POURING OLD POISON INTO NEW BOTTLES: HOW DISCRETION AND THE DISCRIMINATORY ADMINISTRATION OF VOTER ID LAWS RECREATE LITERACY TESTS

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Emboldened by recent Supreme Court decisions, states are enacting increasingly restrictive voter identification (ID) laws. Many state legislators now openly admit to employing such laws as partisan measures designed to tailor the racial and political makeup of the electorate to their advantage—much the same way that Southern Democrats in the Jim Crow era used literacy tests. Troublesomely, voter ID laws are also giving local election officials greater discretion to arbitrarily decide both who is required to show ID and who is eligible to vote, recreating a key disenfranchising feature of literacy tests and the little remembered "voucher" test, a Jim Crow era voter ID law. Even in light of this development, however, legal advocates and scholars, such as Professor Daniel P. Tokaji, remain primarily focused on voter ID laws' disparate impact, overlooking the more pronounced dangers of disparate treatment.

This Article uniquely compares the existing evidence of the selective enforcement of voter ID laws with the past discriminatory administration of literacy tests and related devices. It explains that,

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while facially race-neutral and constitutional, voter ID laws are often applied in a manner that violates the Constitution and voting rights laws. This Article seeks to fill a noticeable gap in the scholarship on this important civil rights issue by proposing new litigation strategies, workable statutory fixes, and other means of preventing racial discrimination in voting.

I. INTRODUCTION

At the time of the 2000 presidential election, only eleven states had strict voter identification (ID) laws[1]—which ostensibly require all would-be voters to first present a prescribed form of ID to the satisfaction of a poll worker. As of the 2012 presidential election, however, thirty-three states had enacted some manner of voter ID law.[2] This recent proliferation of v-oter ID laws continues to provoke much debate over whether strict voter ID laws disparately impact and therefore discriminate against people of color. In considering this issue, scholars and courts are largely focused on just three of the potentially discriminatory effects of voter ID laws: (1) that people of color are less likely to own acceptable forms of ID than white people;[3] (2) that these laws depress voter turnout;[4] and (3) that the cost, time, and other burdens associated with obtaining acceptable ID fall hardest on people of color.[5] However, little attention is paid to how

1. Electionline.org, Election Reform: What's Changed, What Hasn't and Why 2000–2006 16 (2006) [hereinafter Election Reform], *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/electionline_022006.pdf.

2. *Voter Identification Requirements*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (last visited Nov. 2, 2013) [hereinafter *Voter Identification Requirements*].

3. *See*, *e.g.*, Gabriel R. Sanchez et al., *The Disproportionate Impact of Photo-ID Laws on the Minority Electorate*, Latino Decisions (May 24, 2011), http://www.latinodecisions.com/blog/2011/05/24/the-disproportionate-impact-of-stringent-voter-id-laws/ (finding that eighty-eight percent of white registered voters in the 2008 election owned valid photo ID, compared to eighty-one percent of both black and Latino voters and eighty percent of Asian voters); Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 11 (Nov. 8, 2007) (unpublished manuscript), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf (reporting that 84.2 percent of white, but only 78.2 percent of black registrants in Indiana owned valid photo ID in 2007).

4. *See, e.g.*, Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 Harvard L. & Pol'y Rev. 185, 186 (2009) (finding that voter ID laws lower turnout by between 1.6 percent and 2.2 percent).

5. *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d 113, 115, 140–41 (D.D.C. 2012) (holding that Texas's voter ID law has a discriminatory effect because it

voter ID laws recreate a "key disenfranchising feature[]"[6] of Jim Crow era voter qualifications, like literacy tests, by vesting local officials with the broad discretion to discriminatorily administer facially race-neutral laws.

By primarily focusing on voter ID laws' *disparate impact*, civil rights advocates are overlooking the more pronounced dangers of *disparate treatment*. The potential for the disparate treatment of similarly situated individuals is inherent in any system that entrusts low-level bureaucrats with the absolute authority to decide who is eligible to vote. In the Jim Crow South, voting statutes commonly permitted local officials to make unappealable decisions about voter qualifications.[7] The "finality of [the] decision" reinforced local registrars' ability to discriminate, leading them to become "the principal governmental agency for [black] disfranchisement."[8]

Indeed, literacy tests—which ostensibly required all would-be registrants to first read or write a prescribed text to the satisfaction of voter registrars—were facially race-neutral, but in practice allowed each registrar to act as a "law unto himself" and discriminatorily determine whether and how to enforce the tests.[9] From the 1850s until the Voting Rights Act banned certain discriminatory tests nationwide in 1970, states used literacy tests to disenfranchise "undesirable" voters,[10] including Asian and Latino immigrants in the West, Southern and Eastern European immigrants in the Northeast, and black people in the South. In Louisiana in particular, the tests

would require voters of color to travel 200 miles and pay $22 in fees to obtain ID), *vacated*, 133 S. Ct. 2886 (2013) (mem.).; Keesha Gaskins & Sundeep Iyer, Brennan Center for Justice, The Challenge of Obtaining Voter Identification 1 (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf (noting that over one million eligible voters in states with strict voter photo ID laws live in poverty and more than ten miles from the nearest ID-issuing office and that the underlying costs of obtaining valid ID are between $8 to $20).

6. J. M. Kousser, The Shaping of Southern Politics 48 (1974).

7. United States v. Louisiana, 225 F. Supp. 353, 359–60 & n.8 (E.D. La. 1963) (quoting V.O. Key, Southern Politics in State and Nation 560, 563, 573 (1949)), *aff'd*, 380 U.S. 145 (1965).

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Id. Id.

James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in* Quiet Revolution in the South 351, 355–56 (Chandler Davidson & Bernard Grofman eds., 1994).

 meant “absolutely nothing” for whites and “exist[ed] only as a bar to

[black] registration.”[11]

Alas, local officials are now similarly free to decide how to enforce voter ID laws. Like literacy tests, modern voter ID laws, as written, are equally applicable to all voters. However, in practice poll workers are generally free to capriciously and incontestably decide whether to ask a voter for ID and to judge the adequacy of the offered voter ID. This discretion is predictably leading to the disparate treatment of voters of color relative to white voters and racial discrimination in voting. For example, a survey of voters under age thirty in states with voter ID laws found that black youth were asked for ID at a rate ten percentage points higher than were white youth before voting in the 2012 presidential election.[12]

Parallels between modern voter ID laws and past literacy tests are troubling reminders of American democracy’s contested history, a history characterized by expansions of the franchise followed by swift contractions in reaction to perceived threats to dominant political classes.[13] Literacy tests were enacted in response to the early enfranchisement and political engagement of black, immigrant, and poor voters.[14] Likewise, the functional demise of the preclearance provisions of the Voting Rights Act of 1965[15] and the rise

11. *Louisiana*, 225 F. Supp. at 359 n.8 (quoting V.O. Key, Southern Politics in State and Nation 560, 563, 573 (1949)). *See South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966) (describing registrars’ abuses of discretion through the discriminatory employment of various tests).

12. Jon C. Rogowski & Cathy J. Cohen, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election*, Black Youth Project 1, http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf(last visited Nov. 11, 2013).

13. Alexander Keyssar, The Right to Vote, at xxiii (2000).

14. *Id.* at 111–12, 142–44.
15. In *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013), the Supreme

Court held Section 4(b) of the Voting Rights Act of 1965 unconstitutional, leaving no state or jurisdiction covered by Section 5's preclearance provisions. Prior to *Shelby*, Section 5 would have proven a useful tool to block voter ID laws that vest election officials with broad discretion to selectively enforce or discriminatorily operate the ID requirement. *See, e.g.*, Young v. Fordice, 520 U.S. 273, 285 (1997) (requiring Section 5 preclearance for any "new, significantly different administrative practices—practices that are purely ministerial, but reflect the exercise of policy choice and discretion by [state] officials"). Because of the *Shelby* decision, however, the precedential value of Section 5 decisions, including the recent decisions in *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated* 133 S.Ct. 2886 (2013) (mem.), and *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), are in doubt, so discussions of these cases are largely confined to the footnotes. Further, given the at best temporary end of

of voter ID laws both follow recent increases in the size and electoral clout of communities of color.[16] Yet, there is a dearth of scholarship detailing the clear similarities between literacy tests and voter ID laws.[17] In fact, it seems mostly forgotten that the "voucher" test, a discriminatorily administered preregistration voter ID law that required an applicant's identity be proven through the attestation of either an election official or another voter, is amongst the tests prohibited by the Voting Rights Act.[18]

This Article seeks to fill this gap in the scholarship. Part II recounts how literacy tests and later related devices were designed to combat perceived threats of voter fraud and then purposefully applied to disfranchise disfavored voters. Part III reviews the comparable evolution of voter ID laws, their varying characteristics, and the wide discretion that they often confer on poll workers. Part IV summarizes

preclearance, there is no present benefit to a longer Section 5 based analysis of the issues addressed herein.

16. Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 Rutgers L. Rev. 1019, 1024–28 (2012).

17. There are passing references to the similarities between voter ID laws and literacy tests, as well as the possibility of legal action, in other academic works. *See, e.g.*, Rachael V. Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q. J. Pol. Sci. 1, 29–31 (2012) [hereinafter Boston Study] (outlining the legal implications of a study showing that Blacks and Latinos were more likely to be asked for ID before voting in the 2008 presidential election in Boston); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 709–13 (2005) [hereinafter *The New Vote Denial*]

(sketching the contours of legal challenges to discriminatory election administration practices, including voter ID laws); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1233–34 (2005) (noting that the failure of states to develop uniform standards for implementing federal voter ID laws left "discretion in the hands of local election officials and poll workers, and may result in the dissimilar treatment of similarly situated voters").

