *Id.* at 232.

170. *Id.* at 232–233 (first citing *Bush v. Vera*, 517 U.S. 952, 976 (1996); then citing *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 439–440 (2006)).

171. *Veasey*, 830 F.3d at 234.

172. *Id.* at 236–238.

173. *Id.* at 236–237 (“For instance, the Legislature was advised of the likely discriminatory impact by the Deputy General Counsel to the Lieutenant Governor and by many legislators, and such impact was acknowledged to be ‘common sense’ by one of the chief proponents of the legislation.”).

174. *Id.* at 238 (listing some of the departures from protocol, such as Governor Perry designating the bill as “emergency legislation,” cutting floor debate time, and allowing the committee to add provisions to the bill, contrary to the Legislature’s rules and ordinary practices).

fraud;<sup>175</sup> (4) the fact that the “many rationales were given for a voter identification law shifted as they were challenged or disproven by opponents”;<sup>176</sup> and (5) that the law passed in the wake of “seismic demographic shifts” as minority populations in Texas increased in such a way that the Republican stronghold of political power was slipping.<sup>177</sup>

Though the Fifth Circuit Court of Appeals could not affirm the district court’s finding of discriminatory intent, the court did affirm the district court’s finding that the law had a discriminatory effect in violation of Section 2 of the VRA.<sup>178</sup> The court adopted the Fourth Circuit’s two-part totality of the circumstances framework<sup>179</sup> and concluded that the *Gingles* factors<sup>180</sup> should be used to determine “whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination.”<sup>181</sup> The court also approved of the use of statistical analysis, which demonstrated a disparate impact on minority voters.<sup>182</sup>

When weighing the *Gingles* factors, the court found the following factors weighed in favor of a finding that Texas’ voter ID law was racially discriminatory under Section 2 of the VRA: (1) Texas’ history of official discrimination, including long past discrimination and two discriminatory redistricting plans passed by the same legislative session;<sup>183</sup> (2) the existence of racial polarization in Texas;<sup>184</sup> (3) racial disparities in education, employment, housing, and transportation;<sup>185</sup> (4) the fact that minorities are

175. *Id.* at 237 (stating that the record showed by testimony of an expert that Texas has historically justified poll taxes, literacy tests, and other voter suppression tactics with the race-neutral reason of “promoting ballot integrity”).

176. *Id.* at 240–241.

177. *Id.* at 241 (citation omitted).

178. *Veasey*, 830 F.3d at 265.

179. *Id.* at 244. The plaintiff must show: (1) that “the challenged standard, practice, or procedure [imposes] 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) “that burden must be in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.” *Id.* (quoting *League of Women Voters v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (citations omitted)).

180. See *Gingles Factors*, *supra* note 25.

181. *Veasey*, 830 F.3d at 245.

182. *Id.* at 252. The district court concluded that Texas’s voter ID law disparately impacted African Americans and Hispanic registered voters based on expert testimony that revealed blacks were 1.78 times more likely than whites to lack correct ID and Latino/as 2.42 times more likely to lack correct ID. *Id.* at 251. The district court also found that the law “disproportionately impacts the poor, who are disproportionately minorities,” relying on testimony that revealed that 21.4% of eligible voters earning less than \$20,000 per year lack proper ID, compared to only 2.6% of voters earning between \$100,000 and \$150,000 per year. *Id.*

183. *Id.* at 257–258.

184. *Id.* at 258.

185. *Id.* at 259. The court found that 29% of African Americans and 33% of Hispanics in Texas live below the poverty line compared to 12% of Anglos; 6.1% of Anglos were unemployed compared to 8.5% of Hispanics and 12.8% of African Americans; 91.7% of Anglo 25-year-olds in

disproportionately underrepresented in the state legislature and in public office;<sup>186</sup> (5) and “Texas’[s] history of official discrimination.”<sup>187</sup> The court also found evidence that the legislature knew minorities would be most affected by the law, and this, “coupled with [the law’s] effect on minorities in Texas and the Legislature’s response to ameliorative amendments, demonstrated a lack of responsiveness to minority needs by elected officials”;<sup>188</sup> and that the law’s provisions did not meaningfully correspond to Texas’ interests in preventing voter fraud and increasing public confidence in elections.<sup>189</sup> In evaluating Texas’s purported rationales, the court stated that:

the articulation of a legitimate interest is not a magic incantation a state can utter to avoid a finding of disparate impact. Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State’s announced interests and the statute enacted.<sup>190</sup>

Like the Fourth Circuit Court of Appeals in *McCrorry*, the Fifth Circuit Court of Appeals found the voter-fraud prevention rationale to be dubious because there were no ID requirements for mail-in absentee voting, a form of voting that is more conducive to fraud, but there were ID requirements for in-person voting, a form of voting with little proven incidences of fraud.<sup>191</sup> Legislators also cited the possibility that undocumented immigrants and other non-citizens would try to vote, but—besides the fact that there was no evidence of such a scenario occurring—the belief is at odds with the common-sense rationale that undocumented immigrants are likely to avoid contact with government agents.<sup>192</sup> However, the real kicker is that non-citizens can legally obtain a driver’s license, an accepted form of ID.<sup>193</sup> The Fifth Circuit Court of Appeals, unlike the Fourth Circuit Court of Appeals in *McCrorry*, addressed the voter confidence rationale, and found that—not only was there “no credible evidence” to support the assertions that voter turnout is suppressed due to lack of confidence in elections—but also that the voter ID laws themselves would suppress voter turnout.<sup>194</sup>

The Fifth Circuit Court of Appeals concluded that the district court did not clearly err in determining that Texas’s voter ID law had a discriminatory effect on minorities’ voting rights in violation of Section 2 of the VRA

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Texas have graduated from high school, compared to 85.4% of African Americans, and only 58.6% of Hispanics. *Id.* at 258.

186. *Id.* at 261–262.

187. *Veasey*, 830 F.3d at 257.

188. *Id.* at 261–262.

189. *Id.* at 262–264.

190. *Id.* at 262 (citation omitted).

191. *Id.* at 263.

192. *Id.*; see also Vivian Yee, *Immigrants Hide, Fearing Capture on ‘Any Corner,’* N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/immigrants-deportation-fears.html?mcubz=1>.

193. *Veasey*, 830 F.3d at 263.

