Denver Law Review

Volume 86
Issue 4 *Tenth Circuit Surveys*

Article 6

January 2009

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INTRODUCTION

The election of Barack Obama as the forty-fourth President of the United States represents both the completion of a historical campaign season and a triumph of the Civil Rights revolution of the twentieth century. President Obama's 2008 campaign, along with the campaigns of Senators Hillary Rodham Clinton and John McCain, was remarkable in both the identities of the politicians themselves[1] and the attention they brought to the political process. In particular, Obama attracted voters from populations which have not been traditionally represented in national politics. His run was hallmarked, in large part, by significant grassroots fundraising, a concerted effort to generate popular appeal, and, most important, massive voter turnout efforts.[2] As a result, this election cycle generated significant increases in participation during the primary season.[3] Turnout in the general election did not meet anticipated record

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† Legal Writing Instructor, Howard University School of Law. J.D., M.A., Duke University, 2000. An early version of this paper was presented at the Writer's Workshop of the Legal Writing Institute in summer 2007. Later versions were presented at the November 2007 Howard University School of Law faculty colloquy and the September 2008 Northeast People of Color Legal Scholarship Conference. I gratefully acknowledge Andrew Taslitz, Sherman Rogers, Derek Black, Paulette Caldwell, Phoebe Haddon, and Daniel Tokaji for their thoughtful comments on earlier drafts of this paper. I am also grateful for the thoughtful conversations I have had on this topic with James Coleman, Okainer Christian Dark, Lydie Pierre-Louis, Jena Martin, and Josephine Ross. I am indebted to James Nichols and Rae Cousins for their excellent research assistance. I also wish to express my appreciation to Dean Kurt Schmoke of the Howard University School of Law for his thoughtful comments and for providing research support for this effort.

1. Mr. Obama is the first American of African descent to be elected to the chief executive. This is a great feat given the historic status of African Americans throughout the history of European presence in North America. In particular, it represents a transformation from the period of the history of the United States where the policy of Jim Crow treated African Americans as second class citizens. *See infra* Part II. Yet, Mr. Obama clearly was not the only candidate to make history in this campaign season. Senator Clinton, though not the first woman to be considered for nomination by a major party, was nonetheless a serious contender for the Democratic nomination. Additionally, Senator McCain was among the oldest nominees of a major party for the office.

2. The voter turnout effort by the Obama campaign was noted early on as a hallmark of its general electoral strategy. *See* Alec MacGillis & Jennifer Agiesta, *For Obama, Hurdles in Expanding Black Vote*, WASH. POST, July 28, 2008, at A01. Indeed, this turnout effort focused on African American voters and younger voters; increases in the participation of these groups were thought to create significant opportunities for the Democratic campaign to be more competitive in close electoral states. *Id.*

3. Turnout reached an eight year high in thirty-six of the forty states that hold primaries. Nearly fifty-eight million Americans participated in those primaries. THE PEW CTR. ON THE STATES, 2008 PRIMARY IN REVIEW 4, 6 (2008), http://www.pewcenteronthestates.org/uploadedFiles/Primary%202008%20FINAL.pdf.

levels,[4] but nonetheless it represented levels of participation higher than in 2004.[5] Moreover, Mr. Obama appealed to a broad range of people across the political spectrum; this led to his substantial popular vote majority and an electoral vote landslide for President Obama.[6]

This election represents a sea-change from a time as recent as fifty years ago when southern state governments used devices like poll taxes and literacy tests to remove the poor, and specifically African Americans, from the voter rolls.[7] Some of those voters who seek to register today would have been shut out of the polls by these devices designed with the intent of limiting the numbers of African Americans who could register and vote. In large part, the Civil Rights revolution focused on making the ballot box accessible to all.[8] Ultimately, the legal advocacy part of the revolution won significant victories in a series of cases where the Supreme Court repeatedly announced a right to vote available to all citizens.[9]

The Supreme Court's rhetoric of a "right to vote" stands in contrast with modern concerns regarding voter access. Even before the 2008 election, the question of access to the polls was alive and well and a pox on American elections in the late twentieth century. In the controversial presidential election of 2000, one of the major disputes concerned whether voters were illegally purged from the polls. Advocates contended that the polls in Florida were unjustly and unfairly being purged

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4. This appeared to be the case notwithstanding the use of early voting and the long lines on Election Day. Kate Phillips, *Rate of Voter Turnout May Not Be a Record*, N.Y. TIMES, Nov. 7, 2008, http://thecaucus.blogs.nytimes.com/2008/11/07/voter-turnout-not-near-a-record-yethfo/; *see also* The Pew Ctr. on the States, *Electionline Weekly*, Dec. 11, 2008, http://tinyurl.com/cw665o (noting that turnout in 2008 was significant but did not achieve a record for turnout in American presidential elections).

5. United States Elections Project, 2008 Unofficial Voter Turnout, http://elections.gmu.edu/preliminary_vote_2008.html (last visited Feb. 14, 2009). Turnout for the 2008 General Election among eligible voters was 61.7% or 131.3 million votes cast. This represented an increase of 1.6% over the 60.1% turnout rate for the 2004 presidential election. *Id.*

6. *See* Alec MacGillis & Jon Cohen, *A Vote Decided by Big Turnout and Big Discontent with GOP*, WASH. POST, Nov. 5, 2008, at A27. Significantly, the substantial amount of expected turnout from younger voters and from African Americans did not materialize in record numbers. *Id.*

7. For a discussion of the operation of the poll tax, see C. VANN WOODWARD, A HISTORY OF THE SOUTH: 9 ORIGINS OF THE NEW SOUTH 1877-1913, at 331-35 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951). For a thorough single volume that has analyzed the operation of the poll tax, see FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH (1958). For a history of the pattern of disenfranchisement throughout the south, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, (1974).

8. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 257-268 (2000) (discussing history of the Civil Rights Movement and voting rights movements from the 1950s through the 1960s); *see also* Paula D. McClain, Michael C. Brady, Niambi M. Carter, Efren O. Perez, & Victoria M. DeFrancesco Soto, *Rebuilding Black Voting Rights before the Voting Rights Act*, *in* THE VOTING RIGHTS ACT: SECURING THE BALLOT 57, 70-72 (Richard M. Valelly ed., 2006) (discussing Freedom Vote and Freedom Summer campaigns which led to voting rights reform legislation).

9. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

of minority voters due to felon disenfranchisement laws, inaccurate record-keeping, and other practices that were meant to keep African American voters from the polls.[10] These allegations were raised aside from the issue of election maladministration rasied before the Supreme Court in *Bush v. Gore*.[11] And if these allegations are taken to be true, their alleged consequences had significant results—the decisive results in Florida were so narrow that a difference of several thousand votes could have made Al Gore the winner of the 2000 presidential election rather than George W. Bush.[12]

Eight years after *Bush v. Gore*, more questions have emerged about the nature and quality of our election system. One fundamental question that has garnered significant attention is the issue of what criteria ought to be used to qualify voters. This question has most recently presented itself through voter identification laws enacted in a number of states. These laws require that voters possess government-issued identification cards with photographs as a prerequisite to registering to vote and voting in person at the polls. The Supreme Court has recently endorsed the use of photo identification laws, finding that the voter identification statute passed in Indiana law was, on its face, a reasonable election regulation.[13]

This article argues that photo identification laws represent a continuation of the use of economic forces as a way to block people of lower economic status from participation in the electorate. These laws are similar to other restrictions on the franchise, such as property requirements and poll taxes, because the rules required the voter to demonstrate the ability to meet an economic test—the ability to show a certain property

10. African Americans were nearly ten times more likely than whites to have their ballots rejected in the November 2000 election. Poorer counties, particularly those with large minority populations, were more likely to use voting systems with higher spoilage rates than more affluent counties with significant white populations. Of the 100 precincts in Florida with the highest numbers of disqualified ballots, eighty-three of them were majority black precincts. Thirty-one percent of the Florida disenfranchised population consisted of African American men. The report also suggested that Florida's electoral reform law, recently enacted at the time the study was conducted, failed to change the state's policy of permanently disenfranchising former felons, which produced a stark disparity in disenfranchisement rates of African American men compared with their white counterparts. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, at ch. 9 (2001), *available at* http://www.usccr.gov/pubs/vote2000/report/ch9.htm.

11. 531 U.S. 98, 103 (2000). Richard Hasen points out that the Bush v. Gore decision provided an opportunity for the country to become aware of the systemic problems which plague the electoral system and to apply the principles articulated in Reynolds and Harper to addressing current problems in election administration. *See also* Richard Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 43 (2007). Yet, Hasen notes that nonetheless the spectre of partisanship has effectively allowed the politicians and the courts to relegate their post Bush v. Gore decisions to default rules which represent a furthering of partisan retrenchments. *Id.* at 43-44.

12. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at intro., *available at* http://www.usccr.gov/pubs/vote2000/report/intro.htm ("The final vote tally in Florida was 2,912,790 for Bush and 2,912,253 for Gore. In the end, Bush became the president-elect, winning the Electoral College by a margin of 271–267; Gore won the popular vote with 50,158,094 over Bush's 49,820,518.").

13. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1627 (2008).

value, the ability to pay a tax, or the ability to obtain a photo ID. The potential effect of such photo-voter identification laws is that the voters at the lowest end of the socioeconomic scale are effectively excluded from voting because they are the least able to afford the cost of voting exacted by the law.

History has shown that the indirect, non-essential costs of voting are subject to manipulation by political elites such as state legislators and political party leaders as a means to shape the electorate to ensure that it will be composed of voters more disposed to vote for those same lawmakers and party leaders. Thus, laws that rely on socioeconomic status to define eligibility to vote have served—and currently risk becoming, once again—a proxy for the exclusion of otherwise eligible voters from the electorate. This article contends that such lines of exclusion are antithetical to the nature of democracy and ultimately constitute a tyranny of the majority[14] against the minority at the lowest level of socioeconomic status.[15] Moreover, the courts have been largely indifferent to this effect. The Supreme Court, in particular, has articulated a powerful vision of participatory democracy, but has at the same time been apathetic towards the effective exclusion of those on the lower end of the economic scale. This is most clearly shown in the recent Supreme Court decision in *Crawford v. Marion County Election Board.*

The American system, unlike many other constitutional democracies, requires that the voter have sufficient socioeconomic status in order

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14. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 239-42 (Harvey C. Mansfield and Debla Winthrop trans., eds., Univ. Chi. Press 2000) (1835). The concept of the tyranny of the majority lies close to American democracy. Majority rule is the key thesis of the United States Constitution. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (Harvard Univ. Press 1980) (1938). Yet, the danger of rule of the majority is that the majority can then trample on the rights of the minority. *Id.* This is often envisioned as a problem of express minority discrimination in terms of race, gender, political factions, etc. Yet, the problem of economic exclusion in the electorate is one of implicit discrimination. There is no group advocating for the rights of those left out of the electorate due to photo identification laws. Yet, the exclusion of them—and the inability to have their voice heard in the process of American governance—is wholly antithetical to democracy. It is this kind of majoritarian tyranny which this article attempts to name.

15. The underlying principle here is the view that the democratic process must include all citizens without distinction as to any category, including class, for American democracy to be meaningful. Distinctions on the basis of class ought not play a role in the question of who can participate in American democracy, i.e., who is allowed to vote. This view is as old as the republic itself. Indeed, the idea that class ought not to play a role was recognized as a part of the constitutional debates. *See* THE FEDERALIST NO. 57, at 348 (James Madison) (Bantham Books 2003) (1787-88) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant . . . . The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State."); *see also* ELY, *supra* note 14, at 5-6 (noting that the Constitution is fundamentally a document designed to guarantee a system of representative democracy where all citizens are entitled to participate); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1282 (2005) (noting that the root of democratic reinforcement theory was the notion that democracy is the premise of the Constitution—that "all adults must have the right to vote and to engage in expressive activities").

to participate in the electorate.[16] This dynamic has been true throughout the history of the American electorate. The history of the administration of voting laws and the evolution of voting rights illustrates how various types of costs lie at the heart of the rules created to determine who could vote and who could not vote.[17] The greatest external cost—that is, outside of the voter's own motivational costs to vote—is exacted by those rules and regulations created by governments to administer elections.[18]

Thus, the history of the right to vote has been a steady struggle between those who wish to constrain or restrict the vote by raising the cost and those who wish to make the vote more accessible by lowering the costs. Moreover, this history represents a political struggle where the bedrock of democratic systems—the ability for each and every eligible citizen to have his or her vote counted without effective manipulation by the political majority—is left prey to the calculations of politicians attempting to game the electorate. The effect is that a set of voters is left susceptible to this manipulation and is effectively excluded from voting. Even within the regime of voter identification laws, there are those who are excluded from the process and unable to participate due to the shifting of the rules. Some advocates have called this "structural disenfranchisement."[19] The effect of such disenfranchisement is the creation of an underclass of citizens who are unable to vote and who will remain marginalized.

Little attention has been given to these issues by the law review literature.[20] This paper will argue that voting rights jurisprudence must fac-

16. *See* SIDNEY VERBA, NORMAN H. NIE & JAE-ON KIM, PARTICIPATION AND POLITICAL EQUALITY: A SEVEN-NATION COMPARISON 2-3 (1978) (discussing the comparison of seven nations which confirms a correlation between socioeconomic status and political participation specifically in the United States as opposed to the other six nations); *see also* RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 13-36 (1980).

17. *See* Keyssar, *supra* note 8, at 9-10, 28-31, 35-37, 61-62, 111-12 (discussing laws that were put into place to disenfranchise poor and minority voters).

18. *See id.* Indeed, it almost goes without saying that the ability or right to vote only exists within the context of the laws and regulations which define the exercise of that right and thus, the rules themselves define who can and cannot vote. *See* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 13-15 (2006) (asserting that the election law system dictates who can vote—that the "election rules, practices, and decisions filters out certain citizens from voting and organizes the electorate . . . there is no right to vote outside of the terms, conditions, hurdles, and boundaries set by" those responsible for enacting election laws).

19. *See, e.g.*, STEVEN DONZIGER, AMERICA'S MODERN POLL TAX: HOW STRUCTURAL DISENFRANCHISEMENT ERODES DEMOCRACY 1 (2001), *available at* http://www.advancement project.org/reports/AMPT.pdf.