18. 42 U.S.C. § 1973aa(b)(4) (2012) (banning "any test or device" that requires a voter to "prove his qualifications by the voucher of registered voters or members of any other class"). This ban was designed "to hit at the requirement in some states that identity be proven by the voucher of two registered voters, which, where all or a large majority of the registered voters are white, minimizes the possibility of a [black person] registering." Davis v. Gallinghouse, 246 F. Supp. 208, 217 (E.D. La. 1965). However, it is not a per se prohibition on voter ID laws. *See id.* at 213–14 (holding that the ban on voucher tests does not prohibit a fairly administered requirement that a registrant provide documentary proof of identity or residency); *see also* United States v. Louisiana, 265 F. Supp. 703, 707–708 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1970) ("The Louisiana procedures for identification of applicants for registration are not in conflict with the Voting Rights Act.").

polls, surveys, and documented instances of the racially discriminatory administration of voter ID laws. Part V suggests steps that Congress, state legislatures, and local election administrators can take to prevent future acts of discrimination. Finally, Part VI outlines the constitutional and statutory bases for legal challenges to discriminatorily administered voter ID laws, as well as potential judicial remedies.

II. THE HISTORY OF LITERACY TESTS

First widely adopted in the mid-nineteenth century, literacy tests were an integral part of the package of personal voter registration laws that were designed to restrict the right to vote to those "fitted, by intelligence, virtue and personal responsibility, to exercise that right with safety to the community."[19] Before then, local governments maintained lists of eligible voters.[20] After the adoption of personal registration laws, however, the onus shifted to the individual to "appear periodically before local officials to verify her [or his] eligibility."[21] Thereafter, officials were broadly empowered by various means, including literacy tests, to decide whether an applicant was qualified to vote. This section delves into the nationwide development of literacy tests, their racially-driven abuse in the South, their evolution into understanding, good moral character, and voucher tests, and the subsequent bans on such discriminatory tests.

A. Motives for Enacting Literacy Tests

The shift to personal registration laws with literacy tests was part of a national "reform" movement to combat alleged voter fraud and political corruption.[22] The movement was also strongly reactionary and calculated to beat back prospective political

19. William L. Scruggs, *Citizenship and Suffrage*, 177 N. Am. Rev. 837, 844–45 (1903).

20. Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 Yale L. & Pol'y Rev. 370, 384 (1991).

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2. *Id*.
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5. *See id*. at 382 ("Reformers [in the North] saw the highly disciplined,
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organized, and class-based style of machine politics as inherently corrupt, backward, and antithetical to the nascent 'modernizing' technocratic and pro-corporate trends."); *see also id.* at 379 n.49 (noting that Southern Democrats also charged Republicans with corruption).

insurgents.[23] As one prominent supporter of reform explained in 1903: "The difficulty with our political situation to-day [sic] is not that too few votes are cast, but that too many votes are cast. . . . [W]e should prefer a law of disenfranchisement."[24] Throughout the country then, restrictions on the franchise flowed from elitist, partisan, and explicitly racist sensibilities.[25]

In the North, unsubstantiated allegations of fraud and demagoguery were associated with the urban Democratic machines supported by newly arrived European immigrants.[26] In 1900, a quarter of the white male voting age population had been born abroad and two-thirds of those foreign-born individuals were from non-English-speaking nations.[27] Literacy tests and secret ballots—which act as de facto literacy tests since illiterate voters cannot accurately complete such ballots without substantial assistance[28]—were enacted to disenfranchise such immigrants.[29] In the 1850s, for instance, the Connecticut and

Massachusetts literacy tests targeted Irish voters and remained in effect for over a century.[30] In fact, most of the nine other non-Southern states with literacy tests in 1960—including Arizona, California, and New York—had significant Italian, Irish, Jewish, Latino, and other ethnic minority or immigrant populations.[31] Thus, registration reform was tied to immigration debates as, evidently, "[s]o obvious [was] the evil of ignorant voting that more stringent naturalization laws [were] demanded because too many of our foreign-born citizens vote[d] ignorantly."[32]

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2. *Id*. at 374.
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5. George Gunton, *Editor's Note*, *in* Morris S. Wise, *Should Voting Be*
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Compulsory?, 3 Soc. Economist 143, 148–49 (1892), *available at* http://books.google.com/books?id=DWokAQAAIAAJ.

25. *See* Cunningham, *supra* note 20, at 373–74.
26. Alt, *supra* note 10, at 355.
27. Kousser, *supra* note 6, at 53.
28. While the secret ballot is undoubtedly the norm today, at the time of its

adoption in the late nineteenth century, political parties were responsible for printing and distributing ballots to their constituents, eliminating the need for illiterate voters to receive assistance in navigating complex lists of candidates on publicly printed ballots. Cunningham, *supra* note 20, at 378–79.

29. *See* Kousser, *supra* note 6, at 52–53.

30. Alt, *supra* note 10, at 355; *see also* Keyssar, *supra* note 13, at 86 (describing laws passed by the Know-Nothing party "requiring prospective voters to demonstrate their ability to read the Constitution and to write their own names").

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2. *See* Alt, *supra* note 10, at 355; Keyssar, *supra* note 14, at 144–46.
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5. Gunton, *supra* note 24, at 149.
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In the South, literacy tests were an integral part of the region's exceptionally brutal system of black disenfranchisement. During the Post-Civil War period known as Reconstruction and with the aid of the Republican-dominated federal government, the registration rates of newly freed black men met or exceeded the rates of white men in seven of the former Confederate States by 1867.[33] Black men began voting en masse, which resulted in black and white Republicans' domination of state and local governments and congressional delegations.[34] However, with the withdrawal of federal support for Reconstruction in 1877, unreformed white Democrats (former Confederates or their sympathizers) returned to power through the widespread use of intimidation, violence, and brazen electoral fraud aimed primarily at black people.[35] Democrats pledged to use their restored control to permanently rout "corrupt" Blacks and Republicans from office.[36]

In 1890, Mississippian Democrats, reacting to the growing electoral strength of the Populist Movement's coalition of black and poor white voters and still weary of possible federal intervention, were the first Southerners to enact literacy tests as an intentionally discriminatory, but facially race-neutral, means of disenfranchising black voters en masse.[37] Literacy tests had an obvious racially disparate impact: less than twenty percent of whites, but seventy-five percent of Blacks (who under slavery were legally barred from learning to read) were illiterate at that time.[38] Literacy tests and other strict registration requirements were seen as covert "legal" means of circumventing the guarantees of the Fourteenth and

1.
2. Cunningham, *supra* note 20, at 375–76.
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5. *See* W. E. B. DuBois, Black Reconstruction in America 320–21 (1935)
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(describing the large Republican majorities in Congress during Reconstruction as well as the voting patterns of newly freed Black citizens).

35. Eric Foner, Reconstruction 574–75 (1988).

36. *See* Cunningham, *supra* note 20, at 379 n.49 ("Southern Democrats also charged corruption in the electorate, and the governments they elected, as the rallying cry in deposing the Republicans."); *see also* Foner, *supra* note 35, at 588–89 ("Judged in terms of election pledges to reduce the cost of government and the burden of property taxes, the Redeemers[, ascendant Democrats,] were a success. ").

37. Alt, *supra* note 10, at 355; *see also* Foner, *supra* note 35, at 587 ("Constrained only by the increasingly remote possibility of federal intervention, the survival of enclaves of Republican political power, and fear of provoking

divisions within the now dominant [Democrats], the Redeemers moved in the [late] nineteenth century to put in place new systems of political, class, and race relations.").

38. Alt, *supra* note 10, at 355–56.

Fifteenth Amendments and cementing white Democratic supremacy.[39] These efforts ultimately culminated in the complete expulsion of black people and Republican voters from the Southern electorate.[40]

In the early 1900s, however, under pressure to relieve the burdens of registration laws on poor and illiterate whites, Southern Democrats enacted "grandfather clauses" and established "white primaries" to more directly bar black electoral participation.[41] Grandfather clauses waived literacy and other registration requirements if a person or his ancestor could vote before 1867, the year that Blacks were first enfranchised in the South.[42] Meanwhile, states established white primaries by banning black people outright from voting in the Democratic primaries, the only elections that mattered in what had by then become the one-party South.[43] Grandfather clauses and white primaries were so effective as disenfranchisement devices that, for a time, literacy tests fell out of favor.[44]

B. The Evolution and Discriminatory Administration of Literacy Tests in the South

By 1944, however, the United States Supreme Court had declared both grandfather clauses[45] and white primaries[46]

39. Cunningham, *supra* note 20, at 376–77; *see also* Foner, *supra* note 35, at 590 ("The Fourteenth and Fifteenth Amendments, a Southern newspaper had declared in 1875, 'may stand forever; but we intend . . . to make them dead letters on the statute-book.'").

40. Alt, *supra* note 10, at 355.

41. Cunningham, *supra* note 20, at 379–80; *see also* Kousser, *supra* note 6, at 58 (examining the grandfather clause and similar "escape clauses" for those whites who were unable to meet educational and property qualifications).

42. Alt, *supra* note 10, at 355.

43. *See* Smith v. Allwright, 321 U.S. 649, 658–60 (1944) (summarizing the history of the white primary law in Texas from 1920 to 1944); *see also* Louisiana v. United States, 380 U.S. 145, 148 (1965) ("Prior to 1944 Negro interest in voting in Louisiana had been slight, largely because the State's white primary law kept Negroes from voting in the Democratic Party primary election, the only election that mattered in the political climate of that State."); Keyssar, *supra* note 13, at 247–49 (discussing the history of white primaries in the South).

44. *See Louisiana*, 380 U.S. at 148–49 ("The white primary system had been so effective in barring Negroes from voting that the 'interpretation test' as a disfranchising device had been ignored over the years.").