194. *Id.*

and remanded to the district court to determine an appropriate remedy.<sup>195</sup> A few weeks later, Texas reached an agreement with the Department of Justice and minority rights groups, the terms of which allowed registered voters to vote without ID by signing an affidavit and providing proof of residence in the form of a utility bill, bank statement, or paycheck.<sup>196</sup> The judge also ordered the state to communicate these changes to voters through a 2.5 million dollar education campaign, but later found that Texas violated the agreement “by using misleading language [in the campaign materials] that could discourage eligible voters from going to the polls” and ordered Texas to release new voter ID materials.<sup>197</sup> Even after the court order, some Texas election officials continued to give out incorrect information about IDs.<sup>198</sup>

### C. *Wisconsin*

In 2011, one year after Republicans gained control of both houses of the state legislature and the governor’s mansion, Wisconsin’s voter ID law was passed as the first of eight laws enacted over the next four years.<sup>199</sup> Two cases have been filed regarding Wisconsin’s election laws, each with varying success.

#### 1. *Frank v. Walker*

In 2014, the Seventh Circuit Court of Appeals ruled in *Frank v. Walker*<sup>200</sup> that Wisconsin’s photo ID laws did not violate the Equal Protection Clause of the Fourteenth Amendment or Section 2 of the VRA, reversing the district court’s preliminary injunction.<sup>201</sup> The Supreme Court then denied the plaintiffs’ petition for certiorari.<sup>202</sup> The Seventh Circuit Court of Appeals reasoned that the law is no more burdensome than the law at issue in *Crawford*, which therefore compelled the court to reject the constitutional challenge.<sup>203</sup> The court did not describe which constitutional analysis it applied nor did it even mention the Fourteenth Amendment in the opin-

195. *Id.* at 265.

196. Aneri Pattani & Jim Malewitz, *Texas Agrees to Weaken Voter ID Law for November Election*, TEXAS TRIB. (Aug. 3, 2016, 2:27 PM), <https://www.texastribune.org/2016/08/03/texas-agrees-weaken-voter-id-law/>.

197. Order Regarding Agreed Interim Plan for Elections, *Veasey v. Abbott*, 870 F.3d 387 (5th Cir. 2017) (No. 2:13-CV-00193), ECF No. 895; Order, *Veasey v. Abbott*, 870 F.3d 387 (5th Cir. 2017) (No. 2:13-CV-00193), ECF No. 943.

198. Temporary Restraining Order, *Sw. Voter Registration Educ. Project v. Callanen*, No. 2016-CI-18915 (Tex. Dist. Ct. Oct. 28, 2016).

199. 2011 Wis. Sess. Laws 103; 2011 Wis. Sess. Laws 903; 2011 Wis. Sess. Laws 1273; 2011 Wis. Sess. Laws 1299; 2013 Wis. Sess. Laws 794; 2013 Wis. Sess. Laws 959; 2013 Wis. Sess. Laws 1042; 2014 Wis. Sess. Laws 1046.

200. 768 F.3d 744 (7th Cir. 2014) (en banc).

201. *Id.* at 755.

202. *Frank v. Walker*, 135 S. Ct. 1551 (2015).

203. *Frank*, 768 F.3d at 751.

ion. Turning to the VRA claim, the court admitted that—though the findings of the district court document a disparate outcome—“they do not show a ‘denial’ of anything by Wisconsin as [Section 2] requires; unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter.”<sup>204</sup> Thus, the court neatly concluded in eleven pages that, despite the contrary findings at the district court level, Wisconsin’s voter ID laws did not violate the Constitution or Section 2 of the VRA.<sup>205</sup>

## 2. *One Wisconsin Institute, Inc. v. Thomsen*

In *One Wisconsin Institute, Inc. v. Thomsen*,<sup>206</sup> a case currently pending appeal in the Seventh Circuit Court of Appeals, plaintiffs challenged Wisconsin’s election laws under the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments as well as Section 2 of the VRA.<sup>207</sup> The district court judge felt compelled under *Crawford* and *Frank v. Walker* to reject the plaintiffs’ facial challenge, but stated that: “[t]he Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities. To put it bluntly, Wisconsin’s strict version of voter ID law is a cure worse than the disease.”<sup>208</sup> The judge also warned that “Wisconsin may adopt a strict voter ID system only if that system has a well-functioning safety net.”<sup>209</sup> Plaintiffs in this case, like those in the cases challenging the North Carolina voter ID law and Texas voter ID law, contended that the state legislature intentionally discriminated against voters because of their race; however, plaintiffs here did not bring intentional discrimination claims under the Equal Protection Clause<sup>210</sup> or Section 2 of the VRA. Instead, they brought an intentional discrimination claim solely under the Fifteenth Amendment,<sup>211</sup> which still relies on principles articulated by *Arlington Heights*.<sup>212</sup> The district court ultimately ruled that the voter ID provision was not motivated by racial animus and thus did not violate the Fifteenth Amendment, because: (1) the legislature’s rationales were the same as the rationales stated in *Crawford*, which the Supreme Court endorsed; (2) Wisconsin’s history with voter ID does not suggest that such laws are inherently motivated by racial animus (as a voter ID law passed in 2005 garnered signifi-

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204. *Id.* at 753.

205. *Id.* at 755.

206. *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016), *appeal filed*, No. 16-3083 (7th Cir. Aug. 2, 2016).

207. *Id.* at 902.

208. *Id.* at 903.

209. *Id.* at 904.

210. The plaintiffs likely did not bring the claim due to the Seventh Circuit’s ruling in *Frank v. Walker*.

211. *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 917.

212. *Id.*

cant bipartisan support); (3) though there is “scant evidence of actual voter fraud in Wisconsin,” the “election integrity [rationale] provides a valid, non-discriminatory reason for the voter ID law”; and (4) the legislature did not entirely ignore the disparate effects of the law as the law provides that the Wisconsin Division of Motor Vehicles must provide a free ID to any citizen over eighteen requesting one for voting (though there have been demonstrated difficulties with the implementation of this free ID).<sup>213</sup> However, the court did find that another provision challenged under the Fifteenth Amendment, the restriction on the hours for in-person absentee voting, had a disparate effect on African Americans and Latino/as.<sup>214</sup> The court found that “[t]he legislature did not act out of pure racial animus; rather, suppressing the votes of reliably Democratic minority voters in Milwaukee was a means to achieve its political objective.”<sup>215</sup> The court also found that the justification—uniformity in voting across the state—was “meager,” and when combined with the legislature’s real political objective, led the court to conclude that “the legislature passed the provisions restricting the hours for in-person absentee voting motivated in part by the intent to discriminate against voters on the basis of race,” in violation of the Fifteenth Amendment.<sup>216</sup>

The district court found that multiple provisions of the law had a discriminatory effect in violation of Section 2 of the VRA. The district court, unlike the Seventh Circuit Court of Appeals in *Frank v. Walker*, found the plaintiffs’ challenge to be a vote-denial claim, and thus followed the two-step Section 2 discriminatory effect analysis used by the Fourth and Fifth Circuits.<sup>217</sup> First, the court determined that several of the challenged provisions disproportionately burdened minority voters more than other voters, including: (1) the inflexible residence requirement increase from ten to twenty-eight days, because minorities are much more transient and more likely to lack access to transportation to travel to the correct municipality;<sup>218</sup> (2) the limitation of in-person absentee voting to one location per municipality, narrowing the in-person absentee window to ten days, and prohibiting clerks from offering weekend voting because minorities are more likely to use extended weekend hours and most minorities lived in large cities where one location would create large crowds;<sup>219</sup> and (3) Wisconsin’s “free ID” process because it disenfranchised otherwise qualified

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213. *Id.* at 921–922.