20. This is not to say that there has not been a great deal of commentary about photo identification requirements. This commentary has been led by Spencer Overton's seminal article which has greatly influenced discussion in this field. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 631 (2007). Additionally, there has been a significant amount of law review commentary analyzing photo identification voter requirements. *See, e.g.*, Richard Tyler Atkinson, Note, *Underdeveloped and Overexposed: Rethinking Photo ID Voting Requirements*, 33 J. LEGIS. 268, 268 (2007); Kelly T. Brewer, Note, *Disenfranchise This: VoterID Laws and Their Discontents, A Blueprint for Bringing Successful Equal Protection and Poll Tax Claims*, 42 VAL. U. L. REV. 191, 191-92 (2007); Chad Flanders, *How to Think About Voter Fraud (and Why)*, 41 CREIGHTON L. REV. 93, 93 (2007); Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Require-*

tor in these express costs—whether direct or indirect—to ensure that American elections are free, fair, and accessible by all willing participants. Part I of this article will provide an overview of American photo identification laws and discuss the nature of the modern cost of voting to the voter. It will draw upon political science voter participation theory and demonstrate that voting registration and identification laws create inherent burdens on voters and that those burdens are largely socioeconomic in nature. Part II of this article will discuss the history of voter access laws in this country. That history has been premised on the idea that voter access laws rely on economic status as a sufficient identifier for those who have a sufficient stake in the electorate and thus are deserving of the exercise of the franchise. This part will conclude with a discussion of *Harper*, which held that the ability to pay bears no rational relationship with the ability to vote and clearly articulated a vision of a fundamental right to vote. Part III will consider the potential socioeconomic impact of photo identification laws upon voters and how those impacts are similar to historical class-based discrimination. It will examine in detail how the courts have been indifferent to the costs levied upon on the right to vote by voter identification laws and how that indifference tracks the conflict over the socioeconomic burdens of voting raised in *Harper*. Finally, Part IV will recommend how to reframe the standards articulated in *Harper* to take into account this structural socioeconomic bias inherent in, and damaging to, the right to vote.

I. THE COST OF VOTING TO THE VOTER

The history of the American franchise has been one of a tension between those who wish to protect the vote from being freely accessed and those who wish to have the vote defined more liberally to include a broader cross section of the American public. This tension has been the hallmark of battles over how to define the right to vote and who would have access to it. Photographic identification laws represent the latest

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ment, 93 IOWA L. REV. 731, 733 (2008); Debra Milberg, *The National Identification Debate: "Real ID" and Voter Identification*, 3 I/S: J. L. & POL'Y FOR INFO. SOC'Y 443, 444 (2008); Evan D. Montgomery, *The Missouri Photo-ID Requirement for Voting: Ensuring Both Access and Integrity*, 72 MO. L. REV. 651, 651-52 (2007); Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174, 1174 (2007); E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, The New Battleground for Pretextual Race Neutrality*, 8 J. L SOC'Y 75, 76 (2007); David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 485 (2008).

While this commentary provides a sound analysis concerning voter identification laws and the impact that photo ID laws will have on the voting public, the commentary does not connect the litigation surrounding voter identification laws with a broader historical understanding of the manipulation of election laws through the use of economic forces. Nor does the extant literature raise concerns about the danger to the nature of democracy created by the problems exemplified by photo identification laws—that the poor (especially poor ethnic minorities) may be excluded from the democratic process through structural, economics-based means, and that such discrimination is contradictory to basic conceptions of democracy. This article makes an initial attempt to provide both analyses.

manifestation of this tension. These laws, in effect, create an economic barrier which the lowest economic classes in our society cannot surpass. This section of the article will begin by discussing basic conceptions of democracy and provide a framework for thinking about the range of modern voter identification laws and define the kinds of costs such laws impose on voters.

A. Democracy and Citizen Access

The notion that all citizens will be allowed to participate in the selection of our leaders lies at the heart of the concept of American democracy.[21] This core principle seems almost axiomatic to discourse about democracy, yet it is not often articulated in a concrete way. Part of the problem is that the notion of democracy applicable to the American political scheme often eludes definition.[22] Yet, as a basic principle, it would seem that the involvement of the people in making decisions concerning their choices as to whom may govern lies at the heart of the conception of democracy.[23] A close examination of the founding documents of the United States reveals that the key principle the founders sought to protect was a democratic process. The Declaration of Independence, in its appeal to fundamental principles of government, places the people—without differentiation—as the source of the authority of government.[24] Further, the Constitution points to the importance of the principle of participation by the people as at the heart of the American experiment.[25]

The Supreme Court, accordingly, has, as a manifestation of this principle, recognized the right to vote within the scope of rights guaranteed American citizens. Yet in its jurisprudence this right was initially located with the states rather than the federal government and, accordingly, the Court did not recognize the right to vote as fundamental or invi-

21. The basic premise of republican democracy is that the citizens will have the opportunity to participate in electoral process and have a say in choosing their representatives. *See* Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 278 (2003).

22. Jane Schacter explains that multiple meanings of the idea of democracy can be derived from the constitution. *See* Jane S. Schacter, *Unenumerated Democracy: Lessons From the Right to Vote*, 9 U. PA. J. CONST. L 457, 472-73 (2007) (explaining in the context of using 'democracy' as a value which can be defined as an unenumerated right, different perspectives can be reasonably discerned from the Constitution which may be contradictory).

23. The bedrock principle of such an American democratic process is that the rule of the country must be in line with the consent of the governed. *See* ELY, *supra* note 14, at 7. This is democracy put most simply. Ely, in particular, argues persuasively that such protection of democracy is at the heart of American governance and the government must be constrained by that principle. *See id.*

24. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

25. Ely argues persuasively that a close examination of the Constitution itself reveals a concern for creating and protecting a democratic process. *See* ELY, *supra* note 14, at 92-93.

olate.[26] However, in the Warren Court era, the Court recognized that the right to vote was a fundamental federal right. The Court of that era determined that the right to vote was fundamental because, without it, all other rights of citizenship could be damaged.[27] It then follows that without the ability of each citizen to vote and thus have the bedrock amount of participation in the democratic process and in our government, the concept of democracy is meaningless. Moreover, minorities from various groups have struggled against the majority over the past two hundred thirty-plus years to create access to the electoral process. With such access comes the ability to cast a ballot and participate in the core act of democracy—selecting representatives who will, on the local, state, and national levels, dictate policy reflective of the needs and interests of all its citizens.[28] Thus, to preserve the core of American democracy, the mechanisms of voting and political participation should be accessible to all. Accordingly, to be a citizen in a democracy, one must participate within its political activities equally with all other citizens.[29]

This inclusive vision of American democracy and the political process is belied by the fact that many citizens in this country do not participate in the electoral process. Voting in the American system is a voluntary act. Thus, voting participation in the United States is not affected by any direct official governmental interest[30] in encouraging or requiring voters to participate.[31] American citizens are free and able to

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26. This was not the circumstance during the first one hundred fifty years of the republic. Indeed, the Court in Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) stated that there was no federal right to vote; the right to vote depended upon the regulation of the states; *see also* United States v. Cruikshank, 92 U.S. 542, 555 (1875) ("In Minor v. Happersett, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States." (citation omitted)).

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

28. *See* ELY, *supra* note 14, at 117 (noting that a right to vote is central to a right of participation in the democratic process).

29. Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 2005 BYU L. REV. 927, 965 (2005) (describing political participation as a key theory upon which the concept of citizenry is grounded and noting that "[p]olitical participation would encompass at the very least the right and obligation to vote and the right and obligation to serve in political office").

30. This is separate and apart, however, from the interests of those who perform the governing and are subject to elections. Those persons clearly have an incentive to induce citizens disposed to voting for them to do so. Conversely, such politicians also have an incentive to discourage voters who are not inclined to vote for them from participating. Herein is one of the core problems of allowing partisan politics to set the rules for participation in democratic governance. *See* Schacter, *supra* note 22, at 473 (citing ELY, *supra* note 14, at 105-34) (explaining the inherent conflict of interest in allowing incumbent elected officials to control a system that benefits them despite whether or not that system conforms to constitutionally grounded democratic principles).

31. This is in contrast to the mechanisms in other industrialized democracies. A number of countries require that their voters participate in national elections through a number of direct and indirect methods. In some countries, voting is legally mandated. In others, elections are held in ways that are far easier for voters to access in comparison to the American system. For example, voting may take place over a week-long period, or on a weekend, or on an official holiday. Addi-

participate in the democratic process as they wish, with full freedom to express—or not express—their preferences for the people who govern in their name.[32] Despite the fundamental thesis of representative democracy and the resulting interest one would expect from all citizens in voting, American voter participation continues to decrease.[33] Though bias-driven election barriers such as poll taxes, literacy tests, the all-white primary, and other forms of voter exclusion have been eliminated from various states' laws, voter participation in the United States continues to diminish.[34] It has been well documented that the percentage of participation in American elections has dropped dramatically over the last forty years.[35]

This issue has been addressed in various contexts. Political scientists have hypothesized about why so few Americans vote, and discussed in detail whether there is a specific class gap in voter participation.[36]

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tionally, in many systems, the government issues to all citizens voter identification (or some other sort of national identification card) without requiring the citizen to make the effort to obtain such identification. *See* Andrew C. Geddis, *It's a Game Anyone Can Play: Election Laws Around the World*, 4 ELECT L. J. 57, 58 (2005) (reviewing LOUIS MASSICOTTE, ANDRÉ BLAIS, & ANTOINE YOSHINAKA, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES (2004)).

32. Because participation in the democratic process is egalitarian in this sense, participation in the process becomes an indicator of whether people are invested in the democratic process. Low participation rates seem to reflect some degree of apathy concerning the typical American voter on this score. Yet, the questions that the political participation scholars ask appear to go further than merely inquiring about whether Americans do or do not care about the political process. The dramatically increased participation rates in the 2008 primary and general elections for President seem to reflect interest, as opposed to apathy, in the political process. This appears generated by the fact that Americans appear to see a greater stake in the question of who will lead their country at this particular point in history. Given this heightened level of interest, the question of what other factors—particularly express and *de facto* legal factors—dissuade and isolate potential voters from voting.

33. According to the Federal Election Commission, 56.70% of the voting age population participated in the 2004 presidential election. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (2005), *available at* http://www.fec.gov/pubrec/fe2004/federalelections2004.pdf.

34. Michael McDonald, *5 Myths About Turning out the Vote*, WASH. POST, Oct. 29, 2006, at B03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/27/AR2006102701474.html (discussing how voter turnout in 1972, when eighteen-year-olds were given the right to vote was 55.2%; this percentage declined to a low point of 48.9% in 1996).

35. *See, e.g.*, Richard H. Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 37, n.46 (2004) (citing THOMAS E. PATTERSON, THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY 3-23 (2002)). Pildes notes that studies like Patterson's have substantiated the claim that voter turnout has significantly decreased in American elections between 1960 and 2000. This claim, however, has been a subject of recent debate among political science scholars. *See also* Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95:4 AM. POL. SCI. REV. 963, 963 (2001) ("[A]lthough the turnout rate outside the South is lower than in the 1950s and early 1960s, there has been no downward trend during the last 30 years.").

36. For example, a number of political scientists have argued that voter turnout has fallen over time and that such fallout has been concentrated among the poor. *See* RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER 59 (1992) (noting the popularity of the theory that a class gap exists in voting and that this class gap results in the poor being left out of political discourse); *see also* WALTER DEAN BURNHAM, *The Appearance and Disappearance of the American Voter*, *in* THE CURRENT CRISIS IN AMERICAN POLITICS 121, 123-25 (1982); THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 180-83 (1984); FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY

Though the ultimate ramifications of this research are debatable, the studies are premised on a model of political participation which stresses the socioeconomic status of the participant and the fact that the participant must make a rational cost/benefit analysis of whether to participate within the electoral process.[37] Such a model will be helpful in shaping the way we think about the effects of voter identification laws. It will allow us to articulate how such laws impose a cost on voting, both direct and indirect, on the voter. Such analysis will allow us to articulate a means to adequately analyze and promote solutions to the problems posed by such laws.

B. The Costs and Benefits of Voting

Political scientists have, through their research, worked to develop various models to describe American voting behavior. The model most applicable to the question of economic impact of voting rules on voters is the rational actor model of voting behavior. The first premise of this model is that voting exacts a cost on the voter.[38] This cost is often exacted is an economic cost.[39] Additionally, there are a number of other costs which should be taken into account. For example, the psychological costs of voting can deter a voter. Voting in an election requires a level of interest and attention that will divert the voter from other activities to which the voter may wish to attend.[40] Thus, a voter must deliberately think about the choices between political participation and other activities in his or her life. Put another way, choosing to vote requires a voter to forego other activities which may provide that person a benefit.[41] For example, if the voter wishes to participate, the voter will then need to educate him or her self on the candidates, issues, and other pertinent information related to the voting process.

AMERICANS DON'T VOTE 15-16 (1980). However, other political scientists have questioned the notion of a class gap based on empirical study. *See, e.g.*, TEIXEIRA, *supra* at 69-71 (disputing the existence of a class gap and attributing a decline to the view that participation generally is decreasing across socioeconomic groups).

37. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 10-13 ("[C]itizens of higher social and economic status participate more in politics."). As such, socioeconomic status, whether it is measured in terms of level of education, income, or occupation, is an important variable in calculating the benefits and costs of voting. *But see* DANIEL HAYES LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW 51-52 (2d ed. 2001) (summarizing the debates over whether socioeconomic status or the lack of addressing the issues related to individuals of lower socioeconomic status is the source for low American voter participation).

38. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 8 (asserting that "[t]he likelihood that an individual will vote is a direct expression of . . . the costs associated with doing so"; the lower the costs, the more likely it is that an individual will vote).

39. *See id.* (discussing registering to vote and traveling to the polls as examples of economic costs associated with voting).

40. *See id.* (discussing how costs such as learning about the candidates and deciding how to vote are considered costs that require "postponing the opportunity to do something else that might be more pleasurable").

41. *Id.*

Second, voting requires the voter to meet the requirements for registration as set forth by state law prior to actually voting.[42] A voter must register before the election takes place, sometimes a month or more in advance of an upcoming election, and then appear to vote on Election Day (or cast an absentee ballot).[43] As we will see below, the structural cost of voting can be direct, as in the case of the poll tax, or indirect, as in the case of voter identification laws and registration requirements generally. Further, in both instances, the fact that a cost is exacted creates a disincentive for voters to cast their votes.

Third, intertwined with this structural or legal requirement is an economic cost. On some level, even if the cost is relatively *de minimis*, the voter has to make some kind of economic sacrifice to participate in elections. Registering inherently requires voters to take time from economically productive activities to participate, thus losing potential income from that activity. Indeed, registration itself can be a cumbersome process requiring a significant amount of time lost due to the fact that registration offices are only open during business hours, registration oftentimes requires documentation, such as a birth certificate or a proof of citizenship, and obtaining such documentation may require a great deal of cost and effort to obtain. Measures such as the Help America Vote Act (HAVA) and the National Voter Registration Act of 1993 (NVRA) have helped to shift this cost. For example, the NVRA required that states provide means for voters to register while applying for or renewing their drivers' licenses.[44] This may shift the cost of voting to another activity, filing with the DMV, but nonetheless it does require an economic cost of the voter.

Voters must, in effect, undertake a cost/benefit analysis to determine whether they will participate in the political process. For example, because of the nature of registration requirements, a potential voter may be forced to choose between time spent at work, and registering to vote.[45] According to the rational actor theory of voting, which captures this kind of analysis, a voter must weigh the costs of voting and compare those costs with the benefits gained from voting.[46] If the cost outweighs the benefit, then the potential voter will not participate in the voting process.[47] However, if the voter believes that he or she will benefit from

42. For a list of voter registration requirements state-by-state, see State Voter Information Pages—U.S. Election Assistance Commission, http://www.eac.gov/voter/states (last visited Mar. 7, 2009).