45. *See* Lane v. Wilson, 307 U.S. 268 (1939) (declaring unconstitutional a voter registration law that substituted for the previously invalidated grandfather

unconstitutional. In response, Southern states returned registrars to the frontlines of the battle to maintain white supremacy by giving them additional discretion in the form of more subjective tests. State laws transformed literacy tests into understanding tests, good moral character tests, and voucher tests. Understanding tests required applicants to "interpret" or "understand" a state or federal constitutional provision to the satisfaction of a registrar.[47] Good moral character tests required applicants to verify their "good moral character," a requirement "so vague and subjective that it . . . constituted an open invitation to abuse at the hands of voting officials."[48] Voucher tests obligated a black applicant for registration to find a registrar or a registered voter—nearly all of whom were white and hostile to black registration—to vouch for his or her identity, character, or residency.[49] Although as written these tests were universal requirements, whether an applicant was asked to meet or found to have met any of these qualifications was subject solely to the whims of individual registrars.[50]

Thereafter, literacy tests and related devices were once again the "primary legal restriction[] on black registration,"[51] and the discretion wielded by officials in implementing the law became the "most powerful disfranchising tool" in the South.[52] Although segregated and largely inferior schooling caused black people to remain disproportionately illiterate into the 1960s,[53] registrars would use minor test mistakes to justify precluding even erudite black

clause); Guinn v. United States, 238 U.S. 347 (1915) (finding the grandfather clause unconstitutional).

46. *Smith*, 321 U.S. at 664–66.
47. Kousser, *supra* note 6, at 58.

48. South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966).
49. *See, e.g.*, United States v. Logue, 344 F.2d 290, 291–92 (5th Cir. 1965)

(describing the voucher or "supporting witness" test as "designed to expedite the determination that the applicant has met the residency requirement and is of good character," and holding that, in light of the segregated conditions in the county, the test was "inherently discriminatory"); Byrd v. Brice, 104 F. Supp. 442, 442–43 (W.D. La. 1952) (holding the voucher test unconstitutional as-applied in a Louisiana Parish where a registrar claimed to "know" all whites applicants for registration and refused to similarly vouch for black applicants), *aff'd*, 201 F.2d 664 (5th Cir. 1953).

50. Cunningham, *supra* note 20, at 380.
51. Alt, *supra* note 10, at 355.
52. Cunningham, *supra* note 20, at 380.
53. Chandler Davidson, *The Evolution of Voting Rights Law*, *in* Quiet

Revolution in the South, *supra* note 10, at 21, 31.

applicants from registering.[54] Meanwhile, registrars often waived test requirements for white applicants, assisted them with the tests, gave them easier tests, or registered them despite gross test errors.[55]

Registrars happily abused their power in myriad other ways.[56] For example, in Louisiana, registrars used their "enormous discretion" to apply the understanding test as a "trap" for black applicants and, at the behest of the state, registrars were instructed on how to discriminate via pamphlets distributed by the White Citizens Council, a private white supremacist organization.[57] From 1956 to 1962, registrars in Jackson Parish, Louisiana rejected sixty-four percent of black, but just two percent of white applicants.[58] By 1960, Mississippi had strengthened the discriminatory aspects of its literacy test by enacting bans on satellite registration, bans on assisting applicants with registration, and prohibitions on providing applicants with the reasons for their applications' rejection.[59] In Alabama, officials specially selected registrars to fulfill the "spirit of the [state] Constitution, which looks to the registration of all white men not convicted of a crime, and only a few Negroes."[60] And, in South Carolina, one prominent white Democratic official boasted in 1940, "If a coon wants to vote . . ., we make him recite the Constitution backward, as well as forward, make him close his eyes and dot his *t*'s and cross his *i*'s. We have to comply with the law, you see."[61]

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2. South Carolina v. Katzenbach, 383 U.S. 301, 312 n.13 (1966).
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5. *Id.* at 312.
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8. Interestingly, like voter ID issuing offices, Gaskins & Iyer, *supra* note
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5, at 1, registration offices were often open at inconvenient times and located in inaccessible places for poor and black applicants. Cunningham, *supra* note 20, at 378, 386 & n.99. Registrars were able to establish their own hours and locations. Steven L. Lapidus, Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 Fordham L. Rev. 93, 101–04 (1983). Even into the 1980s, for example, many applicants in Sunflower County, Mississippi had to travel up to 100 miles roundtrip in order to register. *Id.* at 93.

57. Richard L. Engstrom et al., *Louisiana*, *in* Quiet Revolution in the South, *supra* note 10, at 103, 107.

58. *Id.* at 108.

59. Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1251–52 (N.D. Miss. 1987), *aff'd sub nom*. Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

60. Kousser, *supra* note 6, at 59.

61. Orvile Vernon Burton et al., *South Carolina*, *in* Quiet Revolution in the South, *supra* note 10, at 191, 195.

Even when black applicants were able to register, proof of registration requirements and the secret ballot would pose additional barriers to black voters.[62] Once registered, every voter was required to bring proof of registration (i.e., voter ID) with them to the polls in order to vote. However, literacy tests often meant

that Blacks were unlikely to possess such proof, and even properly registered black voters would usually have their credentials arbitrarily challenged by poll workers and private partisans.[63] In Alabama, black registered voters who were illiterate had to swear an oath of illiteracy before receiving "help" with the secret ballot from hostile white poll workers.[64] Noting this law's early success at suppressing the black vote, the Alabama State Senate President observed that "the ignorant are practically disfranchised. . . . [W]hen they . . . are unable to fix their own tickets they have to go to the fixer, and this is practical disfranchisement, for we have learned that the cheapest way is to fix the fixer instead of the voter."[65]

Thus, in the Jim Crow South, the discretion that voter registration and election administration laws gave to both registrars and poll workers was designed, and subsequently functioned, to permit and encourage racial discrimination.

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2. Keyssar, *supra* note 13, at 107, 138.
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5. *See* Cunningham, *supra* note 20, at 377 (describing the Southern
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system of restrictive voting requirements and noting that "voters were required to bring proof of payment of poll taxes and proof of registration to the polls with them. Freedmen, unaccustomed to keeping records, were far more likely to forget or lose their proof."); *see also* Keyssar, *supra* note 13, at 138 (discussing proof of registration and of citizenship requirements and their effects on immigrant voters in New Jersey). Because often anyone could contest a voter's credentials even on Election Day, discriminatory challenges to disfavored voters, wherein prejudiced election officials acted as the sole judges of voter eligibility, were common. *Id*. For example, just before the 1956 presidential election, officials in Jackson Parish, Louisiana validated the White Citizen Council's challenges to eighty-four percent of black registrants due to trivial deficiencies on their registration forms. Engstrom, *supra* note 57, at 108. A federal court later overruled these challenges because seventy-five percent of white registrants had made similar errors. *Id.*

64. Harris v. Siegelman (*Harris II*), 695 F. Supp. 517, 523 (M.D. Ala. 1988) (quoting David A. Bagwell, *The "Magical Process": The Sayre Election Law of 1893*, 25 Ala. L. Rev. 83, 95 (1972)).

65. *Id.* (quoting Malcolm C. McMillan, Constitutional Development in Alabama, 1798–1901: A Study in Politics, the Negro, and Sectionalism 222, 225 (1978)).

 C. Federal Bans on Discriminatory Tests

Congress responded to the resurgence of literacy tests and analogous devices by enacting the Civil Rights Act of 1957, codified as Section 1971 of Title 42 of the United States Code, which empowers the

United States Department of Justice to attack racial discrimination in voting.[66] The Justice Department then won a series of federal cases enjoining the use of discriminatorily enforced literacy, understanding, good moral character, and voucher tests.[67]

Nonetheless, in 1959, a unanimous Supreme Court affirmed the constitutionality of literacy tests in *Lassiter v. Northampton County Board of Elections*.[68] The Court upheld the North Carolina test at issue because it was designed to "raise the standards for people of all races who cast the ballot."[69] The Court determined that the test as written was equally applicable to citizens of all races and that the criteria—that every registrant must be able to read and write a section of the North Carolina Constitution in English—was objective.[70] Still, the Court did not foreclose as-applied challenges to "a literacy test, fair on its face, [that is] employed to perpetuate [racial] discrimination . . . ."[71] Moreover, the Court noted that it had in *Davis v. Schnell* struck down Alabama's literacy test in 1949 because "the great discretion it vested in the registrar [to determine test results] made clear that a literacy requirement was merely a device to make racial discrimination easy."[72]

Indeed, on grounds similar to *Schnell*, the unanimous Court in *Louisiana v. United States*, decided in 1965, declared Louisiana's understanding test unconstitutional on its face and as-applied.[73] The Louisiana test required every potential registrant to give a "reasonable interpretation" of a state or federal constitutional clause before registering to vote.[74] The test was discriminatory on its face

66. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637–38 (codified as 42 U.S.C. § 1971 (1958)); *see also* United States v. Alabama, 362 U.S. 602, 602–04 (1960) (per curiam) (describing the history of Section 1971 and its later amendment in the Civil Rights Act of 1960).

67. South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966). 68. 360 U.S. 45 (1959).
69. *Id.* at 54.
70. *Id.* at 53–54.

71. *Id.* at 53.

72. *Id.* (citing Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd per curiam*, 336 U.S. 933 (1949)).

73. Louisiana v. United States, 380 U.S. 145, 150–51 (1965). 74. *Id.* at 149.

because it gave registrars "virtually unlimited discretion"[75] and provided "no effective method whereby arbitrary and capricious action by registrars . . . may be prevented or redressed."[76] The test was also unconstitutional as-applied because registrars "exercised their broad powers to deprive otherwise qualified [black] citizens of their right to vote."[77] Further, state officials had urged registrars to use the test to "promote white political control,"[78] and the mere existence of the test had deterred black registration.[79] This extensive evidence of actual discrimination convinced the Court to permanently enjoin the use of the understanding test.[80]

Contemporaneously, the Voting Rights Act of 1965 (VRA) was enacted in response to pressure from the Civil Rights Movement and with the factual support of evidence garnered by Justice Department litigation.[81] The VRA suspended the use of literacy tests and related devices for five years in Alabama, Georgia, Mississippi, South Carolina, Virginia, and parts of North Carolina.[82] The VRA also prohibited New York's literacy test from disfranchising Puerto Ricans who had completed at least the sixth grade.[83] In 1970, Congress found that the nation's history of segregated schooling and discrimination in voting meant that literacy and similar tests could never be fairly implemented and banned the tests nationwide for five more years—outlawing them in an additional dozen non-Southern states.[84] This ban was made permanent in 1975.[85]

Hence, by 1975, Congress and the courts had fully eliminated literacy, understanding, good moral character, and voucher tests as barriers to voter registration and enfranchisement.[86]

1.