214. *Id.* at 925.

215. *Id.*

216. *Id.*

217. *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 952 (citations omitted). For the first inquiry, the court considered both statistical analyses and comparisons of how the current laws affect minorities compared to previous laws. *Id.* at 952–54.

218. *Id.* at 941.

219. *Id.* at 931–932.

voters who would have to endure severe burdens to obtain an ID over months.<sup>220</sup>

In the second step of the Section 2 vote denial claim, the court was required to determine whether the burdens found in step one were linked to social and historical conditions of discrimination.<sup>221</sup> Though the Seventh Circuit Court of Appeals found the *Gingles* factors “unhelpful,”<sup>222</sup> the district court determined that the VRA still requires courts to examine the totality of the circumstances, “which essentially comprises the same inquiries that the *Gingles* factors address.”<sup>223</sup> The court found that limiting in-person absentee voting to one location per municipality, narrowing the window for in-person absentee voting, and prohibiting extended weekend hours was “linked to historical conditions of discrimination” and thus violated the VRA.<sup>224</sup>

The plaintiffs also contended that the law violated the First and Fourteenth Amendments because it acted as an undue burden on the right to vote, generally.<sup>225</sup> The district court applied the *Anderson-Burdick* standard.<sup>226</sup> Under this standard, a court must undertake a three-step analysis for each challenged provision: (1) the court must “determine the nature and severity of the burden . . . place[d] on eligible voters who cannot comply with the new requirements”; (2) the court must identify the state’s “precise” justification for the provision; and (3) the court must “weigh the burdens against the state’s justifications for imposing them and then make the hard judgment that the adversary system demands.”<sup>227</sup>

After applying the analysis to each provision of the law, the district court found the following provisions violated the First and Fourteenth Amendments: (1) the limitation of in-person absentee voting to one location per municipality, narrowing the window of time to do so, and prohibiting

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220. *Id.* at 949, 913 (finding that two-thirds of those who attempted to get free IDs were minorities, more than half of all people who attempted to get free IDs were African American, and that African Americans and Latino/as represented eighty-five percent of all free ID denials).

221. *Id.* at 951.

222. *Frank v. Walker*, 768 F.3d 744, 754–755 (7th Cir. 2014) (en banc) (as the Court of Appeals was only hypothesizing what would occur if they considered the claim to be a vote-denial claim, this portion of the opinion would fairly be characterized as dicta).

223. *One Wis. Inst.*, 198 F. Supp. 3d at 958.

224. *Id.* at 959–960 (finding that disparities in housing, education, and employment condensed minority groups into high-density urban areas; in-person absentee voting rules required voters in large municipalities to travel farther and contend with larger volumes of people to vote; and lower levels of educational attainment and employment decreased flexibility to spend time waiting to vote).

225. *Id.* at 929–930. Plaintiffs challenging the North Carolina voter ID law did make the same contention; the district court rejected the argument while the Fourth Circuit Court of Appeals never addressed the argument because it found the law invalid on other grounds. No such contention was brought in the Texas voter ID case.

226. *Id.* at 930 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

227. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion)).

weekend voting hours;<sup>228</sup> (2) the requirement that dorm lists be provided for college students to provide proof of citizenship and the prohibition on expired student IDs;<sup>229</sup> (3) the increased residency requirement;<sup>230</sup> (4) the prohibition of clerks from faxing or emailing absentee ballots;<sup>231</sup> and (5) the free ID process.<sup>232</sup>

The court discussed the free ID process at length: a process wherein one can only get a free ID if he or she can corroborate his or her existence with a birth certificate, which minorities overwhelmingly lacked.<sup>233</sup> If the petitioner lacks a birth certificate or an acceptable alternative, “on average, it takes five communications with the DMV after the initial application to get an ID.”<sup>234</sup> Of the sixty-one individuals denied a free ID, fifty-three were minority voters.<sup>235</sup> The court found the free ID process to be a “wretched failure” that disenfranchised a number of qualified voters who “are overwhelmingly African American and Latino. The [free ID provision] violates the constitutional rights of those who must use it, and so Wisconsin must therefore replace or substantially reform the process.”<sup>236</sup> The court permanently enjoined all of the provisions of the law that were found to be unlawful, yet voter ID misinformation continued to occur in Wisconsin after the district court order, forcing a district court judge to order the state to conduct a better public information campaign within a month of the 2016 election.<sup>237</sup>

#### D. Virginia

Months after the Fourth Circuit Court of Appeals struck down North Carolina’s voter ID law, a different panel affirmed the district court’s findings that Virginia’s voter ID law does not intentionally discriminate, have a discriminatory effect, nor does it unduly burden the right to vote.<sup>238</sup> The voter ID law requires voters to present an approved form of ID, which includes: (1) a valid Virginia driver’s license, U.S. passport, or other photo identification provided by the state or United States; (2) a valid student

228. *Id.* at 931–35.

229. *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 937–938.

230. *Id.* at 941–944.

231. *Id.* at 946–948.

232. *Id.* at 948–949.

233. *Id.* at 903.

234. *Id.*

235. *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 915.

236. *Id.* at 916.

237. Opinion & Order at 6–7, *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016), *appeal filed*, No. 16-3083 (7th Cir. Aug. 2, 2016) (No. 15-CV-00324-jdp), ECF No. 293; *see also* Scott Bauer & Todd Richmond, *In Wisconsin, DMV Workers Give Bad Information on Voter IDs*, PBS (Oct. 4, 2016, 4:49 PM), <http://www.pbs.org/newshour/rundown/in-wisconsin-dmv-workers-give-bad-information-on-voter-ids/>; Smith, *supra* note 127.

238. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016). The court also found that Virginia’s voter ID law did not violate the Twenty-Sixth Amendment. *Id.* at 607.

photo ID; or (3) any valid employee photo ID.<sup>239</sup> A voter without proper ID may still cast a provisional ballot, which must be cured within three days.<sup>240</sup> To cure a provisional ballot, a voter must present valid ID to the local registrar either in person or by fax or email.<sup>241</sup> Virginians can obtain a free voter ID without presenting any independent documentation; the “statute simply requires that a registrant provide her name, address, birthdate, and social security number and sign the registration form swearing that the information provided is true and correct.”<sup>242</sup>

The court considered the *Arlington Heights* factors<sup>243</sup> and concluded that Virginia’s voter ID law, unlike North Carolina’s voter ID law, was not enacted with a discriminatory purpose and thus did not violate the Fourteenth and Fifteenth Amendments.<sup>244</sup> For each factor, the court reached the following conclusions: (1) though there is history of discrimination in Virginia, there is “a trajectory toward greater inclusion”;<sup>245</sup> (2) though the debates were occurring when *certiorari* had been granted in *Shelby*, the legislature acted as if the law would be reviewed under Section 5 of the VRA as *Shelby* was not yet decided;<sup>246</sup> (3) though there was a “substantial party split” on the vote, the “legislative process . . . was normal”;<sup>247</sup> (4) “the [legislative history] demonstrate[s] support for the bill for reasons other than vote suppression, such as the prevention of voter fraud and the promotion of public confidence in the voting system”;<sup>248</sup> and (5) though African American and Latino/a voters were “slightly less likely” to have appropriate ID, plaintiffs failed to demonstrate that the law had an adverse disparate impact.<sup>249</sup> After reviewing “the totality of the circumstances involved in the enactment of [the law] in light of *Arlington Heights* and *McCrary*,” the Fourth Circuit Court of Appeals concluded that the evidence was insufficient to prove the law was passed with discriminatory purpose.<sup>250</sup>

The Court also concluded that the law does not have a racially discriminatory effect in violation Section 2 of the VRA because Virginia allows

239. VA. CODE § 24.2-643(B) (2016).

240. VA. CODE § 24.2-653(A) (2016).

241. *Id.*

242. VA. CODE § 24.2-643(B) (2016); *see also Lee*, 843 F.3d at 600 (quoting *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D.Va. 2016)).

243. The factors are: (1) the historical background of the challenged law, (2) the specific sequence of events leading up to the challenged law, (3) departures from normal procedural sequence, (4) the legislative history, and (5) the disproportionate racial impact of the challenged decision. *Arlington Heights*, 429 U.S. at 265–268.

244. *Lee*, 843 F.3d at 604.

245. *Id.* at 597.

246. *Id.* at 601.

247. *Id.* at 603.

248. *Id.* at 602.

249. *Id.* at 598.

250. *Lee*, 843 F.3d at 604.

everyone to vote,<sup>251</sup> and provides free photo IDs to people without them, therefore giving every voter an equal opportunity to vote.<sup>252</sup> The court determined that, to prove a Section 2 violation, plaintiffs must establish that a structure or practice denies or abridges the right to vote on account of race or color in such a way that the political process is not equally open to the protected class. That is, “its members have less opportunity than others to participate in the process and elect representatives of their choice.”<sup>253</sup> The court agreed with the district court’s finding that “African Americans, as a demographic block, are by a slim statistical margin less likely to have a form of valid identification.”<sup>254</sup> The court relied on *Crawford*’s holding that “the minor inconvenience of going to the registrar’s office to obtain an ID does not impose a substantial burden.”<sup>255</sup> The court stated that the “essence” of a burdensome structure or practice that violates Section 2 is “its interaction with social and historical conditions” that causes inequality in electoral opportunity, but the court did not evaluate the social and historical conditions that causes inequality in Virginia.<sup>256</sup>

Finally, the court, relying heavily on *Crawford*, found that Virginia’s voter ID law does not violate the First or Fourteenth Amendment, as it does not place an undue burden on the right to vote.<sup>257</sup> The court articulated the *Anderson-Burdick* standard,<sup>258</sup> recognizing that it weighs the burden on eligible voters unable to obtain ID against the “precise” interests stated by the Virginia legislature.<sup>259</sup> After summarizing the Supreme Court’s analysis in *Crawford*, the Fourth Circuit Court of Appeals determined that Virginia’s voter ID law imposes an even lighter burden on obtaining the free ID because there is no requirement to present any birth certificate or other documentation.<sup>260</sup> As the “precise” justifications of the Virginia legislature mimic exactly the “precise” justification in *Crawford*, the court concluded *a*

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251. “Being able to vote,” according to the court, includes both casting a ballot that is counted without further action being taken and casting a provisional ballot that will not be counted unless a person returns within three days to the DMV with proper ID. *Id.* at 600.

252. *Id.* at 601.

253. *Id.* at 599 (citing Voting Rights Act § 2).

254. *Id.* at 600.

255. *Id.* (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion)).

256. *Lee*, 843 F.3d at 600 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1983)).

257. *Id.* at 607.

258. “A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’ Under this standard, the rigor-ousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citations omitted).

259. *Lee*, 843 F.3d at 606–607.

260. *Id.* at 606.

*fortiori* that the law does not impose an unconstitutional burden on the right to vote.<sup>261</sup>

#### IV. CONSEQUENCES OF THE COURTS' ANALYSES

##### A. *Successes and Shortcomings of the Analytical Frameworks*

###### 1. *Discriminatory Purpose Analysis*

Discriminatory purpose claims for voter ID laws can be brought under the Equal Protection Clause, the Fifteenth Amendment, or Section 2 of the VRA, all of which use the same analytical rubric. Courts typically consider the five non-exhaustive factors originally set out in *Arlington Heights*<sup>262</sup>: (1) the historical background of the challenged law, (2) the specific sequence of events leading up to the challenge of the law, (3) departures from normal procedural sequence, (4) the legislative history, and (5) the disproportionate racial impact of the challenged decision.<sup>263</sup> Discriminatory intent only needs to be a “motivating factor.”<sup>264</sup> Should the plaintiffs establish race to be a motivating factor, the burden shifts to the state to demonstrate that the law would have been enacted regardless of the bad intent on the part of some in the legislature.<sup>265</sup> Plaintiffs brought discriminatory intent claims in each case outlined above: *McCrary*, where the court found the voter ID law was enacted with discriminatory intent;<sup>266</sup> *Veasey*, where the court could not affirm the lower court’s finding of discriminatory purpose, due to the lower court’s reliance on infirm evidence, but which still remanded it to the district court to reanalyze the claim as there was enough evidence to find discriminatory purpose;<sup>267</sup> *One Wisconsin Institute*, where the court did not find the voter ID provision was enacted with discriminatory intent, but found other provisions of the law were enacted with discriminatory intent;<sup>268</sup> and *Lee*, where the court found the law was not enacted with discriminatory purpose.<sup>269</sup>

The most difficult factors for plaintiffs to fully capitalize on are the first factor (the historical background of the challenged decision) and the fourth factor (legislative history). Addressing the first factor, the historical background of the challenged decision in the certain states has proven to be a double-edged sword. States like North Carolina, Texas, and Virginia were subject to Sections 4 and 5 of the VRA and had been since the VRA was enacted in 1965. Thus, from 1965 to 2013, when *Shelby* was decided, North

261. *Id.* at 607.