43. *See, e.g.*, Alaska – U.S. Election Assistance Commission, http://www.eac.gov/voter/states (follow "Alaska" hyperlink) (last visited Mar. 7, 2009).

44. 42 U.S.C.A. § 1973gg-2 (West 2009).

45. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 8.

46. *See* Ellen Dinsmore, One Person, No Vote: Socioeconomic Bias in American Civic Engagement 53-54 (Apr. 2008) (unpublished B.A. thesis, Wesleyan University) (citing SYDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972)).

47. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 8-10.

the act of voting, and that those benefits will outweigh the costs, then the voter will engage in the act of voting.[48]

Thus, several factors emerge to illustrate the cost of voting: the potential voter's interest in participating in the process, the potential voter's willingness to become sufficiently educated in the issues and the candidates to be willing to vote, and the potential voter's ability and willingness to comply with the legal requirements related to voting—registering and participating on election day.[49]

C. Direct and Indirect Costs of Voting

The analysis that follows will focus mainly on this third factor, the willingness and ability for potential voters to comply with the legal requirements related to voting. Usually, these requirements mandate that the voter establish his or her registration with the state and then require the voter to prove his or her identity at the time she wishes to vote. This serves two purposes: to confirm the voter's identity and to ensure the voter is actually registered to vote.[50] In particular, modern voter identification laws—specifically, those voter identification laws that require the presentation of a government-issued photographic identification card—focus most clearly on this proof-of-identity requirement. The key issue for these laws is what forms of information the voter must gather to prove his or her identity when registering and when appearing to vote.

Within the context of the legal barriers to the vote, several costs present themselves. First, the registration requirements exact a particular cost. Whether it is payment of a tax or gathering of registration materials, the effort to present appropriate credentials for voting exacts a burden on the voter to participate in the voting process. These considerations on voting can be considered as two types of costs—direct and indirect. Direct costs for voting are those payments made directly to the government in exchange for the ability to vote. In other words, direct costs relate to the express ability to access a ballot from a governing au-

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48. *See id.*

49. *Id.* at 8. *But see* LOWENSTEIN & HASEN, *supra* note 37, at 48-49 (noting the limitations of rational choice theory and noting that voter turnout may very well not be caused by the costliness of voting in time and effort). Notwithstanding this criticism of the rational voter/voter costliness theory, this paper argues that this theory provides and adequate lens for understanding the effects of photo ID voter identification laws precisely because these laws raise the price of voting to a level where some voters will likely be priced out of the voting process. Thus, the effects of the likely cost should be considered, based upon empirical evidence, when evaluating these laws. *See generally* OVERTON, *supra* note 18, at 161-62 (suggesting that judges also need to rely on empirical data rather than just anecdotes and analogies when determining the constitutionality of photo identification laws).

50. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, REQUIREMENTS FOR VOTER IDENTIFICATION (2008), *available at* http://www.ncsl.org/programs/legismgt/elect/taskfc/VoterID Req.htm (last visited Mar. 7, 2009) (providing information and tables outlining photo ID requirements in each state); State Voter Information Pages—U.S. Election Assistance Commission, http://www.eac.gov/voter/states/voter-information-by-state (last visited Mar. 7, 2009) (listing voter registration requirements state-by-state).

thority. Such costs would involve the exchange of money between the potential voter and the government authority that is running the election itself, e.g., the payment of a poll tax, the requirement to purchase an identification card, and other such costs.

Indirect costs are the costs a voter has to expend to become eligible to vote, but the costs are not paid directly to the government or otherwise related to the actual casting of a ballot. Those costs include the cost related to a person identifying him or herself, whether through obtaining a government-issued photographic identification card such as a driver's license, passport, employment card, or some other related type of card; proving one's citizenship; proving one's current address; proving one's location of birth; or other requirements that relate to this proof.[51] Often such proof requires a potential voter to travel to the issuing office, obtain documents which form the basis of being issued a governmental photo ID, or other costs associated with obtaining an ID.[52]

The indirect costs of voting are inherent in the act of voting. Unlike other protected rights, the act of voting is voluntary and requires the voter to make an affirmative effort to participate in the electoral process. Thus, the nature and complexity of the indirect costs to voting can create disincentives for voting. Political science research suggests that such costs, as represented by registration requirements and photo identification requirements, in and of themselves form a barrier to political participation for those who are socioeconomically disadvantaged.[53] The complexity of the legal rules surrounding voting simply creates a disincentive for participation. Because the costs are so high to some, the disincentive cannot be overcome simply by transforming one kind of indirect cost of voting into another indirect cost.[54] The cost still remains, and for the

51. *See, e.g.*, U.S. ELECTION ASSISTANCE COMMISSION, THE NATIONAL MAIL VOTER REGISTRATION FORM (2006), *available at* http://www.eac.gov/files/voter/nvra_update.pdf (last visited Mar. 7, 2009).

52. *See, e.g.*, Darryl Fears, *Voter ID Law is Overturned*, WASH. POST, Oct. 28, 2005, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102702171.html (discussing hardships that voters in Georgia faced when attempting to register); Ian Urbina, *Voter ID Laws are Set to Face a Crucial Test*, N.Y. TIMES, Jan. 7, 2008, at A01, *available at* http://www.nytimes.com/2008/01/07/us/07identity.html?pagewanted=1&_r=1 (discussing an elderly woman's hardship in getting to the voting office to prove her identity in time to vote); Joan Biskupic, *Indiana Voter ID Case may Hinge on the Theoretical; Supreme Court Takes up Dispute in Which Both Sides are Lacking Proof of Actual Harm*, USA TODAY, Jan. 7, 2008, at 4A, *available at* http://www.usatoday.com/news/washington/2008-01-06-court_N.htm (identifying those who could be hurt by voter registration laws; among them, a stroke victim who made one trip to a state office for an alternative ID but did not have the proper document, and so returned home on foot with the aid of his walker, and a mother of seven who found it would cost $26-$50 to round up the necessary papers for a proper ID).

53. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 8.

54. In other words, the cost of appropriate photo identification cannot be eliminated simply because the cost of purchasing the photo identification from the government is minimized. In a situation where a fee for a photo ID is not assessed, the cost of the fee is removed but the other attended costs—gathering identification, losing time from other economically productive activity, and so on—cannot be replaced. *See* OVERTON, *supra* note 18, at 153-54 (discussing the financial burden associated with obtaining photo identification). For example, a certified copy of a birth

voter who does not think that there is a benefit to participating and who is, moreover, overwhelmed by the nature of the cost exacted, that person will be effectively excluded from the electorate because that person will choose not to vote.[55] This effect is sometimes called "structural disenfranchisement."[56] Structural disenfranchisement has been defined as a complex interaction between the direct and indirect costs exacted upon voters for participation in the electoral system.[57] The courts have been relatively vague and ad hoc in analyzing such indirect costs.

Political elites have used the costs of voting in a variety of ways to create disincentives to vote during all periods of American history. Such categories as property ownership, residency, and ability to pay poll taxes have all been used as tools to exclude certain categories of otherwise eligible voters from the polls.[58] The argument for use of such indicators was one of proper stake of ownership within the society.[59] Historically, this has been a shibboleth for marking a certain class or group of voters as undesirable and a lower type of participant in society. The kinds of social controls exacted by levying certain types of costs—direct and indirect—have been one of the means of identifying and excluding citizens otherwise entitled to vote. This article will turn next to a discussion of these costs as they have existed throughout the history of the American electorate.

II. A PAY-TO-PLAY SYSTEM: A HISTORY OF THE COST OF THE VOTE

The use of economic restraints to effectively increase the cost of voting to the voter is nothing new. Indeed, the use of an indicator of socioeconomic status as a requirement to vote has been a requirement for voting in the American system since the beginning of the American republic.[60] Unlike the ideal of American democracy—the view that all citizens can participate in the electoral process—the American electorate at its beginning was based on the notion that the voter must be able to demonstrate an economic stake in the society in order to participate in the political process.[61] The nature of the requirement has shifted from

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certificate could cost anywhere between $10 and $45, a passport costs $85 to obtain, and limited business hours and long lines at DMV offices discourage some from taking time out of their day to obtain photo identification in order to vote. *Id.* It is these costs that prevent some voters, particularly voters who cannot afford to lose time from work or obtain necessary transportation, from obtaining an otherwise "free" identification card.

55. *See* WOLFINGER & ROSENSTONE, *supra* note 16, at 8 (suggesting that individuals who most easily absorb costs associated with voting will find more of a benefit in voting than those with minimal resources).

56. *See* DONZIGER, *supra* note 19, at 1.

57. *Id.*

58. *See* KEYSSAR, *supra* note 8, at 9-10, 28-30, 35-37, 61-62 (discussing laws that were put into place to disenfranchise poor and minority voters).

59. *Id.* at 8-10.

60. *See id.*

61. *Id.* at 9, 29 (suggesting that after the Revolution, the general attitude was that "only men with property . . . were deemed to be sufficiently attached to the community and sufficiently affected

one of requiring property to requiring the payment of a tax to possessing the means to identify oneself within the context of being a member of the voting community. Indeed, in some states in the nineteenth and twentieth centuries, both the property ownership requirement and the taxation requirement were necessary to vote.[62] Voters were required to demonstrate some minimum economic status they possessed before they could be allowed to vote. This part of the article will discuss the history of this socioeconomic requirement for the right to vote and the tension between the democratic aspiration and the truth of the economic barrier to the franchise.

A. The Franchise in the Early Republic

At the beginning of the American republic there were few centralized rules governing who would be admitted to the franchise. Each of the thirteen original colonies had its own laws to determine voter eligibility in state elections. These requirements often centered on the voter demonstrating that he owned some amount of property within the locality in which the voter sought to vote. To the extent the original United States Constitution speaks to voting, it did not create a specific voting right or voting requirement. Indeed, the Constitution declined to take a stance as to which people would affirmatively be allowed to vote.[63] The only references to the right to vote and who would determine the scope of that right are inferential. For example, the Constitution specifies that "the People of the several States" shall choose their representatives for the House of Representatives[64] and the legislators of the state legislatures shall choose the members of the United States Senate.[65] The Constitution also set out the Electoral College for the election of the President and the Vice President of the United States.[66] In both of these instances, the Constitution leaves it to the states to determine who the electorate

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by its laws to have earned the privilege of voting," and that "the interests of the propertyless . . . could be represented effectively by wise, fair-minded, wealthy white men").

62. *See id.* at 29 (discussing how even after the widespread abolishment of property requirements, many states enacted taxpaying requirements that preserved "the link between a person's financial status and his right to vote").

63. *See* Wesberry v. Sanders, 376 U.S. 1, 13-17 (1964) (providing a detailed discussion of the framers' considerations about whether and how the right to vote to elect representatives should be framed in the Constitution).

64. U.S. CONST. art. I, § 2, cl. 2.

65. U.S. CONST. art. I, § 3, cl. 2 (amended 1913). This requirement was changed to allow for the popular election of Senators with the passage of the Seventeenth Amendment in 1913. *See* U.S. CONST. amend. XVII, § 1. However, while the amendment notes that the election of the Senators will be done by the "people," it does not set up any requirements as to who the people will be. *See id.*

66. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII. The amendment in 1804 retained the structure that the electors shall cast ballots for the office of president rather than the people directly. The assumption is that the electors shall vote for the person who won the popular vote, though that assumption is not expressly stated within the Constitution.

will be to choose their federal representatives and the state legislators who will choose the United States Senate.[67]

The Constitution of 1787 left the states free to determine the population that would be the voting electorate. The states proceeded to define—or merely continued to use already existing—schemes to determine who would be counted within the electorate. The scheme most frequently used within the early republic was the property ownership requirement. Under the property requirement, one had to be a real land owner, or possess at least $300 to $500 in personal property.[68] The rationale for the property requirement in the eighteenth and nineteenth centuries was that "[o]nly men with property . . . were deemed to be sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting."[69] Underlying this view was the belief that "[t]he interests of the propertyless . . . could be represented effectively by wise, fair-minded, wealthy white men."[70] Further, this barrier served to maintain order in society. The view was if the propertyless were allowed to have the vote, they would prove to be "a menace to the maintenance of a well-ordered community."[71]

As the American republic grew and changed economically, qualifications based on property and literacy proved ineffective to maintain the social order and exclude desirable voters from undesirable voters, particularly in the antebellum South. In other words, the wealth qualifications had the effect of excluding white male voters who had an otherwise sufficient "stake" to participate in elections, even though they did not meet

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67. These provisions of the Constitution suggest that states were left to develop and structure laws to access the vote. In contrast, the one area where the Constitution upheld a state practice of voter exclusion was to exclude slaves from the electoral process. It does so by proscribing whom the population will be for purposes of apportioning representation and taxation. The Constitution prescribes the use of a decennial census to tabulate the population of the United States. U.S. CONST. Art I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2. Article I then directs that representation will be based on the tabulation of the whole number of free persons, persons in servitude for a number of years, and three-fifths of "all other Persons." *Id.* The "three-fifths compromise" was meant to strike a balance between the population of slave states, whose economy and population were based upon slavery, and the free states, which had greater economic wealth but lower population. This implicitly suggested that the voting populace (as well as the democratic citizenry for all intents and purposes) only consisted of "free" persons; all others would simply serve to bolster the population count and no other purpose. Thus, the Constitution suggested what was in practice at the time in the individual states—that slavery was accepted and political representation depended on those persons who were free, and the power that those free persons held over those bound up in slavery.

Indeed, the Constitution itself, which, as argued above, implicitly sanctioned a political participation system based upon property ownership, allowed for the ability to practice the franchise upon the ability of one person to own another and to allow the ownership of slaves to count as "property" for purposes of voting. This quandary of a greater and a lesser class of people separated by the subordination inherent in one group of people being the property of another group lies at the heart of the American political dilemma concerning race and politics. I intend to explore this issue—and it's intertwined relationship between personhood, political power, and property—in a future article.

68. *See* WOODWARD, *supra* note 7, at 331.

69. KEYSSAR, *supra* note 8, at 9.

70. *Id.*

71. *Id.*

the property qualifications. In some Southern states, the median yearly income did not equal the property qualification. Historian C. Vann Woodward points out that "[o]f the 231 counties in the United States in which 20 per cent or more of the whites of voting age were illiterate, 204 were in the South."[72] It was in these counties where poverty was rampant and literacy rates low, white voters were largely excluded from the polls. This became an untenable situation in a largely agrarian society where white men were increasingly accumulating wealth, even though it was not in terms of real property, and demanding the vote. Because of factors like this, an absolute bar based on property was unworkable. Moreover, the property requirement in and of itself had the effect of disenfranchising many otherwise voting-eligible white men. Indeed, in North Carolina for example, the property requirements disenfranchised fifty thousand free white men.[73] These voters frequently demanded their vote and this social pressure eventually caused the property requirements to be eased.[74]

B. The Reconstruction Amendments and Defining the Right to Vote

As noted above, the right to vote was not defined directly in the United States Constitution. The states had the power to set the rules as to how one could qualify to vote and to grant access to the polls on Election Day. The states emphasized property requirements in order to ensure that the voter had an economic connection to the community. However, as a result of the Civil War and the passage of the Reconstruction Amendments to the Constitution, the right to vote was strongly implied to exist and would be protected under the national Constitution. This ideal was fixed into our constitutional scope; yet the amendments did not change the fundamental relationship between the voter and the ability to vote—an economic stake in the community.