2. *Id.* at 150.
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5. *Id.* at 152.
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8. *Id.* at 150.
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11. *Id.* at 149–50.
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14. *Id.* at 150.
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16.

17. *Id.* at 154–56.
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20. Katzenbach v. South Carolina, 383 U.S. 301, 310–15 (1966).

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23. Davidson, *supra* note 53, at 31.
24.
25.

26. Katzenbach v. Morgan, 384 U.S. 641, 643–47 (1966).
27.
28.

29. Oregon v. Mitchell, 400 U.S. 112, 117–118, 132–34 (1970).
30.
31.

32. 42 U.S.C. § 1973aa(a) (2012) ("No citizen shall be denied, because of his
33.

failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State."); Keyssar, *supra* note 13, at 274.

86. *Id.* at 269–75 (reviewing the history of congressional and judicial action leading to the end of literacy tests, the poll tax, and certain residency requirements).

III. OVERVIEW OF VOTER ID LAWS

Voter ID laws first came to the fore in 2002 when Congress enacted the Help America Vote Act (HAVA) to modernize state electoral systems in response to the chaotic 2000 presidential election.[87] A compromise HAVA provision mandates that states require all first-time, in-person voters who register by mail to present either a valid photo ID or a non-photo copy of a current utility bill, government document, or bank statement with the voter's name and address on it.[88]

Congressional Republicans had pushed for these voter ID requirements out of a concern about the role that alleged voter fraud might be playing in elections.[89] Following HAVA's enactment in 2002, chiefly Republican-controlled state legislatures also began experimenting with stricter voter ID laws.[90] This section describes the various justifications behind this recent push for voter ID laws, the numerous types of voter ID laws enacted, and the vast authority that these laws give local officials. It also explains how both the Supreme Court and lower federal courts have dealt with lawsuits challenging purportedly discriminatory voter ID laws, past voucher tests, and other ID requirements.

A. Motives for Enacting Voter ID Laws

As with supporters of literacy tests, contemporary proponents of voter ID laws rely on unconfirmed charges of coordinated voter fraud, disturbing partisan considerations, and outright racial animus, at times irrationally connecting voter ID laws to other racialized issues like calls for stricter immigration, to justify voter ID laws and other new restrictions on voting.

While "[t]here have been a handful of substantiated cases of individual ineligible voters attempting to defraud the election

87. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 639 (2007).

88. 42 U.S.C. § 15483(b) (2012). Notably, HAVA allows each state to determine what constitutes acceptable ID, leading to variations of acceptable forms of non-photo ID across the various states. Electionline.org, The Help America Vote Act at 5, 31 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/HAVA.At.5.pdf.

89. Overton, *supra* note 87, at 639.

90. *Id.* at 639–41 (describing which states, as of July 1, 2005, require a voter to show ID beyond what is necessary under HAVA).

system," in-person fraud is "extraordinarily rare."[91] Election fraud generally arises from the exploitation of the absentee ballot system.[92] It rarely involves in-person voter fraud, wherein one voter impersonates another, which is the only form of fraud that a voter ID law can in fact stop. This reality has not prevented voter ID advocates from relying on false allegations of widespread fraud. For example, South Carolina's Attorney General Alan Wilson argued in January 2012 that his state's voter ID law was necessary to stop instances— allegedly over 900 in recent elections—of ballots being cast with the names of dead voters.[93] However, a State Law Enforcement Division report—completed in May 2012 but withheld by Wilson until July 2013—found that "zombie voting" was merely the result of clerical errors or mistaken identities.[94] In Texas, although over 46 million votes were cast in general, primary, and special constitutional elections between 2002 and 2011, there were only four alleged instances of in-person voter fraud.[95] Consistent with the Texas and South Carolina experiences, American elections are simply not plagued by the form of in-person voter fraud that voter ID laws can prevent.[96]

Despite lacking proof of fraud, Republicans, principally, continue to see a partisan advantage to voter ID laws. There are exceptions to this general rule, however, when a Democratic legislature supports a voter ID law or Republicans rally to oppose

91. Justin Levitt, Brennan Ctr. for Justice, The Truth About Voter Fraud 7–8 (2007), *availiable at* http://www.brennancenter.org/sites/default/files/ legacy/The%20Truth%20About%20Voter%20Fraud.pdf.

92. *See id.* at 34 n.16 ("Most proposals to require photo identification of voters do not address the absentee voting process, where fraud through forgery or undue influence, often directly implicating candidates or their close associates, is far more of a threat." (citations omitted)).

93. Glen Kessler, *The Case of 'Zombie' Voters in South Carolina*, Wash. Post (July 25, 2013, 6:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/the-case-of-zombie-voters-in-south-carolina/2013/07/24/86de3c64-f403-11e2-aa2e-4088616498b4_blog.html.

94. *Id.*

95. Defendant-Intervenors' Proposed Supplemental, Non-Duplicative Findings of Fact and Conclusions of Law ¶¶ 86B-86D, Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (No. 12-cv-128), ECF No. 226-2.

96. *See generally* Keesha Gaskins, *Debunking Misinformation on Photo ID*, Brennan Ctr. for Justice (June 9, 2011), http://www.brennancenter.org/blog/ archives/debunking_misinformation_on_photo_id/ (rebutting argument in op-ed by Kansas Secretary of State Kris Kobach that in-person voter fraud is a well-documented phenomenon).

one.[97] Still, Republican legislatures are much more likely to enact voter ID laws as a way of combating alleged fraud and achieving partisan goals.[98] For example, the Republican Pennsylvania House Majority leader incorrectly predicted that his state's voter ID law would allow the Republican Presidential candidate to win Pennsylvania in the 2012 election.[99] Even after the 2012 election, the Pennsylvania Republican Party Chair attributed the five percent drop in statewide voter support for Democratic President Barack Obama in part to the state's voter ID law.[100] Furthermore, Republican support for voter ID laws is particularly strong in the South, where, in the 1960s, the national Democrats' push for civil rights laws instigated an ongoing exodus of white southerners from the Democratic Party to the Republican Party.[101]

The ascent of the Southern Republican Party was finally completed only in 2012 when, backed by decisive blocs of white voters, it finally gained control of all eleven former Confederate states' legislatures.[102] Meanwhile, reminiscent of the Republican Party of the late 1800s, the Democratic Party in these states is now a de facto majority black party.[103] Like the partisan "reformers" who turned to literacy tests before them, modern Republicans in the North and South are experimenting with voter ID laws, cuts to early voting, and other election law changes as

97. *See* Wendy R. Weiser & Lawrence Norden, Brennan Ctr. for Justice, Voting Law Changes in 2012, at 9–11 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_ Voting_Law_V10.pdf (describing how Rhode Island's Democratic legislature enacted a voter ID bill and how Republican opposition defeated an Ohio voter ID bill).

98. *See id.* at 12–13 ("The content of the debate on voter ID bills was noteworthy for its consistency across the country. Proponents of photo ID bills consistently cited allegedly rampant voter fraud in their states and the need for greater ballot security to justify legislation.").

99. Mackenzie Weinger, *Mike Turzai: Voter ID Helps GOP Win State*, Politico (June 25, 2012, 4:26 PM), http://www.politico.com/news/ stories/0612/77811.html.

100. Nick Wing, *Rob Gleason, Pennsylvania GOP Chair: Voter ID Law Helped Republicans Cut Into Obama Vote*, Huffington Post (July 17, 2013, 6:35 PM), http://www.huffingtonpost.com/2013/07/17/rob-gleason-voter ID-pennsylvania_n_3613057.html.

101. Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. Times (July 10, 2013, 9:34 PM), http://opinionator.blogs.nytimes.com/2013/ 07/10/the-decline-of-black-power-in-the-south/.

102. *Id.*; *see also* Weiser & Norden, *supra* note 97, at 9–10 (describing how Republican gains and changes in partisan control of state legislatures after the 2010 elections precipitated a push by Republicans to enact voter ID laws).

103. Edsall, *supra* note 101.

facially race-neutral means of securing their political hegemony and undercutting the electoral clout of an opposition party overwhelmingly supported by voters of color.[104]

Most tellingly, officials who supported voter ID laws or laws restricting early voting as purported anti-fraud measures recently either admitted that these laws in fact served racially discriminatory purposes or were exposed as purposefully callous to the laws' discriminatory effects. In Florida, the chair of the state Republican Party from 2006 to 2010 confessed that changes to Florida's early voting laws were not meant to prevent fraud at all.[105] Instead, the threat of fraud was simply a "marketing ploy" [106] to enact laws that would "keep[] [B]lacks from voting."[107] Likewise, in support of comparable restrictions on early voting, a member of the Franklin County, Ohio Board of Elections stated that he did not want to "contort the voting process to accommodate the urban—read African-American—voter-turnout machine."[108] In South Carolina, state Representative Alan Clemmons, the author of the state's voter ID law, responded "Amen" in agreement with an incendiary constituent email that questioned whether poor, elderly, and black voters would truly be affected by the law.[109] The constituent email went on to posit that if the state had offered monetary rewards for voter photo ID cards, "you would see how fast they [black, elderly and poor voters] got [the] cards . . . . It would be like a swarm of bees going after a watermelon."[110] Correspondingly, the federal court that blocked the Texas voter ID law found that the state legislature had ignored clear warnings that the law would disproportionately burden

1.
2. *Id.*
3.
4.
5. David Firestone, *Why Florida Really Changed Its Voting Rules*, N.Y.
6.

Times (Nov. 26, 2012 3:46 PM), http://takingnote.blogs.nytimes.com/2012/ 11/26/why-florida-really-changed-its-voting-rules/.