262. 429 U.S. 252 (1977).

263. *Id.* at 266–267.

264. *Id.* at 265–266.

265. *Id.* at 270–271 n.21.

266. *McCrary*, 831 F.3d at 219.

267. *Veasey*, 830 F.3d at 234–243.

268. *One Wis. Inst.*, 198 F. Supp. 3d 896 at 918–922.

269. *Lee*, 843 F.3d at 604.

Carolina, Texas, and Virginia could not enact any voting law changes without first receiving approval from the U.S. Attorney General or the District Court of the District of Columbia. This meant that, for those states, there was little official discriminatory history for the past fifty years.

A court could decide to look at the history one of two ways: either the court could find that the historical background in the state indicates that racial discrimination was such an issue that the factor weighs in favor of finding intentional discrimination,<sup>270</sup> or the court could find that since there was no recent historical evidence of racial discrimination, the factor weighs in favor of not finding intentional discrimination.<sup>271</sup> Likewise, a court reviewing the law of states that were never covered by Sections 4 and 5 of the VRA could find that because the state was never covered by Sections 4 and 5, there must not be racial discrimination in the state.

The fourth factor, legislative history, is a difficult factor to effectively utilize since today, most legislators do not openly espouse their racial prejudices and their desire to suppress the voting rights of minorities on record. Even if such sentiments were expressed, oftentimes, no minutes were taken<sup>272</sup> and compelling testimony would be difficult as legislators frequently are afforded privilege.<sup>273</sup> Should a legislator not announce her racist views or her desire to suppress votes but instead express a desire to suppress votes of reliable Democratic voters, plaintiffs could potentially make a separate Fourteenth Amendment claim under *Romer v. Evans*.<sup>274</sup>

Finally, it is imperative that plaintiffs make a discriminatory intent claim under the Fourteenth Amendment *and* either the Fifteenth Amendment or Section 2 of the VRA. Though the analyses are essentially the same, when challenging under the Fifteenth Amendment or Section 2 of the VRA, one must consider an important factor not included in the Fourteenth Amendment analysis: racial polarization.<sup>275</sup> Though racial polarization standing alone does not evince racial discrimination, it does provide an incentive for intentional discrimination.<sup>276</sup> “[I]ntentionally targeting a particular race’s access to the franchise because its members vote for a particular

270. *McCrary*, 831 F.3d at 223 (“Failure to so recognize [pre-1965 history] would risk allowing that troubled history to ‘pick[ ] up where it left off in 1965’ to the detriment of African American voters in North Carolina.”) (citation omitted).

271. *Veasey*, 830 F.3d at 232 (finding that the district court erred in relying on pre-1965 state history of racial discrimination—“In light of [*Shelby* and *McCleskey v. Kemp*], the most relevant ‘historical’ evidence is relatively recent history, not long-past history.”).

272. *See* N.C. State Conference of the NAACP v. *McCrary*, 182 F. Supp. 3d 320, 488–89 (M.D.N.C. 2016), *rev’d sub nom.* N.C. State Conference of NAACP v. *McCrary*, 831 F.3d 204 (4th Cir. 2016) (finding that although no minutes were taken, the plaintiffs included emails from Republican staffers and legislators demonstrating that “certain members of the legislature requested and received demographic data for ‘provisional and one-stop voters.’”).

273. *See Arlington Heights*, 429 U.S. at 268.

274. 517 U.S. 620 (1996).

275. *McCrary*, 831 F.3d at 221.

276. *Id.* at 222.

party, in a predictable manner, constitutes discriminatory purpose.”<sup>277</sup> This factor will allow courts to more closely consider the fact that voter ID law support splits along partisan lines,<sup>278</sup> which weakens the credibility of Republican-led legislatures that advance the purported rationales.

## 2. *Discriminatory Effect Analysis*

Most courts have recognized that Section 2 of the VRA discriminatory-effect claims challenging voter ID laws are vote-denial claims.<sup>279</sup> To prove discriminatory effect in a vote-denial claim under Section 2, a plaintiff must show—under the totality of the circumstances—that: (1) “the challenged standard, practice, or procedure imposes a discriminatory burden on members of a protected class” and (2) “that burden must be in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.”<sup>280</sup> To determine whether there is a sufficient causal link between disparate burden imposed by state voting law and social and historical conditions produced by that discrimination, courts typically consider the non-exclusive *Gingles* factors.<sup>281</sup> In *Veasey*, the Fifth Circuit Court of Appeals found that the voter ID law had a discriminatory effect;<sup>282</sup> the district court in *One Wisconsin Institute* found that the voter ID law did not have a discriminatory effect but other voting restrictions did;<sup>283</sup> and in *Lee*, the Fourth Circuit Court of Appeals found the voter ID law did not have a discriminatory effect.<sup>284</sup>

The Section 2 discriminatory-effect claim is the claim with which a plaintiff is most likely to win when challenging a voter ID law because discriminatory effect is much easier to prove than discriminatory intent and because undue burden claims have been significantly weakened by the Supreme Court’s ruling in *Crawford*, wherein the Court found that the requirements of obtaining an ID is not an undue burden. Furthermore, the *Gingles* factors force courts to look at the bigger picture—they force courts to ac-

277. *Id.*

278. William D. Hicks, Seth C. McKee & Daniel A. Smith, *The Determinants of State Legislator Support for Restrictive Voter ID Laws*, 16 STATE POL. & POL’Y 411, 411 (2016) (finding that beyond the significant effect of party affiliation, there is a “notable relationship between the racial composition of a member’s district, region, and electoral competition and the likelihood that a state lawmaker supports a voter ID bill. Democratic lawmakers representing substantial black district populations are more *opposed* to restrictive voter ID laws, whereas Republican legislators with substantial black district populations are more *supportive*.”).