The passage of the Fourteenth and Fifteenth Amendments to the Constitution represented an assertion of national power over the authority states had to control voting. This assertion of power was, by its nature, limited. The Fourteenth Amendment guaranteed that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; . . . nor deny to any

72. WOODWARD, *supra* note 7, at 331-32. Another type of text that was instituted in the nineteenth century was the literacy test. In several states where the property requirement had evolved into a test of whether one simply owned real property in the jurisdiction, the literacy test was added. It simply required that the potential voter had to be literate enough to read in order to vote, though the judgment of "literate enough" was often in the hands of the registrar of voters. *See* KEYSSAR, *supra* note 8, at 112. Since one had to have sufficient wealth to obtain education during the eighteenth and early nineteenth centuries, literacy requirements also proved to be a wealth-based form of discrimination.

73. *See* KEYSSAR, *supra* note 8, at 41.

74. The property restriction on voting began to diminish after 1790. However, Massachusetts and New York did not abolish their property requirements until 1821, Virginia not until 1850 and North Carolina not until the mid-1850s. *Id.* at 29.

person within its jurisdiction the equal protection of the laws."[75] The Fifteenth Amendment ordered that the right of citizens "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[76] Thus, under federal law, voters were guaranteed not to be discriminated against on the basis of race when it came to voting. Yet, these rules merely prohibited express racial discrimination commands and did not guarantee the right to vote to all citizens.[77] As a result, states were nonetheless free to create socioeconomic and other barriers to the full and free exercise of the franchise.

This is not to diminish the fact that the enforcement of the Fourteenth and Fifteenth Amendments by Union troops during Reconstruction provided the opportunity for former slaves to have an active and tremendous impact on American electoral politics. African Americans elected a number of representatives in many of the states of the former Confederacy. African Americans sent representatives to Congress and elected senior officials in state and local governments across the South. African Americans made tremendous progress throughout the South between 1870 and 1890. Yet, this progress was thwarted through a series of political, legislative, and judicial decisions. Federal forces were withdrawn from the South by President Rutherford B. Hayes in 1877. The ex-Confederate states, without federal supervision, were able to reclaim control of their state legislatures through the Democratic Party and institute plans to disenfranchise African Americans. Thus, neither the words of the U.S. Constitution nor the courts would stand in the way of the turn-of-the-century state constitutional revision conventions and their agenda of disenfranchisement.[78] Rather than a barrier to the polls based on race, the mechanism the States would use to disenfranchise would be based on economic status.[79]

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75. U.S. CONST. amend. XIV, § 1.

76. U.S. CONST. amend. XV. The Nineteenth Amendment, which came into effect in 1920, some fifty years after the Reconstruction amendments, made the same guarantee on the basis of sex. *See* U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

77. In essence, as long as the rules the states adopted did not explicitly differentiate the ability to vote on the basis of race—that is, as long as those rules were neutral towards race—there was no constitutional violation of the Constitution concerning the franchise. Consequently, such neutrality merely enshrined the status quo of African American subordination through focusing ultimately on the effects of creating a wealth requirement for voting, *i.e.*, a poll tax. *Cf.* Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1221 (2007) (noting how neutrality and equality can support subordination and hierarchy through protecting property rights and status inequalities inherent in the economic system). The risk is that the same effect may be present here in photo identification laws.

78. KEYSSAR, *supra* note 8, at 110-16 (discussing states that adopted laws disenfranchising blacks in the face of the reconstruction amendments); *see* Michael J. Klarman, *The Supreme Court and Black Disenfranchisement*, *in* THE VOTING RIGHTS ACT: SECURING THE BALLOT 38-46 (Richard M. Valelly ed., 2006).

79. *Cf.* Parson & McLaughlin, *supra* note 20, at 78 ("In an even larger effort to prohibit African Americans from casting their vote, state officials would again enact race-neutral voting

C. The Jim Crow Poll Tax of the Twentieth Century

By the turn of the twentieth century, the ex-Confederate states from Mississippi to Virginia revised their constitutions to include economic and educational requirements specifically designed to prevent African Americans from possessing the right to vote.[80] These prerequisites to the franchise included meeting particular standards of ownership of property, passing literacy tests, and the payment of a poll tax.[81] Though the intent of these state constitutional provisions was plainly discriminatory, these tests did not explicitly discriminate against any group, such as African Americans, and the laws were ultimately considered neutral and fair by the courts.[82] However, these neutral rules created a different problem—they disenfranchised poor whites as well as poor blacks. To address this concern, the state constitutional conventions created a series of loopholes to guarantee poor white voting while discouraging the African American exercise of the franchise.[83] It was this economic requirement which endured and which this paper will now examine in detail.

The ex-Confederate legislatures turned specifically to the poll tax to remove those voters—largely African Americans—whom they sought to exclude from the electorate. The poll tax did not discriminate against African Americans directly, but set up an economic status requirement that, while neutral on its face, had the effect of disenfranchising many.

The discrimination was effective, however, because poll tax requirements were simply quite expensive. Poll tax payments ranged from $1.00 to $2.00 per year, which was an extreme amount to many.[84] This

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qualifications with pretextual technicalities invented on the spot to eliminate African Americans from the registration process.").

80. KEYSSAR, *supra* note 8, at 111-13.

81. *Id.* at 111-12, 351-58 tbls.A.9, A.10 & A.11, 362-67 tbl.A.13; *see also* Klarman, *supra* note 78, at 37-38.

82. KEYSSAR, *supra* note 8, at 111 (discussing ways in which "Democrats chose to solidify their hold on the South by modifying the voting laws in ways that would exclude African Americans without overtly violating the Fifteenth Amendment.").

83. These voting "qualifications" are legendary and worth brief mention here. The first of these qualifications, the "understanding clause," was implemented by the Mississippi constitutional convention. It permitted poll registrars to register voters who could "understand" any section of the state constitution read to them. KEYSSAR, *supra* note 8, at 111. However, this method of enfranchisement was widely criticized as merely a means to perpetrate mass fraud in order to fill the electorate with voters the planter elite sanctioned. In reaction, southern states turned to the "grandfather clause." "This [rule] exempted from the literacy and property tests those . . . [who were able] to vote . . . [, along with their sons and grandsons, as of] January 1, 1867." WOODWARD, *supra* note 7, at 334. It should come as no surprise that most of these exempted voters were white. *See also* KEYSSAR, *supra* note 8, at 112. Such provisions were also labeled and fought as "un-American," "undemocratic," and outright fraud. *See* WOODWARD, *supra* note 7, at 334. These special clauses were of limited duration in some states—that is, they only carried validity for a limited amount of time and then would be phased out. However, the poll tax—the requirement that a potential voter had to pay a levy before being granted access to the franchise—endured in the south for eighty years as a fixture in southern turn-of-the-century Jim Crow constitutions.

84. OGDEN, *supra* note 7, at 32-33 tbl.1; *see also* KEYSSAR, *supra* note 8, 356-57 tbl.A.10.

expense was compounded by the set of complex procedures set up to affect and prove poll tax payments. First, the payment of the poll tax was optional. Usually, no tax assessor would solicit payment of the poll tax along with the payment of other taxes. Even if a solicitor did require poll tax payment, that person would not necessarily explain to the taxpayer that the poll tax payment was a prerequisite to voting. Second, poll taxes accumulated. A potential voter had to have paid his or her poll taxes for a period of one to three years prior to the period when he desired to vote before being allowed to proceed to the registrar. Third, these cumulative payments had to be paid in full well in advance of the elections for which it was required (sometimes, as far in advance as eighteen months).[85] As Woodward put it, "[g]reat effectiveness was expected of this feature in the case of the 'vicious voter' of both races." Quoting an Alabama disenfranchiser, Woodward pointed to the heart of the matter: "[w]e want that poll tax to pile up so high that he [the "vicious voter"] will never be able to vote again."[86] Fourth, when the poll tax was paid, the tax receipt had to be preserved and presented to both the registrar of voters at registration and the official at the poll on Election Day.[87]

The penalty for not following this complicated structure was disenfranchisement. Professor Woodward states: "[s]ince the payment of the poll tax was optional, complicated, and burdensome, and since additional tests and hurdles might still deprive prospective voters of their ballots even if they paid the tax, it is little wonder that thousands lost the suffrage."[88]

Indeed, thousands of African Americans lost suffrage. In Alabama, the eligible Black voting population had fallen to less than two percent. In Virginia, the tax was implemented in 1903. By 1910, Black registration had sunk from its high participation rate to a paltry fifteen percent. In contrast, the white voting rolls in Virginia maintained nearly eighty

85. OGDEN, *supra* note 7, at 46; *see also id.* at 32-33 (providing an overview of how poll tax payments operated).

86. WOODWARD, *supra* note 7, at 336.

87. For further details concerning the form of and the collection of the poll tax, see OGDEN, *supra* note 7, at 32-76.

88. WOODWARD, *supra* note 7, at 335. For example, the Virginia poll tax of 1966 required a fee of $1.50, payable six months before the election in which the voter wished to participate. Given the fact that different elections took place at different times of the year, different deadlines existed. For instance, if the-voter wished to vote for the Mayor of Richmond, she was required to pay her poll tax by early January of the year of the election. However, if one wished to vote only for governor of the state, she had to register by early May, six months before the November election. *See* Brief for the U.S. as Amicus Curiae at 9-10, Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (No. 48), *reprinted in* 62 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 992 (Phillip B. Kurland & Gerhard Casper eds., 1975) [hereinafter BRIEFS].

percent of the voters of age.[89] This virtually all-white electorate continued to exist for nearly fifty years.

The legal genesis of this mass African American disenfranchisement was the constitutional conventions across the South. These conventions began with Mississippi in 1880. The last convention, held in Virginia, was from 1901 to 1902. The purpose was quite simple: to disenfranchise the African American voter. The framers at these conventions justified this stance on their view that African Americans, who had just emerged from slavery, had little education or knowledge of how to participate in citizenship. Thus, to make African Americans equally responsible citizens in the electorate would do injustice to both the Negro and the white man. Some delegates saw this as a problem of "enforced equality between unequal races." What they sought to avoid was another period of history, like Reconstruction, where "the Anglo-Saxon will again submit to the domination of the black man."[90]

The problem the conventions faced was how to solve the problem of an African American electorate without violating the Fifteenth Amendment. The solution was to implement the "Mississippi Plan" to establish a number of suffrage requirements that would have the effect of disenfranchising African Americans. The Supreme Court upheld the Mississippi Plan and its basis, the legality of the poll tax, in *Williams v. Mississippi*.[91] At the heart of the plan was the fact that the suffrage regulations had no direct animus against minorities and were based on the notion of "fair administration" of elections. Thus, they passed constitutional muster.

The poll tax endured as a prerequisite to the franchise (and thus a substantial barrier to the franchise for the poor, especially poor African Americans) until it was struck down in the mid 1960s. For that amount of time, however, the tax endured in Virginia (as well as in Alabama,

89. DONALD G. NIEMAN, AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861-1900, 6 AFRICAN AMERICANS AND SOUTHERN POLITICS FROM REDEMPTION TO DISENFRANCHISEMENT, at xi (Donald G. Nieman ed., 1994).

90. *Proceedings of the Constitutional Convention*, RICHMOND DISPATCH (Va.), Apr. 3, 1902, at 10. It almost goes without saying that this view of the legislators in turn-of-the-century Virginia, as well as all across the ex-Confederate south, was premised on the social inequalities created during slavery. *See supra* note 67.

91. 170 U.S. 213, 225 (1898). *Williams* involved an African American convict who appealed his sentence on the grounds that the jury who convicted him was composed in a manner that was unconstitutional. The appellant complained that the composition of juries in Mississippi was based upon a statute which required that all jury participants pay poll taxes to the state prior to being allowed to vote (or to serve on a jury). Because Mississippi juries then were all white, he complained that the statute as applied was unconstitutional. The Court rejected these challenges on the grounds that the statute did not discriminate on the basis of race and therefore did not violate the equal protection clause of the Fourteenth Amendment. The Court went further to reject the contention that the disparate impact the statute had was a grounds for declaring the statute unconstitutional. *See id.* ("They [the Mississippi poll tax statutes] do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.").

Mississippi and Texas) where in others states, including Louisiana, Georgia, and North Carolina, the legislature or the people through referenda removed the tax from state constitutions.[92] The main purpose of instituting these revisions was to disenfranchise undesirable voters—particularly African American voters.[93] These preparations, in their meticulous detail, effectively disenfranchised the poor African American voting populace by circumventing the intent of the Fourteenth and Fifteenth Amendments of the U.S. Constitution. Voting participation by African American males declined from ninety-eight percent in 1885 to ten percent in 1905.[94]

The poll tax served as a substantial class barrier to those who wished to participate in elective politics. The southern disenfranchising conventions set up a complex system for registering and made the effort burdensome for those who sought to comply. Yet, the discretion remained in the hands of the registrar to examine the perspective voter. This left open the possibility for fraud and manipulation of the voter rolls. The end result was that for over sixty years, whites of all classes could vote while poor Blacks could not.

D. The Courts and the Poll Tax in the Jim Crow Era

The intent of the turn of the twentieth century conventions was clear: Southern legislatures sought to disenfranchise African Americans through the use of economic measures—mainly, the poll tax. The constitutionality of these measures was upheld in *Williams v. Mississippi.*[95] However, parties challenged the tax on various grounds.[96] The Court upheld the tax and maintained, in effect, that class-based requirements were constitutional grounds on which to withhold the franchise.[97]

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92. *See* Klarman, *supra* note 78, at 45 (discussing how North Carolina, Florida and Louisiana abolished poll tax on their own prior to the Breedlove decision). In addition to its enduring quality, the poll tax and other disenfranchisement tools enshrined in 1901 Virginia Constitution exemplified of the types of laws that developed to restrain the franchise. As discussed earlier, the elements of the understanding clause, the grandfather clause, and the poll tax were added to the constitutions of southern states during the wave of revision conventions which took place between 1890 and 1910. *See* KEYSSAR, *supra* note 8, at 111-13.

93. KEYSSAR, *supra* note 8, at 111-13.

94. KOUSSER, *supra* note 7, at 174. This was the clear intent of this plan: to disenfranchise African American voters without violating the Reconstruction Amendments. For example, the Virginia Supreme Court of Appeals went so far as to admit this: "[a]s we have seen, the principal object of calling the convention of 1901 was to purge the electorate of undesirable and ignorant voters, and the chief difficulty in accomplishing that object was found in the *fourteenth* and *fifteenth amendments to the Constitution of the United States.*" *See* Willis v. Kalmbach, 64 S.E. 342, 348 (Va. 1909).

95. 170 U.S. 213, 225 (1898).

96. *Id.* at 220-21.

97. *Id.* at 225.