106. *Id.*

107. Alex Seitz-Wald, *Fla. Republican: We Wanted to Suppress Black Votes*, Salon (July 27, 2012, 10:34 AM), http://www.salon.com/2012/07/27/ fla_republican_we_suppressed_black_votes.

108. Darrel Rowland, *Voting in Ohio | Fight Over Poll Hours Isn't Just Political*, Columbus Dispatch (Aug. 19, 2012, 7:35 PM), http://www.dispatch.com/content/stories/local/2012/08/19/fight-over-poll-hours- isnt-just-political.html.

109. Luke Johnson, *Alan Clemmons, South Carolina Rep, Admits 'Poorly Considered' Reply To Racist Email on Voter ID Law*, Huffington Post (Aug. 29, 2012, 12:32 PM), http://www.huffingtonpost.com/2012/08/29/alan-clemmons-voter ID-law_n_1839375.html.

110. *Id.*

 voters of color and had knowingly rejected amendments to ease those

burdens.[111]

In addition, proponents of voter ID laws have, at times, expressed the prejudiced and unsupported belief that "poorer, inner-city, and minority Democrats have fewer resources and are more susceptible to invitations to participate in voter fraud."[112] This belief can lead voter ID proponents, as with literacy test supporters of the past, to groundlessly associate people of color and immigrants with voter fraud and the need for voter ID laws. For example, when asked to identify a specific instance of voter fraud or noncitizen voting during her 2012 deposition testimony in the Texas voter ID lawsuit, state Representative Debbie Riddle, a backer of Texas's voter ID law, answered that she once saw a Latina receive help with voting.[113] Her answer appeared to insinuate that the Latina woman was a non-citizen engaging in voter fraud. Representative Riddle subsequently admitted that she knew only that the voter was a Spanish-speaking Latina, but not whether the voter was a citizen.[114] Meanwhile, Lieutenant Governor David Dewhurst, who shepherded the Texas law through the State Senate in 2011, repeatedly linked his support for tighter restrictions on illegal immigration to the need for a strict voter ID law.[115] Similarly, in 2010, Representative Riddle dramatically camped outside of the State House for two days to draw attention to her simultaneous filing of a voter ID bill and a bill giving state police the power to arrest undocumented immigrants.[116]

As described below, the particular motivations for the enactment of voter ID laws can ultimately influence the features of the laws as enacted, as well as how the laws are eventually interpreted and administered by election officials.

111. Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (mem.).

112. Spencer Overton, Stealing Democracy 160 (2007).

113. Defendant-Intervenors' Proposed Supplemental, Non-Duplicative Findings of Fact and Conclusions of Law, *supra* note 95, ¶ 247.

114. *Id*.

115. Attorney General's Proposed Findings of Fact and Conclusions of Law ¶ 189; Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (No. 12-cv-128), ECF No. 223.

116. Kevin Koloian, *Debbie Riddle Files Immigration Reform, Voter ID Bills*, Spring Observer (Nov. 17, 2010, 9:08 AM), http://www.yourhoustonnews.com/spring/news/article_e8b26a0c-ba9d-5c30-94ec- 87953808de6d.html.

 B. Features of Voter ID Laws

Laws requiring voters to show an ID have changed markedly over just the last decade. At the time of the 2000 presidential elections, eighteen states required a voter to sign the poll book in order to vote, eleven required a voter to provide a photo or non-photo ID, nine mandated that a voter's signature match the one on file or on a voter provided ID, nine merely asked a voter to state his or her name, and four left the decision of whether to ask for ID totally up to the discretion of poll workers or localities.[117]

However, as of October 2013, thirty-four states have passed or enacted some manner of voter ID law.[118] Eleven states—Arkansas, Georgia, Indiana, Kansas, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, and Wisconsin—have passed "strict" photo ID laws that require all citizens to produce a specific type of photo ID before casting a regular ballot.[119] Under strict photo ID laws, a person without a photo ID in these states may cast a provisional ballot, but if he or she does not return within a limited number of days after the election with a valid photo ID then that ballot will go uncounted.[120] Eight states—Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, New Hampshire, and South Dakota—have passed laws either requiring or allowing poll workers to request photo ID; a voter without photo ID may still cast a ballot, however, if he or she signs an affidavit or if poll workers will vouch for the voter's identity.[121] Three states—Arizona, Ohio, and Virginia—have strict non-photo ID laws, whereby voters may only cast a valid ballot if they can show a specific type of photo or non-photo ID on or within several days of the election.[122] Sixteen states have in effect non-strict, non-photo ID laws that allow voters without ID to cast a regular ballot on Election Day if they merely sign an affidavit.[123]

Regrettably, like the discriminatory tests of the past, both strict and non-strict voter ID laws often empower poll workers with the explicit or de facto discretion to decide whether a person may

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2. Election Reform, *supra* note 1, at 16.
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5. *Voter Identification Requirements*, *supra* note 2.
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8. *Id.*
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11. *Id.*
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14. *Id.*
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17. *Id.*
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20. *Id.*
21.

vote.[124] For example, the Indiana voter ID law allows poll workers to reject a prospective voter whose photo ID does not "conform[]" to the name on the registration list.[125] To the extent there are no further standards, Indianan poll workers are left with extensive discretion. In Pennsylvania, when a state trial court partially stayed the implementation of that state's strict voter photo ID law in 2012, it confusingly allowed poll workers to ask for ID but did not require voters to show ID. [126] This ruling has bewildered voters and created obvious opportunities for abuse by election officials.[127] In Missouri, no person without ID can vote at all unless two election judges attest to knowing her or him.[128] In Alabama and Alaska, a person without ID cannot cast a regular ballot on Election Day unless poll workers agree to vouch for his or her identity, but that person can cast a provisional ballot, which is counted only if the voter appears before election officials with ID within several days after Election Day.[129] These three laws are eerie recreations of the voucher test that, while now banned under the VRA,[130] once allowed white registrars to waive ID requirements for white applicants whom they "knew" while imposing more onerous ID requirements on black applicants.[131]

Also like the voucher and literacy tests, voter ID laws lack any significant checks to prevent or redress capricious enforcement

124. *See* Anthony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 Mich. J. Race & L. 1, 4–6 (2009).

1.

2. *Id.* at 5–6 (citing Ind. Code § 3-5-2-40.5 (2006)).
3.

4.

5. Karen Langley, *Pennsylvania Judge in Voter ID Case Demands*
6.

Database Info, Pittsburgh Post-Gazette, (Apr. 30, 2013, 12:00 AM), http://www.post-gazette.com/state/2013/04/30/Pennsylvania-judge-in-voter-ID-case-demands-database-info/stories/201304300225.

127. Jessica Parks, *Pa.'s New Voter ID Law Causes Confusion, Voters Say*, Phila. Inquirer, (Nov. 7,

2012), http://articles.philly.com/2012-11-07/news/34974527_1_voter-id-law-poll- workers-general-election.

128. *Voter Identification Requirements*, *supra* note 2 (citing Mo. Rev. Stat. § 115.427 (2006)).

129. *Id.* (citing Ala. Code § 17-9-30 (2006) and Alaska Stat. § 15.15.225 (2012)). Alabama's voter photo ID law does not go into effect until the June 2014 primary elections. *Id.*

130. 42 U.S.C. § 1973aa(b)(4) (2012).

131. *See, e.g.*, United States v. Logue, 344 F.2d 290, 291–92 (5th Cir. 1965) (discussing the discriminatory application of the voucher test); Byrd v. Brice, 104 F. Supp. 442, 442–43 (W.D. La. 1952) (granting an injunction against the registrar's discriminatory practices), *aff'd*, 201 F.2d 664 (5th Cir. 1953).

practices by individual election officials or private partisan groups.[132] Voter ID laws are structured so that the decisions of poll workers are final and unappealable. For instance, in Hawaii, a poll worker can unilaterally request ID and, because the statute does not specify acceptable forms of ID except to require a photo and signature, arbitrarily decide the adequacy of the tendered ID.[133] People without ID in Georgia and Tennessee may vote by casting provisional ballots then going to a local election office within a few days to show acceptable ID.[134] However, local officials there are the lone, penultimate judges of whether the ID requirement is met and whether to count the ballot.[135] Additionally, many voter ID laws, such as North Carolina's new voter ID bill (HB 589), empower unappointed, private partisan groups of "election observers" to heedlessly challenge the eligibility of voters. HB 589 will allow up to ten "at-large

observers"—an increase from two observers under the previous law—to freely roam county polling sites to challenge voters on Election Day.[136]

Undoubtedly, the broad discretion given to poll workers, local election officials, and partisan election observers under many voter

132. Even the availability of purportedly free photo ID cards can hinge on discretionary decisions about where to locate ID-issuing offices, the offices' hours of operation, and other choices affecting offices accessibility. For example, ten million eligible voters, including 1.2 million Blacks and 500,000 Latinos, live over ten miles from the nearest state ID-issuing office that is open more than two days a week. Gaskins & Iyer, *supra* note 5, at 1. In Alabama, Georgia, Mississippi, and Texas, only part-time ID-issuing offices are available in the states' rural regions that also have the states' highest concentrations of people of color and people living in poverty. *Id.* Further, government officials working in the ID-issuing offices can also misapply the law by giving people incorrect information about the documents necessary to obtain free voter ID cards. *Id.* at 8.

133. *See* Haw. Rev. Stat. § 11-136 (2008).

134. *See* Ga. Code Ann. § 21-2-417(b) (2008); Tenn. Code Ann. § 2-7- 112(e)(6) (2013 Supp.).

135. *See* Ga. Code Ann. § 21-2-417(b); Tenn. Code Ann. § 2-7-112(e)(6).