279. *See Veasey*, 830 F.3d at 244; *League of Women Voters v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); *One Wis. Inst.*, 198 F. Supp. 3d 896; *but see Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014) (en banc).

280. *League of Women Voters*, 769 F.3d at 240 (citations omitted); *see also Veasey*, 830 F.3d at 244.

281. *See Gingles Factors*, *supra* note 25.

282. *Veasey*, 830 F.3d at 265.

283. *One Wis. Inst.*, 198 F. Supp. 3d at 958–960.

284. *Lee*, 843 F.3d at 598. The Fourth Circuit Court of Appeals did not address this argument in *McCrory*.

knowledge that, for example, “racial disparities in education, employment, housing, and transportation” affect minority voters right to vote.<sup>285</sup> The factors force a court to look to a state’s overt and subtle attempts to reinforce systemic racial exclusion and consider the tenuousness of the policy underlying the law.<sup>286</sup>

Weaknesses in this analysis still exist, however, mainly due to the difficulty in statistically proving how many people were prevented from voting or had to surmount unreasonable obstacles to vote, as well as the difficulty in *disproving* the existence of voter fraud. Here, the plaintiff should rely on the studies conducted by election experts, including Justin Levitt, who found thirty-one incidences of voter fraud in 1 billion votes cast between 2000 and mid-2014,<sup>287</sup> and Shelley de Alth, who analyzed the change in nationwide voter turnout between 2002 and 2006 and found that voter ID laws decreased turnout by between 1.6 and 2.2% (3 million to 4.5 million voters).<sup>288</sup> Additionally, plaintiffs need to keep the focus on statistical disparities in ID rates, not solely on whether voters were actually denied the right to vote due to the law.

### 3. *Undue Burden Analysis*

The undue burden analysis, as applied to a state election law challenge, applies the *Anderson-Burdick* standard, which weighs the nature and severity of the burden placed on eligible voters who cannot comply with the provision’s new requirements against the state’s “precise” justifications for the provision.<sup>289</sup> Unfortunately, the strength of such a challenge was significantly weakened by the Supreme Court’s application of the standard in *Crawford*,<sup>290</sup> where the Court found that Indiana’s justifications for the law, despite no evidence of in-person voter fraud in Indiana or that such laws would instill voter confidence, were reasonable and nondiscriminatory,<sup>291</sup> which means that instead of strict scrutiny, the court applies a “sliding scale” inquiry, which in actuality is a glorified rational basis inquiry.<sup>292</sup> *Crawford* was, unquestionably, incorrectly decided: the Court only gave a

285. See Gingles *Factors*, *supra* note 25.

286. *Id.*

287. 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=.Ce6b784302ce](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=.Ce6b784302ce); see also Justin Levitt, *The Truth About Voter Fraud*, *supra* note 76.

288. Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 186 (2009).

289. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citations and quotation marks omitted).

290. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion).

291. *Id.* at 194–198.

292. *Burdick*, 504 U.S. at 434 (stating that when “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of

cursorily examination of the state's rationales as it determined the burden was "limited." The Court seemed to exclusively rely on the poorly developed record of people actually denied the right to vote and did not consider the fact that, regardless of less-than-compelling "real word impact" testimony, 43,000 Indianans lack required ID.<sup>293</sup> If the Court actually weighed the impact of 43,000 Indiana residents lacking ID who now faced extra obstacles to voting against the weakly supported rationale, the undue burden analysis would clearly prevent the implementation of the law or at least significant portions thereof. Instead, the Court has concluded that so long as there is a neutral, nondiscriminatory rationale, i.e., the prevention of voter fraud, the *Anderson-Burdick* standard is satisfied.

Incorrectly decided or not, lower courts are required to follow Supreme Court rulings, but even so, lower courts will likely continue to incorrectly analogize *Crawford* by misplacing reliance on the sentence from *Crawford*'s plurality, which states that "the inconvenience of making a trip to the [Department of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."<sup>294</sup> The undue burden analysis was addressed in *One Wisconsin Institute* in which the claim succeeded<sup>295</sup> and *Lee* in which the claim failed.<sup>296</sup> Lower courts are likely to continue to incorrectly rely on *Crawford* by: (1) failing to recognize that *Crawford* was a facial challenge,<sup>297</sup> which leaves open room for distinguishing as-applied challenges; (2) ignoring the sliding scale nature of the *Anderson-Burdick* standard and instead treating it as an either/or—either the burden is "severe" and the law faces strict scrutiny, or it is a reasonable, nondiscriminatory reason that essentially undergoes a rational-basis review;<sup>298</sup> and (3) failing to realize that

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voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (some citations omitted).

293. *Crawford*, 553 U.S. at 187–88.

294. *Id.* at 198.

295. *One Wis. Inst.*, 198 F. Supp. 3d at 904, 949–950 (finding that, because the purported justifications for these laws do not justify the burdens they impose, the state may not enforce: (1) most of the state-imposed limitations on the time and location for in-person absentee voting save in one circumstance; (2) the requirement that "dorm lists" include citizenship information; (3) the twenty-eight-day durational residency requirement; (4) the prohibition on distributing absentee ballots by fax or email; (5) the bar on using expired student IDs; and (6) Wisconsin's free ID process).

296. *Lee*, 843 F.3d at 606–607 (finding that as the Virginia voter ID law imposes even lighter burdens on one's First and Fourteenth Amendment rights than the Indiana law did in *Crawford*—"particularly inasmuch as Virginia voters are not required to present any birth certificate or other documentation to obtain a free ID"—and the justifications were exactly the same as the Indiana law, the law did not impose an unconstitutional burden on the right to vote).

297. *Crawford*, 553 U.S. at 188.