1. *Breedlove v. Stuttles*

The monolith of the poll tax was fought on many fronts, including popular politics, the legislature, and the courtroom. However, the legal battle against the poll tax failed during the first half of the twentieth century. The major case of this era was *Breedlove v. Suttles*.[98] The Supreme Court upheld the Georgia poll tax and affirmed its legality for the next twenty-nine years.[99] Mr. Breedlove, a twenty-eight year old white male, was denied the ability to register because he had not fulfilled the poll tax prerequisite. He sued the state tax collector, claiming that the denial of his right to vote because he did not pay his poll tax worked a denial of his protected privilege and immunity to vote and his right to equal protection under the Fourteenth Amendment of the Constitution.[100]

The Court held that making a poll tax payment did not deny him any privilege and immunity under the Fourteenth Amendment.[101] The Court explained that the right to vote was not derived from the federal Constitution but from the individual states.[102] The only constraint on this right existed in the Fifteenth and Nineteenth Amendments. Therefore, "the state may condition suffrage as it deems appropriate."[103] The Court reasoned further that "the payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy."[104] In other words, the Court found that the state had a reasonable interest in collecting the tax, and that making the tax a prerequisite to voting constituted a rational state action. The court deferred to the judgment of the state.[105] Thus, the 1937 Supreme Court found that the poll tax was constitutional.[106] Effec-

98. 302 U.S. 277 (1937).
99. *Id.* at 283-84.
100. *Id.* at 280.
101. *Id.* at 283.
102. *Id.*
103. *Id.*
104. *Id.* at 283-84.
105. The *Breedlove* decision did not consider the racial consequences of the poll tax—or, for that matter, the tremendous effect of disenfranchisement on poor whites. Interestingly, the one major distinction that the decision drew was concerning men and women in relation to the poll tax. Georgia law had required that the male, as "head of the family," was responsible for payment of the tax. In the face of the plaintiffs' argument that this rule treated men and women differently for no rational reason, the court stated that this tax burdened all men equally, and thus was not a violation of equal protection. *Id.* at 282. "Women may be exempted on the basis of special considerations to which they are naturally entitled. In view of burdens necessarily borne by them for the preservation of the race, the state reasonably may exempt them from poll taxes." *Id.*
106. The year after *Breedlove*, in footnote four of United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), the Supreme Court stated that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." This one sentence indicated that the Court will not easily defer to legislative judgments concerning the validity of laws, especially if those laws affected the rights of people as guaranteed within the Bill of Rights or within other protected contexts. The court offered the "right to vote" as one of those arenas where the court would apply a stricter standard of review

tively, the Supreme Court allowed the states to charge whatever cost the legislatures deemed rational, and maintain its apathy towards this class-based exclusion from the electorate.

2. *Butler v. Thompson:* Racial Discrimination and the Poll Tax

In what was to mark the beginning of civil rights litigation to come, a plaintiff challenged the poll tax as a violation of equal protection. In *Butler v. Thompson*,[107] Jessie Butler, an African American female, brought suit against the Central Registrar of Arlington County, Virginia. Butler claimed that the registrar refused to allow her to register to vote because she had not paid her poll taxes for the ten years preceding her registration.[108] Butler argued that the poll tax requirement was unconstitutional because the poll tax was enacted by the Virginia Constitutional Convention of 1902 with the specific purpose of disenfranchising the Negro.[109] Further, she alleged that the election officials of Virginia had conspired to administer the law in such a way as to maintain the disenfranchisement of the Negro.[110] She contended that these laws violated the Fourteenth and Fifteenth Amendments to the Constitution.[111]

The *Butler* court summarily ruled against Ms. Butler. It stated that the intent of the statute was irrelevant. The court reasoned that while the Virginia Constitutional Convention of 1902 did express a desire to disenfranchise the Negro, the laws which resulted from the convention were "valid under the Federal Constitution or Federal laws."[112] Further, the court stated the administration of the law was fair. The court pointed to statistics that stated that by 1950, sixty-one percent of the African Americans in Virginia were assessed poll taxes as compared to approximately seventy-six percent of the whites in Virginia. Given this difference of poll tax assessment rates, the court contended that the tax was administered fairly.[113]

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than merely accepting any purpose a legislative body articulated. *See id.* ("[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). Though this statement was merely dicta, this one recognition began the opening of the door for *Harper* and other cases that sustained the right to vote for all without regard to class as well as other protected rights. *See* Jane S. Schacter, *Ely and the Idea Of Democracy*, 57 STAN. L. REV. 737, 739-41, 746-47 (2004) (noting that *Carolene Products* represents implementation of the democratic ideal of horizontal democracy).

107. 97 F. Supp. 17, 18-19 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951).

108. *Id.* at 19, 24.

109. *Id.* at 20.

110. *Id.*

111. *Id.* at 19.

112. *Id.* at 21.

113. *Id.* at 23. The *Butler* court stated "Certainly we cannot declare the Virginia poll tax laws invalid solely on these statistics upon the assumption that a difference of 15% in poll tax assessments between Negroes and white persons . . . ." *Id.* This implies that the court had assumed some sort of disparate impact standard and found the case failed to meet it here.

Since the court found that the tax was fair and valid on its face and as administered, the court upheld the poll tax by invoking what the court called a settled rule of law: "Finally, in this connection, it is well settled that a law that is fair on its face and is also fairly administered is not rendered invalid by the evil motives of its draftsmen . . . [nor does] such a law . . . offend the Federal Constitution . . . ."[114] This was true, according to the court, because "courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or [inferable] from their operation . . . ."[115] The Supreme Court summarily affirmed.

In both *Breedlove* and *Butler*, the federal courts upheld the poll tax on the basis that the decision as to what types of qualifications were necessary for the vote lies in the purview of state legislatures. The courts reasoned that if the basis is rational and the law is neutral on its face (notwithstanding the discriminatory intent of the law) and the law is enforced fairly, then it would meet constitutional muster. Accordingly, this economic standard—the poll tax—would be considered constitutional.

E. The Abolition of the Poll Tax—Harper v. Virginia

Breedlove remained the law until 1966. By the early sixties, however, several events had taken place which inched the court to the realization that voting was a fundamental right and that the conditioning of that right upon payment of a tax was unconstitutional. First, the nation ratified the Twenty-Fourth Amendment in 1964, which eliminated the poll tax from all federal elections. Second, Congress passed the Voting Rights Act in 1964 and the Civil Rights Act in 1965. This granted the United States Justice Department broad power to initiate lawsuits to protect African Americans from discrimination by the states, including discrimination based on denial of the ability to vote.[116] Finally, in this context, the Civil Rights movement influenced policy makers who ratified the two aforementioned rules of law, and shaped the national conception of what should be considered as protected rights.[117]

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114. *Id.* at 21-22.

115. *Id.* at 21.

116. The Voting Rights Act accorded the United States Justice Department significant powers to enforce the guarantees of the Fifteenth Amendment to protect African Americans from discrimination in voting. These protections resulted in massive gains for the African American right to vote. As Parson and McLaughlin point out, "the percentage of African Americans of voting age registered to vote in the South, which was approximately three percent (3%) in 1940, increased from 43.3 percent . . . in 1934 to approximately 63.7 percent." Parson & McLaughlin, *supra* note 20, at 86. These numbers also illustrate the deep impact that the poll tax had—along with other discriminatory devices—in infringing on the right to vote.

117. *See* KEYSSAR, *supra* note 8, at 257-68 (discussing the history of the Civil Rights Movement and voting rights movements from the 1950s through the 1960s). McClain et al., *in* THE VOTING RIGHTS ACT: SECURING THE BALLOT, *supra* note 8, at 70-72 (discussing Freedom Vote and Freedom Summer campaigns, which led to voting rights reform legislation).

In this new political and legal environment came the challenge to the poll tax that proved effective. Several African American men and women attempted to register and vote in the early sixties. All of these plaintiffs were Black citizens of Virginia who met the age and residency requirements to participate in state elections. However, because they were unemployed or employed in less than profitable occupations, they were unable to meet the poll tax requirement.[118] As a result, they were denied the right to vote.[119] These plaintiffs sued the Virginia State Board of Elections on the grounds that the poll tax abridged their privileges and immunities as United States citizens as well as violated their right to equal protection of the laws under the Fourteenth Amendment. In an unsigned *per curium* opinion, a three judge panel of the Eastern District of Virginia summarily dismissed the claim of the plaintiffs citing *Breedlove.*[120] The court noted that "[t]he tax is levied upon every adult resident irrespective of his intent to vote. Moreover, no racial discrimination is exhibited in its application as a condition to voting."[121] Ms. Harper and the other plaintiffs appealed this decision to the United States Supreme Court.[122]

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118. They included Anne E. Harper, a single woman who supported herself by performing household work. At the time of her lawsuit, however, she was dependent on federal social security benefits. She was required to pay $4.74 in order to meet her poll tax requirement, a requirement she could not afford. Gladys A. Berry was also single. She had no source of income and cared for seven minor children (two were hers and the other five belonged to her married daughters). Curtis Burr worked in the construction industry. His gross income was less than $5,000. He had to care for his wife, Myrtle, and their nine children. In order to participate in the elections, the two of them would have to pay $10.02. BRIEFS, *supra* note 88, at 881-83.

119. KEYSSAR, *supra* note 8, at 269-71.

120. Harper v. Va. State Bd. of Elections, 240 F. Supp. 270, 271 (1964).

121. *Id.* Testimony was presented at trial as to the disparate economic and race-based effects that the poll tax had on the poor. However, the court did not find that illegal racial purposes or illegal application of the law played a role in the poll tax. Though the intent was clear to any skim of the original constitutional convention record, the Supreme Court could ignore it because the district court claimed that the administration of the tax in the 1960s did not rely explicitly on that original intent.

122. The Supreme Court arguments for the *Harper* plaintiffs focused on the economic impact of the tax on the poor. Harper's counsel argued that the state had intentionally designed the poll tax "to limit the right of suffrage to those who took sufficient interest in the affairs of the State to qualify themselves to vote." BRIEFS, *supra* note 87, at 1028. He argued that it is obvious that the poor will be excluded from the franchise by definition. Further, "the tax does not in any way establish their [the poor's] lack of responsibility as citizens, nor their lack of intelligence." *Id.* Solicitor General Thurgood Marshall argued that one cannot put a tax on the right to vote "in any form or fashion." *Id.* at 1034. He argued that the republican form of the United States government assumed regular state elections in which all the people would be able to participate. Thus, it made no sense to impose a poll tax because it would interfere with this democratic process. *Id.* at 1034-35. He also alluded to property qualifications as the original barrier for limiting the franchise, and he drew the parallel between that barrier and poll taxes. *Id.* at 1034-37. George Gibson, on behalf of the State of Virginia, argued that the poll tax constituted a minimum requirement that was easily met. *Id.* at 1053. Gibson argued that "the dissemination of voter qualifications is exclusively a matter of state concern, and is to be exercised by the state as they may wish, unless their particular conduct in a particular situation infringes upon some other constitutional inhibition." *Id.* at 1054 Because it was a state concern, he argued there was no need for the Supreme Court to abolish the poll tax since there is no authority within the Constitution for the Court to do so. He went further to argue that:

[A]n objection based upon payment of one dollar and a half is so insubstantial as to merit dismissal on that ground alone .... [I]t is found that groups least able to pay a poll tax are also the ones least

The Court struck down the Virginia poll tax in state elections as a violation of the Fourteenth Amendment's Equal Protection and Due Process Clauses. In a majority opinion written by Justice Douglas, the court reasoned that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[123] Though the law did not implicate race and was defensible as policy, the poll tax nonetheless bore no rational relation to the ability to vote because it singled out wealth as a qualification for voting.[124] "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored."[125]

Further, the Court noted that "the Equal Protection Clause is not shackled to the political theory of a particular era."[126] The Court claimed that it never excluded rights to a certain list of guarantees or to historic notions of equality. The Court cited to *Plessy v. Ferguson*[127] and *Brown v. Board of Education*[128] as illustrations of how the Court grew beyond notions of equality or inequality that existed in another era—here, the "separate but equal" doctrine.[129] The Court was unwilling to "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896" to support an outmoded way of thinking about the law.[130] The Court concluded by reiterating that the right to vote was a fundamental right. "Wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[131] Thus, the majority applied a strict scrutiny analysis and declared the poll tax unconstitutional.

Though the majority pronounced the value of the right to vote and held that its exercise had no relation to one's wealth or financial ability, three justices dissented from the opinion and articulated a different view

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interested in voting. This means that the incidence of the real prevention of voting because of the dollar and a half requirement is very infrequent.

Id. at 1076. Under Gibson's reasoning, the relative economic conditions of those who are most burdened by the tax are irrelevant in as much as they do not want to vote anyway. For Gibson, the purpose the poll tax served was facilitating an effective electoral process. Thus, the tax was tied to a rational basis and was "the simplest, the most equal, nondiscriminatory and objective test of minimum intelligence and responsibility to be devised." *Id.* at 1078.

123. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

124. *Id.* at 666. It is worth mentioning that the court also affirmed the legal principle of the time that "the ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

125. *Harper*, 383 U.S. at 668.

126. *Id.* at 669.

127. Plessy v. Ferguson, 163 U.S. 537, 548-49 (1896).

128. Brown v. Bd. of Educ., 347 U.S. 483, 487-88 (1954).

129. *Harper*, 383 U.S. at 669-70.

130. *Id.* at 670.

131. *Id.*

of the nature of the right. Justice Black dissented on the grounds that Section Five of the Fourteenth Amendment empowered Congress to pass legislation designed to protect the rights listed in the Amendment, and therefore it was not the place of the Court to strike down the poll tax.[132] Justice Harlan, with whom Justice Stewart joined, dissented on the grounds that the Court overstepped its powers by declaring the Virginia poll tax law unconstitutional. They argued that the equal protection clause does not require equal treatment of all people. What was necessary in evaluating these cases was a determination of whether the action the state was taking was actually rational or not. Such a judicial philosophy would prevent the judiciary from imposing its own views on those of policy-makers.[133]

Harper is thus marked by the tension between two competing views as to the nature of the right to vote. The majority view was that American democracy required allowing full access to the right to vote by removing economic barriers to the right to vote. The majority championed the right to vote by striking down the poll tax. This contrasted with the dissenters' view: that the right to vote was necessary but not absolute. Reasonable burdens upon the right to vote are acceptable and should be left in the judgment of either the states or the coordinate branches of the federal government despite the cost to be paid by otherwise eligible voters like Annie Harper. Despite the dissents, the Court held the poll tax unconstitutional.

III. MEASURING THE COST OF VOTING: *HARPER*, *BURDICK*, AND BALANCING ACCESS AND BURDEN

A. The Balancing Test for Burdens on Voting

Harper marked a watershed in American election law. The Court had, in striking down the poll tax, ruled that one's economic status—as evidenced by one's ability to pay a tax—had no relation to the right to vote. Wealth as a status had no bearing on the ability to vote, thus, the poll tax served to be an invidious factor on which to condition access to the right to vote. The Court of the Warren Era had articulated a vision of the right to vote and found at the center of that vision that the right bore no relation to one's economic status.