136. Brentin Mock, *The Racist History of Voter Challenge Provisions in NC 'Monster' Election Bill*, Inst. for S. Stud. (Aug. 8, 2013, 2:57 PM), http://www.southernstudies.org/2013/08/the-racist-history-of-voter-challenge-provisions-i.html. The North Carolina law was passed in the immediate aftermath of the Supreme Court's decision in *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612 (2013), which struck down the Section 4 coverage formula of the Voting Rights Act, and has been called the "worst voter suppression law" in the country. Ari Berman, *North Carolina Passes the Country's Worst Voter Suppression Law*, Nation (July 26, 2013, 8:51 AM), http://www.thenation.com/blog/175441/north-carolina-passes-countrys-worst-voter-suppression-law#axzz2boHoYetO.

 ID laws effectively permits them to ask "for [ID] even when the law

does not require it or when they are forbidden from doing so."[137]

C. Federal Courts and Initial Challenges to Voter ID Laws

Following the push for new voter ID laws in the early 2000s, their constitutionality was challenged in several lawsuits. Recent and past rulings of the Supreme Court and lower federal courts on the legality of voter ID laws define and inform the scope of any future legislative reforms and lawsuits designed to inhibit racial discrimination in voting. Just as *Lassiter* held that race-neutral literacy tests are constitutional on

their face, the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board* held that race-neutral voter ID laws are constitutional on their face.[138]

Unfortunately, three of the four federal court cases to meaningfully address the discriminatory administration of voter ID laws were issued before *Crawford*—one in 2002 and the other two addressing voucher tests in the 1960s. The fourth case is the most informative because it had both a pre-*Crawford* district court opinion and post-*Crawford* appellate decision, and involved a facial constitutional challenge raising the *potential* for a voter ID law's arbitrary enforcement. Because *Crawford* does not address facial or as-applied constitutional challenges to voter ID laws' racially discriminatory enforcement, these cases offer important insight into how to approach legislative and administrative reforms and how courts will address future lawsuits attacking voter ID laws.

1. *Crawford v. Marion County Election Board*

In 2008, the *Crawford* decision foreclosed future direct facial federal Equal Protection Clause attacks on racially neutral, strict voter photo ID laws.[139] Yet, *Crawford* addresses neither voter ID laws that operate in a racially discriminatory manner, nor the problems inherent in giving local officials broad discretion in implementation. Instead, the lead, concurring, and dissenting opinions assume that the Indiana law at issue—a strict voter ID law that requires all in-person voters to present a valid government-issued photo ID—will operate in a nondiscriminatory manner. Thus, while *Crawford* offers important guidance, it does not foreclose Fourteenth and Fifteenth

137. Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements,* 63 N.Y.U. Ann. Surv. Am. L. 613, 621 (2008).

138. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008). 139. *Id.* at 204.

laws.

The Court in *Crawford* rejected a facial challenge to Indiana's strict voter photo ID law. The lead opinion by Justice Stevens, joined by Chief Justice Roberts and Justice Kennedy, applied the *Burdick* test, wherein an Equal Protection challenge to a nondiscriminatory rule affecting the franchise must balance the stated justifications for the rule against its alleged burdens on voters.[140] The Court first held that States have valid interests in (1) "improv[ing] and moderniz[ing] election procedures"; (2) "preventing voter fraud," even where there is scarce evidence that such fraud exists; and (3) inspiring voter confidence in a fraud-free electoral system.[141] The Court then identified the burdens imposed on eligible voters who lack valid photo ID, including the difficulty and costs associated with obtaining "free" voter photo ID cards.[142]

Examining these burdens, the Court concluded that, in the abstract, "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . ."[143] Importantly, the Court did not have before it any record evidence of the law's impact on particular groups of voters and, as written, the statute was applicable to all Indiana voters.[144] Balancing the valid state interests against the "minimal" burdens placed on some voters, the Court upheld the statute as a "nondiscriminatory law . . . supported by valid neutral justifications."[145]

In his concurrence, Justice Scalia, joined by Justices Thomas and Alito, also believed that strict voter ID laws are constitutional insofar as "[t]he burden of acquiring, possessing, and showing a free photo identification is simply not severe" and "does not 'even represent a significant increase over the usual burdens of voting.'"[146] Going further than the lead opinion, however, the concurrence asserts that where "[t]he State draws no classifications, let alone discriminatory ones," even evidence of the disparate impact of the law on the poor, disabled, and elderly is irrelevant insofar as the burdens

1.
2. *Id.*
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5. *Id.*
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8. *Id.*
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11. *Id.*
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14. *Id.*
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17. *Id.*
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19.
20. *Id.*
21.

at 190–91 (citing Burdick v. Takushi, 504 U.S. 428 (1992)). at 191.
at 198.

at 199–201.
at 204.
at 209 (Scalia, J., concurring) (quoting *id.* at 198).

imposed by voter ID laws do not present an Equal Protection claim.[147] Justice Scalia also noted that even voters with a constitutional race discrimination claim against a generally applicable law must show proof of unlawful intent.[148] The concurrence also relied heavily on the assumption that the statute will be enforced as written so that "[t]o vote in person in Indiana, *everyone* must have and present a [photo ID]."[149]

Finally, both of the dissents—one written by Justice Souter, who was joined by Justice Ginsberg, and one by Justice Breyer alone—would have declared the Indiana law unconstitutional due to the burdens that it places on the poor, elderly, and disabled in obtaining "free" ID.[150]

2. Lower Courts and Discriminatory Voucher Tests and Voter ID Requirements

Before *Crawford*, in two decisions from the 1960s and one 2002 decision, federal district courts held that discriminatorily requiring ID from people of color, but not from white people, violated the rights of people of color under both the Constitution and civil rights statutes. In a fourth case, a pre-*Crawford*, 2007 district court decision held facially unconstitutional a voter ID law that gave individual poll workers broad discretion to selectively enforce the law, but was reversed in 2008 in an appellate court decision following *Crawford*. [151]

a. Voucher Tests in the 1960s

In the 1960s, Louisiana law required all applicants for registration to verify their identities to the satisfaction of the

1.

2. *Id.* at 205.
3.
4.

5. *Id.* at 207 (citing Washington v. Davis, 426 U.S. 229, 248 (1976)).
6.
7.

8. *Id.* at 205.
9.
10.

11. *See id.* at 221 (Souter, J., dissenting) ("The Voter ID Law places
12.

hurdles in the way of either getting an ID or of voting provisionally, and they translate into nontrivial economic costs. There is accordingly no reason to doubt that a significant number of state residents will be discouraged or disabled from voting."); *id.* at 237 (Breyer, J., dissenting) ("[W]hile the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs.").

151. Am. Civil Liberties Union of N.M. v. Santillanes, 506 F. Supp. 2d 598 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

registrar.[152] The Louisiana State Board of Registration issued a letter in January 1961 outlining the type of proof of ID which the registrars should accept, including hunting, fishing, or drivers' licenses; utility and rent receipts; library cards; draft cards; and deeds or contracts.[153] Both before and after the letter's issuance, however, Parish registrars wielded unbridled discretion and would require any "unknown" applicants to produce two locally registered voters to attest to his or her identity under oath.[154] In response to local registrars discriminatorily administering this voter ID law, the Justice Department initiated several lawsuits attacking these practices.[155]

In 1962, a federal district court found in *United States v. Manning* that the East Carroll Parish registrar was permitting only persons whom the registrar "knew" to register without ID and that his standard of "knowing" was "applied liberally in favor of white persons and arbitrarily with respect to [black persons]."[156] While the registrar permitted any white applicant without ID to register if another white person introduced him or her to the registrar, a black applicant could only be registered if he or she was identified and vouched for by two white registered voters.[157] The registrar rejected all other reasonable forms of ID when presented by black applicants, including those outlined in the Louisiana State Board of Registration's letter.[158] The court held that the registrar's discriminatory administrative practices, but not the voter ID law itself, were unlawful and unconstitutional.[159]

A year later, in *United States v. Ward*, the same district court held that the Madison Parish registrar's policy of asking only previously unregistered applicants or people unfamiliar to her to prove their identity was unconstitutional.[160] The court ruled that this policy "inevitably operated to discriminate" against black citizens

152. United States v. Ward, 222 F. Supp. 617, 618–19 (W.D. La. 1963), *rev'd on other grounds*, 349 F.2d 795 (5th Cir.), *modified on rehearing*, 352 F.2d 329 (5th Cir. 1965).

153. *Id.* at 618.
154. United States v. Manning, 205 F. Supp. 172, 172–73 (W.D. La. 1962). 155. *See Ward*, 222 F. Supp. at 620; *Manning*, 205 F. Supp. at 173–74.
156. *Manning*, 205 F. Supp. at 173.
157. *Id.*
158. *See id.* (listing drivers' licenses, hunting licenses, homestead

exemption certificates, tax records, and military ID documents as forms of ID the registrar would not accept).

159. *Id.* at 174.
160. *Ward*, 222 F. Supp at 619.

since no black person had ever been registered in the Parish[161] and the registrar "knew" most white residents, but very few black ones.[162] Again, while the ID requirement was not struck down, the court concluded that "[a] registrar cannot constitutionally use the identification requirement in any manner which

will impose a heavier burden upon [black] applicants than upon white applicants."[163] The court ordered the registrar to permit all applicants to prove their identity under the terms of the 1961 letter.[164]

In fact, in affirming *Ward*, the United States Court of Appeals for the Fifth Circuit believed that such abuses of discretion in administering registration and ID requirements were so pervasive in 1965 that a model order was necessary to preemptively assist courts in adjudicating later cases regarding related practices.[165]

Ultimately, because of these and similar cases,[166] the VRA, while not banning voter ID laws outright, now prohibits any test or device that conditions the vote on an election official or anyone else having to vouch for a voter's identity.[167]

b. Voter ID Requirements in the 2000s

In *United States v. Berks County*, the district court agreed with Justice Department allegations that, despite the fact that Pennsylvania had no voter ID law at the time, poll workers in Berks County, Pennsylvania were discriminatorily requesting ID from Latino voters.[168] The court held that the poll workers' spurious practices constituted racial harassment in violation of Section 2 of the VRA.[169] Unfortunately, this 2003 decision does not involve the selective enforcement of a voter ID law that clearly authorizes poll

1.
2. *Id.*
3.
4.
5. *Id.*
6.
7.
8. *Id.* at 620.
9.
10.
11. *Id.* at 620–21.
12.
13.
14. United States v. Ward, 349 F. 2d 795, 805 (5th Cir. 1965), *rev'd on*
15.

other grounds, 222 F. Supp. 617 (W.D. La. 1963).
166. *See, e.g.*, United States v. Logue, 344 F. 2d 290, 292 (5th Cir. 1965)

(holding that registration and county officials had discriminatorily vouched for 88.6 percent of white applicants and no black applicants); Byrd v. Brice, 104 F. Supp. 442, 442-43 (W.D. La. 1952) (holding that a registrar had

unconstitutionally waived ID requirements and vouched for all white registrants and no black applicants), *aff'd*, 201 F.2d 664 (5th Cir. 1953).