298. Unlike *One Wisconsin Institute*, in which the district court weighed the burden that each provision imposed, the findings ranged from a "slight burden," to a "moderate" to a "severe" (and finding that the justifications of the state legislature cannot justify any provision with a moderate or severe burden). *One Wis. Inst.*, 198 F. Supp. 3d at 929–951.

if a law's safety nets (typically in the form of "free IDs") inadequately protect the burdened population's voting rights, the burden must be considered severe and face strict scrutiny (which a voter ID law cannot survive).<sup>299</sup>

## B. *Lessons from and Implications of the Voter ID Cases*

### 1. *Lessons from the Voter ID Cases*

A few general lessons can be taken from the cases in North Carolina, Texas, Wisconsin, and Virginia. First, the Fourth Circuit Court of Appeals ruling in *McCrory*—that North Carolina's voter ID law was enacted with discriminatory intent—is an anomaly because the facts presented in *McCrory* were a jarring aberration from all other cases. In no other case did the legislature ask for, receive, or rely on racial voter data to eliminate voting mechanisms disproportionately used by African Americans.<sup>300</sup> Nor did any other state explain that early voting was cut to make sure only one Sunday was in the period, not just because they wanted uniformity in voting center hours, but also because "[c]ounties with Sunday voting in 2014 were disproportionately black' and 'disproportionately Democratic.'"<sup>301</sup> The outlandishness of the facts of this case are starkly contrasted by the results of *Lee*, also decided in the Fourth Circuit Court of Appeals, where the court determined that not only was the Virginia voter ID law not enacted with discriminatory intent, but also that it did not have a discriminatory effect, nor did it place an undue burden on the right to vote.<sup>302</sup> In fact, the overt invidiousness of the facts in *McCrory* may have hurt the plaintiffs' discriminatory intent claim in *Lee* as the court, in distinguishing the cases, seemed to have set the bar with *McCrory*: anything not quite as egregious does not qualify as discriminatory intent.<sup>303</sup> *McCrory* will likely influence how state legislatures rely on data when making election-law decisions, which will be discussed in greater detail below.

Second, plaintiffs need inscrutable statistics to be explained by multiple experts and they need to compel witnesses to testify as to the "real-world impact" of the law. For example, the plaintiffs in *Lee* put on extensive evidence to show discriminatory intent by having experts explain that most voter ID laws were passed by Republican legislatures (as was the case in Virginia), minority voters overwhelmingly vote for Democrats, and minority voters and young voters were more likely to lack proper ID.<sup>304</sup> The state's experts criticized and poked holes in the plaintiffs' experts' findings,

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299. *See id.* at 903–904.

300. *McCrory*, 831 F.3d at 230.

301. *Id.* at 226.

302. *Lee*, 843 F.3d at 592.

303. *McCrory*, 831 F.3d at 233.

304. *Lee*, 843 F.3d at 597.

which the district court judge found persuasive.<sup>305</sup> Ultimately the parties agreed on the statistic that 96.8% of Caucasians and 94.6% of African Americans had appropriate IDs.<sup>306</sup> The fact that the parties stipulated to a superficial statistic and the fact that the district court judge ultimately found plaintiffs' witnesses unpersuasive<sup>307</sup> led the Fourth Circuit Court of Appeals to conclude that, not only was there no evidence of discriminatory intent, but there also was no evidence of a discriminatory effect, effectively dismissing two of the three claims.<sup>308</sup>

Plaintiffs must ensure a court relies on the correct statistics, as in *Veasey*, where the plaintiffs focused on the statistical disparity in ID rates, not on whether voters were actually denied the right to vote because, under the Fifteenth Amendment and Section 2 of the VRA, it is not just voter denial that is prohibited, but also voter *abridgment*.<sup>309</sup> Plaintiffs must remain focused on statistical disparity and should limit time spent seeking out citizens who were actually denied their right to vote for two reasons: first, even several dozen people testifying about vote denial does not carry the weight of statistics, which can be extrapolated to determine an estimated number of denied voters; second, it forces the plaintiffs into a position of waiting for actual harm to occur rather than allowing them to effectively attack the law facially before it goes into effect.

Additionally, plaintiffs need to outmatch the statistical evidence of the state's expert(s) by not only outnumbering the state's expert, but also by presenting robust statistical analyses that support the same conclusion: that racial minorities were disproportionately adversely affected by the voter ID law.<sup>310</sup> The court in *Veasey* was simply unpersuaded by the state's experts' own analysis in light of the plaintiffs' experts' use of three types of analyses coming to a vastly different result.<sup>311</sup> This is an expensive but necessary process to ensure that a court finds a voter ID law has a discriminatory effect and to bring the court closer to finding discriminatory intent.

A final way in which voter ID opponents should use statistics is to send statistical data to all legislators in a state legislature considering a voter ID law (or better yet, testify before the state legislatures about these statistics). Should a lawsuit arise challenging the law, the court would be hard pressed to find more compelling evidence than proof that state legislators who passed the law received statistical data showing that voter ID laws are racially discriminatory.

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305. *Id.*

306. *Id.* at 597–598.

307. *Id.* at 597.

308. *Id.* at 598.

309. *Veasey*, 830 F.3d at 253.

310. *See id.* at 250–252.

311. *Id.*

Finally, if a plaintiff wants to challenge the constitutionality of a state's voter ID law, the plaintiff should challenge all the provisions that make up the voting restriction law, not just the voter ID portion. This seems obvious, but plaintiffs in *Lee* and *Veasey* only challenged the voter ID laws<sup>312</sup> and did not include the states' new restrictions on third-party registration, which is a way in which many racial minorities register.<sup>313</sup> Whereas the plaintiffs in *McCrary* and *One Wisconsin Institute* challenged the voter ID laws *and* challenged limitations on early voting, out-of-precinct voting, and weekend voting, among other provisions.<sup>314</sup> This proved to be important in *One Wisconsin Institute*, in which discriminatory effect was not found for the voter ID law, but was found for: the limitation of in-person absentee voting to one location per municipality, the narrowing of the window for in-person absentee voting, and the prohibition on extended weekend voting hours.<sup>315</sup>

When challenging multiple provisions, it forces the courts to consider the full range of discriminatory effects instead of focusing solely on the voter ID portion of the law. For example, in *McCrary*, the court found discriminatory intent because all of the voting restriction provisions—requiring state-issued ID, eliminating out-of-precinct voting, eliminating preregistration, and limiting early voting—*only* disproportionately affected African Americans.<sup>316</sup> If the plaintiffs in *McCrary* had only challenged the voter ID provision, perhaps such a finding could not have been made even in light of the legislature looking at racial data, because requiring an ID alone does not show that the legislature *relied* on that data.

## 2. Implications of the Voter ID Cases

The outcomes of the recent voter ID cases are inconsistent, but as legislators, judges, civil-rights groups, and citizens digest the results, there are a few likely consequences of the decisions. First, and most obviously, state legislatures will not rely on racial data when designing new voting-restriction laws as that was a deciding factor in finding the North Carolina voter ID law was unconstitutional. However, it is in the Democratic legislators' best interests to gather such racial data to arm themselves with counterarguments when a voting restriction bill is introduced. This allows civil-rights groups combatting the law in later litigation to introduce the legislative history as evidence that the Republican lawmakers knew of the racially dis-

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312. *Lee*, 843 F.3d at 592; *Veasey*, 830 F.3d at 225.