Yet after the watershed moment, the high tide of the right to vote receded. The Court, forced to apply the right to vote to other contexts, evolved an approach focused not on the fundamental nature of the right to vote; instead, it articulated a standard that required the balancing of the interests of the voter in voting with the interests of the government in administrating fair elections.

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132. *Id.* at 679.
133. *Id.* at 680-83.

The Court articulated this approach in two cases, *Anderson v. Celebrezze*[134] and *Burdick v. Takushi*.[135] *Anderson* involved the third-party candidacy of John Anderson for the Presidency of the United States. Mr. Anderson had run for, and lost, the Republican Party nomination for President. Thereafter, and after the early filing deadline had passed for the Ohio primary, Mr. Anderson attempted to have his name placed on the ballot as an independent candidate. Anderson proffered a nominating petition signed by 14,500 residents of Ohio along with a statement of his candidacy to the Ohio Secretary of State.[136] The Secretary of State refused his petition as untimely.[137] Anderson brought an Equal Protection challenge asserting that the deadline for independent candidates, which was different than the deadline for the major parties, was unconstitutional because it imposed different burdens on the different kinds of candidates.[138] The state countered that the qualifications were constitutional because they met the interests of (1) voter education; (2) equal treatment for partisan and independent candidates; and (3) political stability.[139]

In ruling on this challenge, the *Anderson* Court took care to note that not all restrictions on the right to vote warrant strict scrutiny.[140] Indeed, generally applicable and evenhanded restrictions that "protect the integrity and reliability of the electoral process itself" should be upheld as constitutional.[141] The Court suggested a balancing test to assess the constitutionality of a challenged election law to be used on a case-by-case basis:

> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests burden the plaintiff's rights. Only after weighing all these fac-

134. 460 U.S. 780, 821-22 (1983).
135. 504 U.S. 428, 441 (1992).
136. *Anderson*, 460 U.S. at 782.
137. *Id.* at 782-83.
138. *Id.* at 783.
139. *Id.* at 796.
140. *See id.* at 788 ("Although [certain] rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates . . . . To achieve [fair, honest and orderly elections], States have enacted comprehensive . . . election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.").
141. *Id.* at 788 n.9.

tors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[142]

After articulating its balancing test, the Court assessed the challenges that the rule imposed on Anderson and held that the statute in question burdened an "identifiable segment of Ohio's independent-minded voters."[143] The burden imposed by Ohio's early filing deadline was "especially difficult" for the state to justify since it limited "political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."[144] The Court then dismissed the state's proffered interests and found for Anderson.

Burdick involved a challenge to certain limitations set out in the Hawaiian write-in ballot law which would prevent certain voters from casting their ballot preferences.[145] The Court, in upholding the Hawai'i law, rearticulated the *Anderson* balancing test for analyzing claims, but then added an important caveat: that evaluation of the injury to the claimant's First and Fourteenth Amendment rights must precede any balancing of the claimant's rights against the governmental injury.[146]

The *Burdick* Court held that this balancing test was the proper approach for assessing freedom of speech claims based on infringement of voting rights.[147] The Court has held to this standard for analyzing free speech voting infringement claims ever since.[148]

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142. *Id.* at 789.

143. *Id.* at 792.

144. *Id.* at 792-93 (noting that the financial burdens that could be created by filing fees for candidates could disproportionately affect independent candidates as opposed to major party candidates). The Court, in the context of dealing with an Equal Protection challenge, recognized that economic impacts can affect the ability of open political participation. Indeed, within the context of this situation, this represents a freezing of the political status quo because the disproportionate burden on independent candidates effectively helps to insulate the major parties from significant challenges. Such similar effects could arguably be at play within the voter identification context. *Cf.* Moran & Wildman, *supra* note 77, at 1221 (noting how neutrality and equality can support subordination and hierarchy through protecting property rights and status inequalities inherent in the economic system).

145. Burdick v. Takushi, 504 U.S. 428, 430 (1992).

146. *Id.* at 434.

147. *Id.*

148. The *Burdick* decision has been criticized by many commentators as confusing and muddying the analysis of state election laws rather than providing clarity. *See, e.g.*, Schultz, *supra* note 20, at 491-92 (criticizing the *Burdick* decision as diluting the otherwise fundamental right to vote; and confusing due to the fact that it did not rely on right-to-vote cases and failed to define the distinction between severe burdens on the right to vote and reasonable burdens on the right to vote). This shift from presuming the right to vote as fundamental and the lack of clarity in effecting the balancing test set forth in *Burdick* creates an inability for the test to comprehend the distinction between indirect costs which create severe burdens on the right to vote and those indirect costs which create a reasonable burden. This becomes significantly burdensome due to the fact that evidence of burdens in the photo identification context is difficult to produce and is problematic in terms of the analysis of these problems. As a result, as is discussed below, the courts are left to rely on the rationales proffered by the government without an effective counterweight in the *Burdick* balance. The result is one-sided opinions which, in the absence of a normative standard, *see* Flanders, *supra* note 20, at 97, or statis-

B. The Evolution of Voter Identification Policy

While *Burdick* shifted the election administration analysis from the strict scrutiny of *Harper*, the technological ability and needs for demonstrating one's identity also evolved over the thirty years between *Harper* and *Burdick*. With the advent of photographic identification cards came the ability to present such identification to register and to vote. However, a number of other forms of identification were also available which voters could use to register and vote. These included the presentation of letters from either the federal or state government bearing the voter's name or address (including social security information, hunting and fishing licenses, and other types of documentation). State laws concerning identification found these types of documentation acceptable for over thirty years.

Moreover, there are those who do not possess government-issued photographic identification cards.[149] This population of the United States is shut out of the ability to participate in the activities that are day-to-day for most citizens (e.g., boarding an airplane, entering a secured building, etc.). They are also shut out of the ability to cast ballots for political office.

National policy, nonetheless, has sanctioned, to some extent, the move for states to require photo identification of voters seeking to register. Two major laws passed in the late 1990s and early twenty-first century affected this trend. The National Voter Registration Act of 1993,[150] or NVRA, required that state governments register voters at various points where they obtain governmental services, including Motor Vehicles bureaus, Social Security offices, and other points where citizens would obtain governmental services.[151] Additionally, the Help America Vote Act of 2002,[152] or HAVA, required that state governments insist that first-time voters present photographic identification cards when registering to vote.[153] From these two national initiatives, Congress has

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tical proof of which a court can categorize as severe, *see* Overton, *supra* note 20, at 672, the courts tend to side with the state in upholding the identification laws.

149. According to the Brennan Center, twelve percent of eligible voters nationwide do not have photo IDs. Brennan Center For Justice, Voter ID, http://www.brennancenter.org/content/section/category/voter_id (last visited Mar. 7, 2009). According to the U.S. Census Bureau, as of 2007, the voting age population estimate was 227,719,424. U.S. Census Bureau, General Demographic Characteristics, http://tinyurl.com/59ll4r (last visited Mar. 7, 2009). That means that there are approximately 27.3 million eligible voters without photo IDs.

150. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C.A. §§ 1973gg-1 to -10 (West 2009)).

151. 42 U.S.C.A. § 1973gg-2 (West 2009).

152. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat 1666 (codified at 42 U.S.C.A. §§ 15301-15545 (West 2009)).

153. 42 U.S.C.A. § 15483(b)(2)(A)(i)-(ii) (West 2009).

clearly suggested that voter identification laws are appropriate for use in modernizing voter registration.[154]

Following these imperatives to modernize elections, Georgia, Arizona, Missouri, Michigan, and New Mexico (along with approximately twenty other states) either have passed or will be passing voter identification laws in the near future.[155] Although these laws provide exceptions for indigent voters to vote based on an affidavit attesting to the voter's poverty or allowing free identification cards to voters who cannot afford them, it has been argued that voters must pay an indirect cost for voting by providing documentation such as a birth certificate, demonstrating one's residency, or otherwise gathering documentation to obtain the government-issued photographic identification.[156] This article will now turn to an analysis of how different courts have evaluated voter identification laws and addressed—if at all—the issue of the economic bias in such laws.

C. Judicial Analysis of Modern Voter Identification Laws

The voter identification dispute brings to the fore the issue of embedded socioeconomic bias against voters within the electoral system. As argued earlier, the American republic has consistently looked toward a socioeconomic indicator, such as the amount of property a free Caucasian man owned, or the ability of a voter to pay a poll tax, as a measure of whether the citizen has a sufficient stake in the process to be granted the vote. The intent of these barriers was to exclude those voters that the majority in power wished to see excluded.

The courts in particular have been apathetic to this concern. *Breedlove* represented the Court's apathy towards the problem of states' use of an economic indicator as a way to discriminate between the desired voters and the undesirable voters. *Harper*, in turn, marked a decided shift from this view and articulated a right to vote that bore no relation to the ability to pay a tax. Yet, the pendulum has now potentially swung back to the view that voter identification laws which require photographic

154. Additionally, the Carter-Baker Commission, which was charged by Congress to study election reform alternatives, suggested that voter ID rules should be used more aggressively as a tool for registration. *See* COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at ii (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf. The Commission proposed that all states require a valid photo ID card for purposes of registering to vote, but only to the extent that it's used to register new voters instead of allowing the ID to be a barrier to voting. *See id.* at 18-21. The Commission suggests that states would play an affirmative role of reaching out to the undeserved communities by providing them more offices, including mobile ones, to register them and provide photo IDs free of charge. *Id.* at 19-20.

155. Twenty-four states have broader identification requirements than those listed in HAVA. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 50. Seven of these states, Florida, Georgia, Hawaii, Indiana, Louisiana, Michigan and South Dakota, require photo ID. *Id.* The other seventeen require ID, but a photo ID is not required. *Id.*

156. *See id.* (containing a list of voter ID requirements by state and also providing the steps that voters without photo ID at the time of election need to do to have their vote counted).

identification—and the prerequisites which have to be fulfilled to meet that end—will create a new economic bright line, and the Court will retreat into apathy towards those effectively removed from the electorate.[157]

This debate raises the question of whether the requirements would actually have a detrimental effect on voters who are of lower socioeconomic status. Indeed, the question of whether any given potential voter's socioeconomic status is relevant to the issue of determining the impact of election laws is at the heart of the ongoing debate around voter identification laws. Yet, as we have seen, socioeconomic status has been one of the fulcrums used by those in power to shape the electorate and influence who can and cannot vote, regardless of the merit of the suggestion. Indeed, until *Harper*, these socioeconomic markers were considered to be an appropriate measure of the ability to participate in the electorate. This question of the role of socioeconomic status—the ability to show one's stake in the voting process before one is even admitted to vote—lingers under the surface of the recent judicial analyses of voter identification laws.

A number of courts have addressed this issue within the last few years. Many courts have rejected the argument that voter identification laws have a harmful impact on the socioeconomically disadvantaged because they found the evidence lacking of any such impact and, in the absence of such evidence, that the government's rationale of maintaining fair elections should be granted deference. This trend represents a return to the apathy towards the plight of those discriminated against in the poll tax era and a diminution of the right to vote. The Supreme Court's ruling in *Crawford v. Marion County Election Board* shows that the Court has, potentially, turned away from the principles of *Harper*.

The Court took the *Crawford* case from Indiana. The case began when the state of Indiana passed a photo-identification requirement for its voters.[158] The law required that all voters in Indiana have the requisite voter-identification card to vote. Specifically, the Indiana law requires that only identification issued by either the state of Indiana or the federal government will qualify to meet the photo-identification requirement.[159]

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157. This fear has been echoed by many advocates against photo identification laws. They fear that these laws will exclude otherwise eligible voters on the basis of whether that voter has the ability to obtain appropriate identification or not since these voters simply do not have the economic means to obtain the identification. Proponents of photo identification laws contend that these rules are generally applicable regulations necessary to maintain the validity of federal elections. Generally, they argue that the risk of voter fraud is such that stringent voter identification regulations are necessary and essential to ensure effective and fair elections.

158. Act effective Jul. 1, 2005, Pub. L. No. 109-2005, 2005 Ind. Acts 2005 (codified at IND. CODE ANN. § 3-11-8-25 (West 2005)), *repealed by* Act of Mar. 24, 2006, Pub. L. No. 164-2006, sec. 143, 2006 Ind. Legis. Serv. 2006 (West). The requirement has been haled by some as the most stringent in the land due to its rigorous requirements.

159. IND. CODE ANN. § 3-11-8-25.2(b) (West 2009).

Thus, those otherwise eligible voters who meet the other registration requirements and yet have not had the opportunity to obtain the identification card would be ineligible to vote. Additionally, the law required a number of documents be presented to demonstrate the voter's identity. The Indiana law, Senate Enrolled Bill 483, provides several exceptions for the identification requirement: (1) if a person is unable or unwilling to purchase an identification card from the Indiana Bureau of Motor Vehicles, he or she may cast an absentee ballot; (2) elderly people residing in nursing homes may vote by absentee ballot; and (3) indigent voters may file an affidavit attesting to the voter's indigent status and cast a provisional ballot.[160]

The Democratic Party of Indiana sued to enjoin implementation of the law.[161] The Party's theory was that by implementing these voter standards, the Democratic Party would lose voters that would typically vote with it. Additionally, in a separate but parallel lawsuit, two Indiana democratic legislators sued to enjoin the law on substantially the same grounds.[162] The plaintiffs, in essence, argued that the court ought to apply a strict scrutiny analysis to the law and hold it unconstitutional because it substantially burdened the fundamental right to vote, disproportionately affected economically disadvantaged voters by effectively placing a poll tax upon them, and was not justified by existing circumstances of voter fraud.[163]

The Indiana photo identification law was upheld by the U.S. District Court for the Southern District of Indiana. The district court held that the evidence presented to it was not sufficient to enjoin the law in light of the state's proffered justifications.[164] The opinion was affirmed by the U.S. Court of Appeals for the Seventh Circuit.[165] The majority opinion by Judge Richard Posner upheld the Indiana statute on the grounds that it represented a rational interest of the state in preventing voter fraud. In particular, Judge Posner reasoned that the cost impact on the certain set of voters is negligible in comparison to the benefits that the law has in preventing voter fraud.[166] Indeed, Judge Posner reasoned that the interests of those who may be most directly affected by the law are irrelevant to the analysis of the law's constitutionality. The majority here believed that the indirect costs of obtaining photo identification were wholly irrelevant to the consideration of the impact of the law.[167] The Seventh Cir-

160. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006).
161. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1614 (2008) (referring to the lower court case of Indiana Democratic Party v. Rokita).
162. *Id.*
163. *Id.* at 1615.
164. *Rokita*, 458 F. Supp. 2d at 820.
165. Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).
166. *See id.* at 952-54.
167. *Id.* at 952.

cuit *en banc* declined to rehear the case.[168] The Supreme Court granted certiorari.