167. *See* 42 U.S.C. § 1973aa(b)(4) (2012).

168. United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 573 (E.D. Pa. 2003).

169. *Id.* at 582–85.

workers to request ID from some voters, waive ID requirements for others, or otherwise arbitrarily differentiate between voters. For that reason and because the case is a VRA claim, *Berks County* is somewhat distinctive, and the later *Crawford* decision would likely not affect its legal reasoning.

More directly relevant, however, is the 2007 district court decision in *American Civil Liberties Union of New Mexico v. Santillanes*, which held that an Albuquerque, New Mexico municipal voter photo ID ordinance was unconstitutional on its face.[170] The district court found that municipal election officials lacked any standard definition for what would constitute "valid" or "current" photo ID and that these officials explicitly intended to give individual poll workers no meaningful guidance and, therefore, broad discretion in the ordinance's enforcement.[171] In fact, in her deposition, the city's chief election official admitted that individual poll workers would be allowed to "make the [final] call" on whether a particular ID would allow a person to vote.[172] While not overtly concerned with racial discrimination, the *Santillanes* district court did cite *Louisiana v. United States* in enjoining the voter ID ordinance.[173] The court reasoned that, like the Louisiana understanding test, the discretion the ordinance needlessly conferred upon poll workers and the ordinance's ambiguities would make it "possible for entire groups of voters to be arbitrarily disenfranchised . . . ."[174] Accordingly, the court held that the ordinance's "lack of clear guidance, and the unbridled discretion it leaves to election officials . . . will likely result in arbitrary and inconsistent treatment of similarly situated voters."[175]

Nonetheless, on appeal and following the issuance of *Crawford*, the Tenth Circuit Court of Appeals reversed the *Santillanes* district court and upheld the Albuquerque voter ID ordinance.[176] The Tenth Circuit did so in part because it was "not persuaded that [the ordinance was] inherently confusing or difficult

170. Am. Civil Liberties Union of N.M. v. Santillanes, 506 F. Supp. 2d 598, 641–42 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

171. *Id.* at 607.
172. *Id.* at 617.
173. *Id.* at 631–36, 644–46.
174. *Id.* at 640.
175. *Id.* at 641–42.
176. Am. Civil Liberties Union of N.M. v. Santillanes, 546 F.3d 1313, 1316

(10th Cir. 2008).

 to apply" and did not see any intrinsic danger in poll worker

discretion.[177]

The Tenth Circuit's decision suggests that *Crawford* forecloses facial challenges to voter ID laws that vest poll workers with broad discretion so long as the laws provide poll workers with some objective criteria. Yet, neither the Tenth Circuit nor the Supreme Court bar as-applied challenges to laws that in fact operate to racially discriminate. Therefore, the below studies, surveys, and anecdotes of voter ID laws' discriminatory administration are essential to any eventual lawsuit.

IV. Evidence of Discriminatory Administration

Both the lead and concurring opinions in *Crawford* ruled that voter ID laws are constitutional on their face as long as the laws are nondiscriminatory as written. *Crawford* does not, however, speak to discriminatorily administered voter ID laws. Yet, there is clear and mounting evidence that voter ID laws, as with literacy tests, function in practice so that voters of color often must meet different ID requirements than white voters.

A. Voter Surveys

1. The 2008 Boston Exit Poll

In the most comprehensive study of this issue to date, researchers surveyed voters in Boston, Massachusetts during the 2008 presidential election to determine if it is "feasible . . . to administer voter identification laws in a race-neutral manner."[178] To test their thesis, the researchers conducted an exit poll, wherein 400 volunteer pollsters were posted outside of Boston polling stations and asked every eighth voter as he or she left polling stations to complete a questionnaire.[179] The multiple-choice questionnaire inquired, among other things: (1) whether the voter was asked to show any kind of ID at the polling station; (2) if ID had been required, whether the voter had been asked for a photo ID; and (3) his or her

ethnicity (“Hispanic or Latino” or not) and race (“Asian,” “Black/African American,” “White,” or “Other”).[180] The pollsters also recorded their “*perceptions*

1.
2. *Id.* at 1323–25.
3.
4.
5. *See* Boston Study, *supra* note 17, at 2.
6.
7.
8. *Id.* at 10.
9.
10.
11. *Id.* at 12 n.8.
12.

of the approached voter’s age, sex, and race/ethnicity.”[181] The researchers posited that, because polling would occur immediately after voting, exit polls would provide the most accurate data.[182]

Researchers located the exit poll in Boston for a number of reasons. First, Boston’s voter ID requirement includes only the minimal HAVA requirement that first-time voters who registered by mail show a photo or non-photo ID and Massachusetts’ state requirement that a once inactive voter provide a photo or non-photo ID.[183] Second, researchers believed that Boston was not primed to be on alert for fraud, but was sensitive to issues of voter access and racial discrimination due in part to recent Justice Department scrutiny.[184] Third, the 2008 election was noncompetitive in heavily Democratic Boston and, therefore, “one would not expect voter ID laws to have a large and disparate impact across racial groups.”[185] Fourth, poll worker demographics were largely reflective of the racial and ethnic diversity of the voting age population.[186]

Yet, even in this environment, the probability that black and Latino Bostonians would be asked for ID was ten percentage points higher than the probability white Bostonians would be asked.[187] The probability that a black or Latino voter with limited English proficiency would be asked for ID was over twenty percentage points higher than the probability that an average white voter would be asked.[188] Indeed, even controlling for the possibility that black and Latino voters are overrepresented amongst HAVA and inactive voters, a regression analysis found that these voters were still more likely than white voters to be asked for ID.[189]

Additionally, the researchers devised and managed a secondary experiment to determine whether training, provided to a randomly selected group of poll workers, could discourage discrimination.[190] The specialized trainings included role-playing

1.
2. *Id.* at 10.
3.
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5. *Id.* at 9.
6.
7.
8. *Id.* at 7. While Massachusetts law gives poll workers the ability to
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request ID at their discretion, 950 Mass. Code Regs. 54.04(6)(b) (1999), there was no evidence that this little used statute was being invoked by officials here. Boston Study, *supra* note 17, at 7 n.3.

184. *Id.* at 8. 185. *Id.*
186. *Id.* at 8–9. 187. *Id.* at 22. 188. *Id.*

189. *Id.* at 23–28. 190. *Id.* at 3, 7–8.

sessions and tutorial presentation slides meant to discourage discriminatory requests for ID.[191] Despite this, the specially trained poll workers were just as likely to discriminate as the poll workers who did not

complete the training.[192] The study, therefore, concluded that discriminatory abuses of discretion were resistant to "remediation via simple training programs."[193]

2. The 2006 New Mexico Survey

In another study, researchers surveyed voters in New Mexico to examine whether poll workers were discriminatorily implementing that state's voter ID laws. On Election Day in 2006, researchers mailed requests to participate in an Internet or mail-in survey to a random sample of voters in New Mexico's First Congressional District, which includes the city of Albuquerque in Bernalillo County and one-third of the state's voters.[194] The survey of voters had a twenty-two percent response rate.[195]

In contrast to Boston, researchers chose New Mexico's First Congressional District not as an ideal jurisdiction where discrimination was unlikely to occur, but because its conditions and voter ID laws mimicked those of many other states and localities.[196] At the time, in addition to HAVA requirements, all would-be voters in New Mexico were obligated to first provide either: (1) a written or oral statement of his or her name, date of birth, and the last four digits of his or her social security number; (2) a photo ID without an address; or (3) a non-photo ID with the correct address.[197] Also, the 2006 election in New Mexico's First Congressional District was an extremely competitive race, and the issue of fraud was of concern to both voters and election officials.[198] Finally, twenty-five percent of voters had Spanish-surnames, whereas thirty-seven percent of poll workers were Latino and fifty percent were white.[199]

1.
2. *Id*. at 7–8.
3.
4.
5. *Id.* at 23.
6.
7.
8. *Id.* at 3.
9.

194. Lonna Rae Atkeson et al., *A New Barrier to Participation:*

Heterogeneous Application of Voter Identification Policies, 29 Electoral Stud. 66, 68 (2010) (hereinafter New Mexico Study).

195. *Id.*
196. *Id.* at 67. 197. *Id.* at 68. 198. *Id.* at 68–69. 199. *Id.* at 68.

The regression analysis of the survey found that self-identified Latino voters were sixteen percent more likely to be asked for ID than non-Latino voters.[200] A non-Latino voter of the median age, education, income, and gender (female) had only a sixty-nine percent chance of being asked for ID, but a demographically identical Spanish-surnamed voter had an eighty-five percent chance of being asked.[201] Remarkably, a Latino male had a ninety-two percent chance of being asked for ID, the highest probability.[202]

In addition, the voter survey was supplemented by a mail survey of poll workers in Bernalillo County, which had a seventy-seven percent response rate and was meant to determine why voters were asked for ID and if a poll worker's race or partisan affiliation affected the likelihood of him or her requesting ID.[203] "A majority (56 [percent]) of poll workers indicated that they asked for [ID] all or most of the time, and 44 [percent] indicated that they asked for [ID] only some of the time, hardly at all, or never."[204] Just under half of the poll workers (47.7 percent) reported asking for ID because it was legally required, but 6.5 percent indicated that they asked for ID in order to "prevent voter fraud."[205] Curiously, as with the Boston study, this survey also suggests that neither the poll worker's race nor party affiliation affected his or her propensity for requesting ID.[206]

3. Additional Voter Surveys

Three recent national surveys and polls of randomly selected voters show comparable results. Unfortunately, these surveys are much less comprehensive than the Boston and New Mexico studies because they do not account for HAVA, the potential overrepresentation of people of color amongst HAVA voters, or the particularities of each state's election laws. Nonetheless, this data can at least give an important overview of how voter ID laws are administered across the nation.