313. *New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE, [https://www.brennancenter.org/sites/default/files/analysis/New\\_Voting\\_Restrictions.pdf](https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf) (last updated May 10, 2017).

314. *McCrary*, 831 F.3d at 219; *One Wis. Inst.*, 198 F. Supp. 3d at 905–907.

315. *One Wis. Inst.*, 198 F. Supp. 3d at 958–960.

316. *McCrary*, 831 F.3d at 230.

crimnatory effects and still went ahead in enacting the law.<sup>317</sup> Unfortunately, reliance on racial data may no longer be necessary in light of the fact that these opinions carefully combed through the effects of the laws—savvy legislators will already be aware of *McCrary* and the research finding that black and minority citizens are more likely to lack state-issued ID, use preregistration, or use early voting; thus, these legislators will avoid discussing these effects on the record to minimize the evidence of the discriminatory intent of the law.<sup>318</sup>

Second, even without reliance on actual data, legislators will likely continue to enact voter-restriction laws in a way that greatly affects low-income voters who are disproportionately minorities. Courts have disapproved of actual direct costs to obtaining proper ID,<sup>319</sup> but have largely ignored indirect costs (such as traveling, taking off work, etc). Thus, legislators will likely try to limit voting hours and limit the number of polling areas to disproportionately affect people who have less flexible work hours and lack personal transportation.

Furthermore, there will likely be a rise in the “free ID” option in voter ID laws, as this safety net will more likely allow otherwise strict and unyielding voter ID laws to withstand judicial scrutiny.<sup>320</sup> Civil-rights groups should be sure to separately challenge any free ID provision of a voter ID law as a poor safety net. For example, the district court found in *One Wisconsin Institute* that the free ID safety net was ineffectively and discriminatorily used and thus found that the law could not stand without major revisions.<sup>321</sup>

Third, Republican legislators will continue to use the rationales of preventing voter fraud and upholding election integrity to support the laws. So long as a court does not find discriminatory intent, the voter fraud and election integrity rationales have held up surprisingly well despite judges openly questioning the judgment of the legislators. This kind of overt misinformation may become more prevalent in the so-called “post-truth” era of American politics.<sup>322</sup> Legislators who oppose the laws must attack these rationales and attempt to get proponents to concede flaws or alter their ar-

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317. *Veasey*, 830 F.3d at 236–237. The Fifth Circuit Court of Appeals found this to be a factor that weighs in favor of finding the law was enacted with discriminatory intent.

318. *McCrary*, 831 F.3d at 216–218.

319. If direct costs are imposed, civil rights groups should consider raising a Twenty-Fourth Amendment argument and contend that such costs are a poll tax. *See Ellis*, *supra* note 4, at 1037–38.

320. *See Crawford*, 553 U.S. 181 (2008) (plurality opinion).

321. *Ellis*, *supra* note 4, at 1037–38.

322. *See cf.* Eric Oliver & Thomas Wood, *A New Poll Shows 52% of Republicans Actually Think Trump Won the Popular Vote*, WASH. POST (Dec. 18, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/18/a-new-poll-shows-an-astonishing-52-of-republicans-think-trump-won-the-popular-vote/?utm\\_term=.0373ed99b685](https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/18/a-new-poll-shows-an-astonishing-52-of-republicans-think-trump-won-the-popular-vote/?utm_term=.0373ed99b685).

guments as the rationales are challenged or disproven.<sup>323</sup> Civil-rights groups and the news media must continuously combat the misinformation spread by voter ID proponents by explicitly noting and condemning the racist motives behind these actors' rhetoric. Too long have Republican legislatures been able to use dog-whistles to gain the support of discontented poor whites, and these racist overtures should be labeled as such. The dangerousness of the rhetoric has seeped into the *Crawford* opinion, in which Justice Stevens stated that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph" is not a substantial burden,<sup>324</sup> implicitly approving of Republican's claims that those who don't stand in voter registration lines are "lazy" and thus unworthy of participating in democracy.<sup>325</sup> *Crawford's* holding is not infallible, as it is a plurality opinion, and thus will be easier to have the Supreme Court overturn it. Regardless of this fact, voter ID opponents are unlikely to win by solely attacking the baseless rationales of voter ID laws. Democratic lawmakers are already finding ways to combat the effects of the voter ID laws, such as automatic voter registration laws.<sup>326</sup>

### CONCLUSION

Voter ID laws make up one part of the structural disenfranchisement that prevents minority voters from fully exercising their constitutionally guaranteed right to vote. The increase of the power of the minority vote in recent years has led to a wave of voter ID laws enacted by panicked Republican legislators. The proffered rationales of these laws is the prevention of voter fraud and the protection of the integrity of elections; however, they allow lawmakers to suppress the votes of minorities, who overwhelmingly vote Democrat, without overtly doing so on the basis of race. Due in part to the Supreme Court's flippant disregard of systemic racism in the election process, the laws are succeeding in spite of their baseless rationales. Despite this, lower courts remain skeptical of the dubious rationales; thus, civil-rights groups should capitalize on the discriminatory effect analyses.

Successfully proving that there is discriminatory effect will significantly dismantle or void the laws entirely and will take these groups one step closer to having the courts find that the laws were enacted with dis-

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323. *Veasey*, 830 F.3d at 240–241. The Fifth Circuit Court of Appeals found this to be a factor that weighs in favor of finding the law was enacted with discriminatory intent.

324. *Crawford*, 553 U.S. at 198.

325. Ellis, *supra* note 81, at 910 (citing *Pennsylvania Republican Condemns 'Lazy' Americans without Voter ID*, MSNBC (Sept. 20, 2012, 12:13 PM), <http://www.msnbc.com/rachel-maddow-show/pennsylvania-republican-condemns-lazy>; David Weigel, *GOP Precinct Chairman Says Voter ID Will Hurt "Lazy Blacks," Then Resigns*, SLATE (Oct. 25, 2013, 10:05 AM), [http://www.slate.com/blogs/weigel/2013/10/25/gop\\_precinct\\_chairman\\_says\\_voter\\_id\\_will\\_hurt\\_lazy\\_blacks\\_then\\_resigns.html](http://www.slate.com/blogs/weigel/2013/10/25/gop_precinct_chairman_says_voter_id_will_hurt_lazy_blacks_then_resigns.html)).

326. *Automatic Voter Registration*, BRENNAN CTR. FOR JUSTICE (Nov. 9, 2016), <https://www.brennancenter.org/analysis/automatic-voter-registration>.

criminatorious purpose. A finding of discriminatory purpose will allow courts to openly proclaim that the rationales are pretextual, which will eventually undermine the use of the rationales by other state legislatures.