The Supreme Court upheld the Indiana photo identification law in a fractious 6–3 ruling. The "Lead Opinion" by Justice Stevens performed the *Burdick* balancing test and found that the interests of the state in maintaining the voter-ID law outweighed any impact that the statute would have on populations who may effectively be disenfranchised by the law.[169] The Stevens opinion considered the three main bases which the government proffered to support the law. First, it credited the government's argument that the law was necessary to maintain the integrity of elections. The Stevens opinion recognized that Indiana had an interest in modernizing its election process as well as preventing potential voter fraud in light of such risks as over-inflated voter rolls.[170]

In contrast, the Court found that the plaintiffs had failed to present sufficient evidence on the record to support their assertion that the law should be struck down on a facial challenge. The Stevens opinion pointed out that the plaintiffs were unable to demonstrate one plaintiff who had been directly affected by the law. The Stevens opinion also asserted that the plaintiffs failed to demonstrate on the record how many people actually would be affected by the law. The opinion conceded that, conceivably, some voters would be effectively shut out by the inability to register under the structure of the law as written, but it declined to overturn the law on this basis. The Stevens opinion contended that on this record, it would be inappropriate to declare the law unconstitutional simply because some voters may be affected, particularly in light of the fact that the government had offered justifiable reasons for enacting the law.[171]

The Scalia opinion declined to engage in the lengthy balancing analysis. Instead, the Scalia opinion contended that the issue was easily resolved under the principle that this election law was a moderate, reasonable regulation which effectively was only subject to rational basis review. The Scalia opinion went further to argue that to provide further analysis to the claims presented would cut against the long, well-settled

168. *See* Crawford v. Marion County Election Bd., 484 F.3d 436, 437 (7th Cir. 2007). Judge Diane P. Wood, joined by three other judges, dissented from rehearing *en banc*. *Id.* The dissenters to the denial of rehearing *en banc* contended that the Seventh Circuit majority had ignored the potential impact of the regulation on individual voters. *See id.* at 438. Indeed, Judge Wood stressed that the Supreme Court's precedent in this area did not give license to the view that no one vote matters. *Id.* Judge Wood also stressed that the potential impact of the Indiana photo identification law had not been determined and thus was a question of fact to be determined by the lower court. *Id.* at 439. Judge Wood also noted that to the extent these laws completely disenfranchise voters, they represented the same invidious harm that poll taxes represented. *Id.* at 438 ("To the extent that [the photo identification law] operates to turn them away from the polls, it is just as insidious as the poll taxes and literacy tests that were repudiated long ago.").

169. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616-19 (2008).

170. *Id.* at 1618-20.

171. *Id.* at 1620-24.

precedent of the court that neutral laws of general application ought only be subject to rational basis review; and that any disparate impact that is the consequence of such laws is irrelevant to constitutional considerations. Moreover, Justice Scalia joined the lead opinion's view that the law was founded on reasons which are rational and justified, and therefore concurred in the result.[172]

The two dissenting opinions took a different view. Justice Souter (joined by Justice Ginsberg) dissented on the grounds that there was sufficient evidence on the record to demonstrate that the effect would be substantial on an identifiable set of voters. Justice Souter argued that a definable number of voters in Indiana would be effected by the law and unable to vote in an election where the law was in place.[173] Additionally, Justice Souter contended that the government's overriding rationale for putting the law in place—the need to prevent voter fraud—was not credible. Justice Souter contended that there was no established case of voter fraud in Indiana on which the government could base is rationale of needing to prevent voter fraud. Justice Souter also contended that the other basis upon which the rationale was offered had no support and should not weigh against the actual impact that the law would have.[174]

Justice Breyer dissented separately. Justice Breyer agreed that the Constitution does not prohibit Indiana from framing voter identification laws. However, Justice Breyer contended that the burdens on the voters are substantial and had not been taken into account by the state. Moreover, Justice Breyer compared the Indiana law to the laws passed by Florida and Georgia which, in his view, were less restrictive than Indiana's law. Justice Breyer also substantially relied on the recommendations of the Carter-Baker report to argue that such substantial burdens on voters should be avoided. Justice Breyer concluded by realizing that while the Constitution does not forbid voter identification laws, the Indiana statute in particular overburdens voters who do not possess the applicable photographic identification.[175]

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172. *Id.* at 1624-27. Justice Scalia's assertion here seems to amount to the suggestion that voter impact concerns as those raised in the *Crawford* opinion should be considered purely under a rational basis review, and that to countenance the application of the balancing test set forth in *Burdick* would run counter to the anti-disparate impact jurisprudence articulated in such cases as *Washington v. Davis*. This line of reasoning is consistent with the Justice's jurisprudence; however, its discussion in the voting rights context raises a number of concerns. Adoption of this position within the voting rights arena would substantially change the analysis of voting rights cases concerning election regulations. It would, taken to an extreme, eviscerate both *Burdick* and *Harper* and extend the influence of *Davis* into voting rights law and other areas of equal protection jurisprudence. In a future article, I hope to contemplate the ramifications of this potential change in voting rights jurisprudence and its consequential effects on equal protection jurisprudence and voting rights jurisprudence in particular.

173. *Id.* at 1632-34.

174. *Id.* at 1636-39.

175. *Id.* at 1643-45.

Crawford, ultimately, marks another moment where the Court appears to be at odds concerning the competing visions of democratic participation. Yet, in its 6–3 decision, the pendulum has decidedly shifted from a vision of voter access unfettered that ought not to be defined by an economic standard. The apparent shift is to a standard where the default position is one where the government's rationale for election integrity ought to control. Even within this, however, it seems clear that the Court in itself is not of one mind about this issue. The Stevens opinion relied on the premise that there was insufficient evidence to support striking down the Indiana law. The Scalia opinion resisted the notion of weighing the evidence of voter impact in its entirety. These two opinions represent two different versions of indifference by the Court towards the problem of the economic impact of voter identification laws—the indifference of insufficient evidence and the apathy of relying solely on the state's rationale. Both of these markedly contradict the vision in *Harper* of a right to vote unfettered by the impact of an economic requirement.

Even prior to *Crawford*, lower court decisions have also followed a similar line of analysis. Indeed, the unifying theme in the pre-*Crawford* voter identification jurisprudence is the problem of presenting sufficient evidence of voters being impacted by the identification laws. For example, *Gonzalez v. Arizona*[176] dealt with the question of the constitutionality of Arizona Proposition 200. Proposition 200 required registering voters to submit evidence of United States citizenship[177] as part of the registration process. The *Gonzalez* plaintiffs contended that the rule constituted a poll tax, severely burdened the fundamental right to vote, and placed a severe burden on the ability of naturalized citizens' to vote. The Ninth Circuit rejected each of these claims. First, the Ninth Circuit held that Proposition 200 was not a poll tax because "voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They only have to provide the proof of citizenship."[178] Next, the Ninth Circuit rejected plaintiffs' assertion that Proposition 200 placed a severe burden on the fundamental right to vote by applying the *Burdick* test and stating that "appellants have not shown that it is anything other than an even-handed and politically neutral law. The evidence that Arizona citizens may be burdened by the new law consists of

176. 485 F.3d 1041 (9th Cir. 2007).

177. *Id.* at 1046. "Satisfactory evidence of citizenship" may be shown by including, with the voter registration form, any of the following: the number of an Arizona driver's license or non-operating identification license issued after September 1, 1996; a birth certificate; a copy of a U.S. passport; or U.S. naturalization documents. This question of satisfactory evidence of citizenship creates another level of difficulty—and another potential realm where voter identification laws will have a disparate impact against a protected group, recently naturalized citizens. This topic merits further study as to the ramifications for naturalized citizens and the exercise of their voting rights and how these photo identification laws may impact the nature of citizenship in the United States.

178. *Id.* at 1049.

declarations from individuals who are not parties to the litigation."[179] Finally, the Court disposed of plaintiffs' claims that Proposition 200 disproportionately burdens naturalized citizens by stating simply: "The record before us . . . contains no affidavits or declarations from naturalized citizens. Therefore, we do not know the extent to which this requirement may burden . . . any such citizen."[180] The Ninth Circuit essentially rejected the plaintiffs' claims that Proposition 200 was unconstitutional because the plaintiffs offered nothing except hypothetical speculation about the harm or burden imposed by Proposition 200.

Similarly, in *Common Cause of Georgia v. Billups*[181] the plaintiffs sued to challenge the constitutionality of the 2006 Photo ID Act. The Act required all Georgia voters to obtain a special "Georgia Voter Photo ID card"[182] to vote in state and federal elections.[183] This provision did not require registering voters to purchase a photo-identification card from the state.[184] Those who could not obtain Georgia Voter Identification Cards could vote via absentee ballot. The Act provided for a place within the registrar's primary office in each county of the state to process applications for Georgia Voter Identification Cards and distribute such cards. The Act also allowed the Georgia Department of Driver Services ("DDS") to register voters and issue voter identification cards. Further, the Act provided for comprehensive notification and education efforts on behalf of the state of Georgia to increase awareness of the requirements of the Act.

The plaintiffs attacked the Act on the grounds that it placed a severe burden on the voting rights of individuals who either lacked (1) the ne-

179. *Id.* at 1049-50.

180. *Id.* at 1050.

181. Common Cause/Georgia v. Billups (*Common Cause II*), 504 F. Supp. 2d 1333, 1337 (N.D. Ga. 2007).

182. *Id.* at 1339.

183. Georgia had previously attempted to implement photo identification requirements, yet those requirements were struck down as a poll tax. *See* Common Cause/Georgia v. Billups (*Common Cause I*), 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Georgia had initially passed a photo identification law in 2005 which mandated that every voter purchase and present some form of government-issued photographic identification to register to vote and prove the voter's identity on Election Day. Proponents of the law argued that the law served to detour voter fraud and helped to secure elections. The law passed over the objections of the Georgia Secretary of State, who stated that there was no voter fraud problem or other election-day oriented security problem which required a photo-ID law. After the law was passed by the Georgia legislature, the law then gained pre-clearance from the United States Department of Justice. *Id.* at 1332-36. The U.S. District Court for the Northern District of Georgia enjoined the law as a violation of the Fourteenth and Twenty-Fourth Amendments to the Constitution. The court reasoned that the law would create an equal protection violation because of its requirement that potential voters had to purchase their identification created a group that had its ability to vote burdened. Moreover, the court in *Common Cause I* held that the photo identification requirement constituted a poll tax because all citizens had to purchase an identification card to vote, and thus linking the purchase of an identification card to the ability to vote constituted a poll tax. *Id.* at 1366-70.

184. The 2006 Photo ID Act "requires the Board of Elections in each county to issue 'Georgia voter identification card' containing a photograph of the voter, without charge to voters residing in the county, upon presentation of certain identifying documents." *Common Cause II*, 504 F. Supp. 2d at 1343.

cessary "identifying documents"[185] needed to obtain a Georgia Voter Identification Cards or (2) transportation to travel to DDS or county registrar offices to obtain the voter identification cards. Plaintiffs also asserted that the Act amounted to an unconstitutional poll tax because a photo ID or proof of residential address was required to procure any of the "identifying documents" needed to obtain a Georgia Voter Identification Card.[186] The Northern District of Georgia applied the *Burdick* test and determined that the Act did not create a severe burden on voting rights because (1) the photo ID cards could be obtained without any payment to the state; (2) the two named plaintiffs testified that they could and would travel to their local registrar's office if the Act were to be upheld; (3) the state of Georgia made efforts to notify and educate voters who lacked photo ID about the procedures for obtaining a Georgia Voter Identification Card; and (4) voters who lacked acceptable identification could vote by casting absentee ballots. On this basis, the court found that the statute was a reasonable and nondiscriminatory restriction on voting rights.[187] A significant part of the *Common Cause II* court's rationale was none of the named plaintiffs could show the requisite amount of concrete harm necessary to warrant a strict scrutiny standard of review. Ultimately the court decided that the Act was not a poll tax and that the restrictions imposed on fundamental rights were not severe enough to warrant a type of strict scrutiny review.[188]

Even outside of the evidentiary context, at least one court has performed a facial analysis of a photo identification requirement and upheld its constitutionality. In *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*,[189] the Michigan House of Representatives asked the Michigan Supreme Court to advise the House about the constitutionality of pending voter identification legislation. Specifically, the Michigan legislation would require that voters either present photo ID or sign an affidavit averring that the voter lacks identification before

185. For a comprehensive listing of "identifying documents," see *id.* at 1346-48.

186. *Id.* at 1337.

187. *Id.* at 1377-80.

188. What is curious about the position of the *Common Cause II* court is its own description of the operation of the Act itself. *See id.* at 1342-48, 1355-70. Although the court notes that over 600,000 Georgia residents could be potentially disfranchised, the notice provisions of the Act, the minimal costs associated with obtaining a Georgia Voter Identification Card and the absentee ballot exception, proved to be factors that convinced the court to deem the statute a reasonable and nondiscriminatory means of combating voter-impersonation fraud. *Id.* at 1360. Despite former Secretary of State Cathy Cox's expressed belief that "[t]he Photo ID requirement for in-person voting was unnecessary, created a significant obstacle to voting for many voters, was unlikely to receive preclearance from the Justice Department, violated the Georgia Constitution, and unduly burdened the right to vote," the court was still disinclined to make the state actually prove (1) the existence of voter fraud, (2) demonstrate that the Act was narrowly drawn to prevent such fraud, and (3) that there were no less restrictive alternative means to achieve that end, because the *Burdick* test dictates that the plaintiff show *actual* harm before strict scrutiny review is warranted. *Id.* at 1357.

189. 740 N.W.2d 444, 447 (Mich. 2007).

voting. The question presented to the court was whether this requirement created an unconstitutional burden on the right to vote.[190]

The Michigan Supreme Court held that (1) under the *Burdick* standard, the law was facially constitutional because it was a reasonable, nondiscriminatory restriction designed to prevent the dilution of votes and (2) since no voter is required to incur the costs of obtaining a photo ID as a condition of voting, the identification requirement could not be characterized as a poll tax. Among other objections, the opposing Attorney General asserted that even if the Court deemed the proposed restriction a reasonable, nondiscriminatory means to prevent voter-impersonation fraud under the *Burdick* rational basis standard, the legislature should still be required to make a showing that the voter-impersonation fraud actually exists and that the restriction is rationally related to furthering the state's interest in preventing such fraud. The Court rejected this assertion and held that as long as the restriction is reasonable and nondiscriminatory, "the state is not required to provide any proof, much less 'significant proof,' of in-person voter fraud before it may permissibly take steps to prevent it."[191]

Not all courts have upheld voter identification laws. For example, in *Weinschenk v. State*,[192] the Missouri Supreme Court, applying the state's constitution, struck down the Missouri voter identification law. The *Weinschenk* court determined the evidentiary record sufficient to support an attack on the photo identification laws. On that basis, the *Weinschenk* court analyzed the indirect costs imposed by the statue and found that those costs created an adverse impact on voting.

There, the plaintiff was a disabled woman who sued claiming that the Missouri photo identification law abridged her ability to vote.[193] Ms. Weinschenk sued under both the Fourteenth Amendment of the U.S. Constitution as well as the Missouri State Constitution. The Missouri Supreme Court found that under Missouri state law, the law was uncons-

190. Generally, 2005 PA 71 requires voters, at each election, to show photo ID to an election official and execute an application that contains among other identifying information, proof of address and the voter's mark or signature. If a voter does not possess valid photo ID, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote. A voter allowed to vote without photo ID is subject to challenge by an election official. MICH. COMP. LAWS ANN. § 168.523 (West 2009).

191. *Constitutionality of 2005 PA 71*, 740 N.W.2d at 459. This case is notable for the clarity and reasonableness of Judge Cavanaugh's dissent. Judge Cavanaugh asserted that the relevant inquiry in these types of cases should be "whether, and to what degree, in-person voter fraud would be addressed by the photo identification requirement," irrespective of the level of scrutiny applied under the *Burdick* test. *Id.* at 474 (Cavanaugh, J., dissenting). The dissent questioned whether the proposed legislation can actually prevent in-person voter fraud when there is no evidence that voter fraud actually exists in the state of Michigan. *Id.* at 472-78 (Cavanaugh, J., dissenting). Ultimately, Judge Cavanaugh rejected the proposed legislation as unconstitutional because the burdens imposed are severe and the operation of the challenge provision of the proposed law itself is subject to abuse by overzealous election officials.

192. 203 S.W.3d 201, 204 (Mo. 2006).

193. *Id.* at 208.

titutional as applied to Ms. Weinschenk and the other plaintiffs in this lawsuit.[194] The majority in *Weinschenk* focused on the fact that under both the federal constitution and the State of Missouri constitutions, the right to vote qualified as a fundamental right. Thus, the court measured the nature of the burdens imposed by the photo-identification law under strict scrutiny.[195]

Accordingly, the court found that the burdens imposed on the ability to vote were great, and the state had not used the least restrictive means to affect its aim. The court's reasoning focused on the fact that there were a substantial number of Missourians who did not have federal or state-issued identification containing a photograph. The court also relied upon the fact that a number of these residents were either elderly or disabled and thus had little opportunity to gather the documents and credentials necessary to obtain the photo identification card. The court stressed that materials such as birth certificates, citizenship papers, and other required documents cost a significant amount of money and time, which would be difficult for such citizens to expend. The court recognized this as a cost that effectively would prevent voters—particularly the elderly and those who did not have such documents—from being able to cast their vote.[196]

Another case where a court struck down a voter identification ordinance on its face was *ACLU of N.M. v. Santillanes*.[197] At issue in *Santillanes* was an amendment to the town charter of the City of Santillanes, NM which required all who voted in-person at the election polls in municipal elections to present a valid and current photo identification card. This amendment to the city charter was approved by voters. The American Civil Liberties Union and others brought suit to enjoin the ordinance.[198] The *Santillanes* court held that the law was unconstitutional on its face. It reasoned that the plaintiffs showed a realistic threat to their legally protected interests in voting in-person. The court went further to hold that the amendment posed a severe burden on indigent citizens' right to vote.[199] Thus, according to the court, heightened scrutiny was merited under *Burdick*. Under this strict scrutiny analysis, the court found that the burden imposed by the amendment was not adequately tailored to further the city's interest in preventing voter-impersonation fraud.[200]

In *Weinschenk* and *Santillanes*, the courts recognized that the right to vote was directly burdened by costs created by the state or local gov-

194. *Id.* at 219.
195. *Id.* at 216.
196. *Id.* at 213-15.
197. 506 F. Supp. 2d 598 (D.N.M. 2007).
198. *Id.* at 605.
199. *Id.* at 636.
200. *Id.* at 636-42.

ernment election laws. The plaintiffs in these cases were able to present concrete evidence of how the indirect cost generated by obtaining supporting materials to obtain a card frustrated the plaintiff's right to vote.

Nonetheless, the foregoing discussion demonstrates that the conflicted apathy towards the right to vote is not only representative in the *Crawford* opinions but in the lower courts as well. The lower courts have, in the absence of direct evidence showing the impact of voter identification laws, effectively defaulted to the rationale of the government in implementing these laws. The legal question has significantly shifted to one of requiring sufficient evidence to support the inference that photo identification laws effectively disenfranchise potential voters of lower socioeconomic status. This represents a failure to take into account the severity of the impact of indirect costs in considering voting. That failure is, in large part, due to the unfocused structure of the *Burdick* test. It is to this problem the article will now turn.

D. The Burdick *Sliding Scale and Unfocused Analyses of the Economic Cost of Voting*

Courts applying the *Burdick* test have tended to discount, in the absence of significant evidence, the indirect economic costs to be taken into account when analyzing the effects of voter identification laws. Most courts considering the issue have adopted a two-part approach: First, the courts will tend to reject analogies between the direct costs of the poll tax and the indirect costs brought on by needing to meet the requirements of obtaining photographic identification. Second, the courts then tend to rule in favor of the state's interest in maintaining election integrity or have defaulted towards the state's interest in light of insufficient demonstrated proof of the economic burden upon voters. These courts, moreover, have apparently assumed as a starting premise that the indirect costs imposed by the burdens of narrowed voter identification laws as less relevant than the state's interest in maintaining the integrity of elections. Consistently, the courts have defaulted to supporting the state's interests when considering these laws under a *Burdick* balancing test.

This inability to account for the indirect costs exasperates the long-standing problem of economic bias and the requirement of an economic stake within society in order to exercise the political right to vote. In essence, voter identification requirements which narrow the list of prescribed voting requirements and thus force voters to obtain the information—at substantial cost of time, money, and in some cases, a strain on the abilities of the voter—create a barrier which the prospective voter cannot effectively overcome. The ability to accomplish the fulfillment of these costs acts as a barrier which separates those who are allowed to vote from those who are not. As such, the economic effect is, as the Missouri Supreme Court observed, tangible. It is this dynamic which creates a political underclass of those who cannot, despite being other-

wise qualified, vote. This is antithetical to a coherent theory of democracy.[201]

Such an analysis is often rejected on the grounds that there are only a miniscule number of voters who are affected by this dynamic. Indeed, the courts often observe that a balance must be struck between the interests of the state in administering fair elections with the interests of the voter in having his or her vote counted fairly.[202] This recognition has been used as a means for courts to ignore the issue of the effects—whether speculative or actual—of the cost of voter identification cards upon potential voters. It manifested itself in the eras of property requirements and of poll taxes when the courts would defer to the states' unfettered ability to set up the qualifications for voting. And it seems apparent now in the era of voter identification laws.

This is not to diminish the importance of the need to prevent voter fraud. The integrity of the democratic process is, in itself, an important and necessary interest to be protected. An election process that does not possess the basic guarantees which ensure that the votes cast are authentic, are properly counted, and are correctly reported, effectively undermines the democratic process. Without basic guarantees which ensure that those registered are those who actually cast votes, the system will be subject to immense fraud. All of the courts to decide this issue have found this to be true. This is a basic tenet of election law.

However, the emphasis of the facts related to voter fraud tends to focus not on in-person voter impersonation, but on fraud in absentee ballots and problems with electronic voting. The balance of issues related to integrity through voter identification is, in essence, a solution seeking a problem. In the absence of actual documented contemporary problems concerning voter impersonation fraud, courts and legislatures weighing the implementation and adjudication of voter identification laws should base their analyses on maintaining the ease with which voters can access the polls as opposed to abstract notions of voter integrity which lack actual substantiation.[203]

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201. *See* JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 4-5 (1992) ("What distinguishes democratic from nondemocratic societies is . . . the way in which power is acquired and decisions are arrived . . . ." In particular, Cohen and Arato stress that "[s]o long as some core set of civil rights is respected and regularly contested elections are held on the basis of a universal franchise . . . a polity can be considered democratic."). Thus, to set forward a form of constituting the polity that will tend to exclude some segment of it creates doubt in the integrity of the democratic nature of the institution. This is the problem of the photo ID laws. *See also* Parson & Mclaughlin, *supra* note 20, at 95-96 (noting that voter identification laws coupled with other "burdensome laws" erode the public's faith in the electoral system).

202. *See supra* Part III.

203. The *Burdick* balancing seems to create a false dichotomy between the interests of voters in expressing their First and Fourteenth Amendment free expression rights and the state's interests in maintaining fair elections. Any democratic government must premise its entire existence on the notion that the people and their ability to govern is the source of the government's legitimacy. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Govern-

In the end, the interest in election integrity must be balanced with the interest in ensuring that every otherwise-qualified voter can have access to the ballot. This is the core premise of American democracy—that everyone who can rightfully vote should be able to vote. The battle of access described in this article is ultimately one of ensuring that there must not be any invidious requirement which prevents voters from voting. This is the tie that binds us together in our civic society and should not be easily discounted simply because, as in the voter identification controversy, only a relative few voters may be affected.[204] It is to this end of preserving the value of realistically complete access to American elections for all who are eligible to vote that our laws should be directed.

IV. REFRAMING THE ANALYSIS TO ACCOUNT FOR SOCIOECONOMIC BIAS

The open legal question here is what kind of role should the indirect cost of voting play within the context of analyzing the burdens presented by voter identification laws. This article contends that the consequences of economic status should be taken into account when analyzing voter identification laws. As a practical matter, this article makes several recommendations.

First, judicial analysis under either a *Burdick* balancing test or under a defined right to vote under a state constitutional scheme needs to weigh expressly both the direct and the indirect costs of voting within the context of the balancing of the individual voter's rights compared to the interests of the state. The directives of *Harper*, which note that there should be no price attached to the ability to exercise the right to vote, should be interpreted to require courts to strike down voting regulations which exact unreasonable costs on voting. The calculation of this cost should include the direct costs—as we can see in the poll tax and those voter identification laws which have been held unconstitutional because they required a direct payment from the voter as a precondition of voting. This calculation should also capture the indirect costs of voting, including the need to spend money to obtain the documentation necessary to

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ments are instituted among Men, deriving their just powers from the consent of the governed . . . ."). Because the consent of the governed is the bedrock of democracy generally, and the founding source of American democracy in particular, it is a strange juxtaposition to set at odds the interests of the governed against the interests of the government. This vision of voting rights—which sets the rights of the people at odds with the government itself—is a major contributing factor to the antidemocratic results we see in the majority of the photo identification cases. A better way to frame the *Burdick* test as well as to think about this issue of democratic process would be to set the people's interest in voting as the first and most important interest the government possesses in administrating elections. Once seen through this lens, the ability to better construct and consider the costs of voting upon the voter and how that frustrates voter participation would become clearer.

204. This is because these requirements will exclude voters from the process and thus obstruct their core political rights as citizens. *See* Overton, *supra* note 20, at 673-74 ("Photo-identification requirements that exclude legitimate voters interfere with the ability of citizens to identify with one another as a political community, create alliances with others of different backgrounds, and use the vote instrumentally to enact political change.").

vote, as well as the time loss and potential employment loss and travel costs to obtain the voter ID. This analysis should occur in the first instance rather than waiting for a preliminary showing of substantial harm by the plaintiff prior to determining the level of scrutiny to which the law may be subject.

In other words, there ought to be a reordering of the *Burdick* test in light of the *Harper* rationale. Rather than a balancing test that defaults to the interests of the state, the test should be structured to require the state to demonstrate that the means it has adopted in its voter identification laws represent a significant interest in preventing voter fraud coupled with a showing that the conditional costs—direct and indirect—to the voter are minimized in the scheme the government is implementing. Those costs ought to be presumed to affect voting; thus the government should demonstrate that its rules account for the indirect costs and provide alternatives which will minimize those costs. Once it has done so, it would be up to the plaintiffs to disprove the government's proof.

In a larger sense, courts should take into account the complexity that surrounds voting when considering voter identification laws and laws that condition voting generally. The political science literature shows us that it is these kinds of restrictions which influence whether voters will actually participate in the electoral process. Moreover, it is the amount of economic stake required to vote—and its susceptibility to manipulation by the political majorities—which forms the backbone of the historical evil of the poll tax. Similarly, this same susceptibility is at play here with the voter identification laws when one focuses on the socioeconomic forces which underlie the tax. As such, the effect of the policy consequences of relating the choice of applying a voter registration regime which depends upon the socioeconomic status of the potential voter creates a dynamic where policy makers can choose what electorate they may wish to have or not wish to have. Because of this, the ability to vote becomes subject to a kind of tyranny of the majority which runs counter to the notion of what the vote is for—to allow each and every citizen to make their voice heard.

As seen above, judicial analyses have tended to only look at whether there was a literal cost of the poll tax or something comparable. Indeed, most jurisdictions when analyzing the burdens have simply dismissed even the specter of costs outside of the direct costs as irrelevant to the analysis. This reduction of this crucial issue to virtual irrelevancy will cause courts to miss the point completely concerning the socioeconomic effects of voter identification laws. Moreover, a policy of adopting an express analysis of both the direct and indirect costs of the vote and thus preventing such costs from escaping scrutiny in analyzing voting laws will move election laws one step further towards formulating a uniform right to vote which is not bound by socioeconomic biases or the whims of a potentially tyrannical majority.

The challenge is finding a method for courts to engage in this analysis. Finding the answer is difficult in as much as courts have tended not to be persuaded by purely statistical analyses showing the degree of citizens who would be plausibly affected by the economic bias. For example, as an evidentiary matter, the trial court in *Crawford* rejected the research proffered by the experts. As explained earlier, other courts have rejected analyses based on statistical evidence. Moreover, as the *Crawford* case showed, it is difficult to find the live plaintiff directly affected by these rules because such citizens are virtually invisible. Yet, the *Weinschenk* decision demonstrates that such statistical analyses—coupled with an identifiable plaintiff who had been effectively excluded by the laws—would provide a basis sufficient for a court to strike down the law. Plaintiffs and courts ought to look towards this example of evidentiary sufficiency as a model for future cases.

Moreover, one of the difficulties illustrated across the history of the vote is the fact that within both the federal system and each state system are different standards of qualifications to vote. Indeed, as seen in *Weinschenk*, the Missouri Supreme Court interpreted the Missouri Constitution to reach the result that the voter identification laws at issue in that case created too great of an infringement on the right to vote. Yet, given that Missouri appears to have relied on state law rather than federal law, other states have ruled that such laws are constitutional; and given that over half of the states have yet to consider the issue, it seems important to establish a clear uniform interpretation of these laws to ensure that the balance between election integrity and voter access are met. The only way to ensure uniformity of such laws is, in the long term, to explicitly define in affirmative terms what the right to vote means and how it should be interpreted in relation to voter identification laws and other relevant rules. Congress, through HAVA and the NVRA, has made some suggestions as to both the validity of voter identification laws and the need for uniform standards. Those suggestions seem to bend in the interests of ensuring efficiency of elections and ensuring their fairness. This work should continue; it should also take into account the socioeconomic bias discussed here.

CONCLUSION

This article has argued that the manipulation of the costs of voting is the steady, consistent theme which underlies both the anti-democratic history of the right to vote as well as the future threat presented by photo identification requirements as prerequisites for voting. Such lines of exclusion are antithetical to the nature of democracy and ultimately constitute a tyranny of the majority against the minority at the lowest level of socioeconomic status. In light of this, judicial and legislative analyses of these laws should focus on the indirect costs of voting and how those costs potentially exclude voters. Only in this way will we be able to create an enduring and greater character for American democracy.