First, as noted in this Article's introduction, a survey of youth under age thirty taken after the 2012 presidential election found that

1.
2. *Id.*
3.
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5. *Id.*
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8. *Id.*
9.
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11. *Id.*
12.
13.

14. *Id.*
15.
16.

17. *Id.*
18.
19.

20. *Id.*
21.

at 69–70. at 70.

at 68, 70–71. at 69.
at 70.
at 71.

young black voters were ten percentage points more likely than young white voters to be asked for ID in states with photo ID laws.[207] That same survey reported that 17.3% of young black nonvoters were discouraged from voting because of a perceived lack of proper ID, whereas only 4.7% of young white

nonvoters and 8.1% of young Latino nonvoters experienced such discouragement.[208] A second survey taken after the 2008 "Super Tuesday" primary elections[209] found that fifty-three percent of white voters, fifty-eight percent of Latino voters, and, incredibly, seventy-three percent of black voters were asked for ID.[210] Finally, a third national survey taken after the 2006 congressional elections found that fifty-five percent of Blacks, fifty-four percent of Latinos, and forty-seven percent of whites had to show ID before voting.[211] This 2006 survey is particularly telling since, at that time, outside of HAVA, only two states actually required ID from all voters.[212] This suggests that, even before the more recent proliferation of voter ID laws, poll workers were using their discretion to unfairly request ID from some, but not all voters.

Interestingly, the 2008 Super Tuesday survey and 2006 midterm elections survey also revealed that only a fraction of a percent of voters were actually kept from voting at all because of a lack of ID.[213] While the surveys do not reveal whether voters without ID cast regular or provisional ballots, most of these voters undoubtedly cast provisional ballots.[214] Therefore, it is worth noting that, according to one analysis, election officials discarded eighty percent of the provisional ballots cast by voters without acceptable ID in the Indiana presidential primaries in 2008 and 2012.[215] It is likely

1.

2. Rogowski & Cohen, *supra* note 12, at 3.
3.
4.

5. *Id.* at 4.
6.
7.

8. Twenty-four states, including California, Massachusetts, and New
9.

York, held either caucuses or primary elections for one or both parties on February 5, 2008. *A Fighter in Search of an Opponent*, Economist (Feb. 7, 2008), http://www.economist.com/node/10656864.

210. Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 Pol. Sci. & Pol. 127, 128 (2009).

211. *Id.*

212. *Id.*; *see also supra* Part III.B (discussing the move to more restrictive voter ID laws in recent years).

213. Ansolabehere, *supra* note 210, at 128–29.

214. Although voters were asked whether they voted a provisional ballot or regular ballot, that breakdown was not reported. *Id.* at 128.

215. Michael J. Pitts, *Photo ID, Provisional Balloting, and Indiana's 2012 Primary Election*, 47 U. Rich. L. Rev. 939, 951–52 (2013).

 that voters without ID who cast provisional ballots in other states

and jurisdictions are being similarly disenfranchised.

B. Anecdotal Evidence

News reports and the observations of impartial election monitors over the last decade support the findings of the above described polls and surveys. In the 2012 presidential election, limited English proficiency voters in Saint Paul, Minnesota[216] and one-sixth of Asian voters in New York City[217] were asked for photo ID by poll workers, despite these jurisdictions lacking any such requirements. In majority-black Detroit, Michigan, officials reportedly turned away voters with acceptable ID or unnecessarily required voters to cast provisional ballots.[218] Testimony submitted in 2006 for a federal lawsuit against Springfield, Massachusetts alleged that poll workers unnecessarily turned away Latino voters due to a lack of ID.[219] In the 2006 midterm elections, poll workers in Dekalb County, Georgia purportedly requested ID from black voters, but not from white voters.[220] In South Dakota, officials unlawfully refused to offer identity-verifying affidavits to Native Americans without photo ID.[221]

Like the literacy test, voter ID laws also make it easier for private groups to discriminatorily challenge the eligibility of voters of color. For example, in May 2013, Dallas Tea Party leader Ken Emmanuelson admitted that "[t]he Republican Party doesn't want black people to vote if they are going to vote 9-to-1 for Democrats."[222]

216. Lawyers Comm. for Civil Rights Under Law, Election Protection 2012: A Preliminary Look at the Problems Plaguing the American Voter 6 (2012) [hereinafter LCCR 2012 Report], *available at* http://www.lawyerscommittee.org/admin/site/documents/files/EP-2012-Preliminary-Report-to-Congress-FINAL.pdf.

217. Spencer Overton, Stealing Democracy 160 (2007).

218. LCCR 2012 Report, *supra* note 216, at 8, 11.

219. John Tanner, *Effective Monitoring of Polling Places*, 61 Baylor L. Rev.

50, 59 (2009) (quoting Memorandum of Points and Authorities in Support of United States' Motion for Temporary Restraining Order, or in the Alternative, A Preliminary Injunction and Request for Oral Argument at 14–15, United States v. Springfield, No. 06-30123-MAP (D. Mass. 2006)).

220. Lawyers Comm. for Civil Rights Under Law, Report on the Legal Program to Board of Directors and Trustees, Staff and Pro Bono Partners 22–23 (2006) [hereinafter LCCR 2006 Report], *available at* http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0021.pdf.

221. Overton, *supra* note 217.

222. Jay Root, *Tea Party Leader Says He Misspoke About Black Voters*, Tex. Tribune (June 4, 2013), www.texastribune.org/2013/06/04/gop-distances-itself-tea- party-leaders-remarks. Although Emmanuelson disavowed any authority within the Republican Party, he later reiterated his belief that it is "not in the interests

While Mr. Emmanuelson holds no authority within the Republican Party, his admission came on the heels of Tea Party activists' November 2012 plans to stop "voter fraud" by challenging voters of color at the polls in several battleground states.[223] These 2012 efforts were inspired by a Texas Tea Party affiliate's program of sending white volunteers to challenge the identities of black voters in Houston, Texas during the 2010 midterm elections.[224] With the stated goal of making the voting experience like "driving and seeing the police following you," these activists allegedly hovered over voters, held up voting lines, and harangued election officials.[225] The actions of the Texas Tea Party affiliate led the Harris County attorney to criminally investigate the group.[226]

Correspondingly, partisan operatives have also been accused of targeting communities of color. In Ohio, a federal court found that partisan poll monitors were deployed during the 2004 presidential election so that ninety-seven percent of new black registrants, but just fourteen percent of white registrants, would have their identities challenged at the polls.[227] On Election Day, monitors and others challenged forty-seven percent of black Ohioan voters, but only thirty-five percent of white voters.[228] In Pine Bluff, Arkansas, five partisan poll watchers were reportedly asking only black voters for ID, causing some frustrated black people to leave without voting.[229] Such actions, when taken by Republican poll monitors, likely violate a 1982 consent decree, whereby the national Republican Party agreed

of the Republican Party to spend its own time and energy working to generally increase the number of Democratic voters at the polls, and at this point in time, nine out of every ten African American voters cast their votes for the Democratic Party." *Id*.

223. Brentin Mock, *A True Army Responds to True the Vote Threats*, The Nation (Oct. 19, 2012, 1:51 PM), http://www.thenation.com/blog/170698/true- army-responds-true-vote-threats#.

224. Mariah Blake, *The Ballot Cops*, The Atlantic (Sept. 19, 2012, 8:56 PM), http://www.theatlantic.com/magazine/archive/2012/10/the-ballot-cops/ 309085; *see also* Editorial, *Voter Harassment, Circa 2012*, N.Y. Times, Sept. 21, 2012, http://www.nytimes.com/2012/09/22/opinion/voter-harassment-circa-

2012.html (comparing Tea Party intimidation techniques at polls with voter harassment of black citizens in 1966 by white teenagers).

225. *Id.*
226. *Id.*
227. Overton, *supra* note 217.
228. Jason Belmont Conn, *Of Challengers and Challenges*, 37 U. Tol. L.

Rev. 1037, 1038 (2005) (citation omitted).
229. People for the Am. Way, The Long Shadow of Jim Crow: Voter

Intimidation and Suppression in America Today 7 (2004), *available at* http://www.pfaw.org/sites/default/files/thelongshadowofjimcrow.pdf.

 not to engage in racially discriminatory "ballot security" or "anti-voter

fraud" programs.[230]

Widespread reports that poll workers, private groups, and political partisans are compelling voters of color to prove their identity in a manner that is inconsistent with the law and distinct from the standards applied to white voters suggests that these practices are systematic, pervasive, and perhaps intentionally discriminatory.

C. Explanations for Discriminatory Practices

As with literacy tests, this misconduct likely is provoked by racial biases and ill-advised efforts to gain partisan advantage. Unlike HAVA, strict voter ID laws, in theory, require every voter to show ID before casting a ballot. Thus, the idiosyncrasies of an individual voter should not play a role in whether he or she is asked for ID. However, poll worker discretion often means that intentional discrimination (i.e., explicitly racist intentions and assumptions) or implicit biases (i.e., unconscious racism against or in favor of certain races of people) can distort implementation of voter ID laws. Given the structure of strict voter ID laws, there are few (if any) other conceivable explanations for their racial administration other than the invidiously discriminatory abuse of discretion.

1. Intentional Discrimination

The Supreme Court has ruled that a governmental action is unconstitutional only if it was demonstrably motivated in part by intentional discrimination, whereas an action that has a disparate

230. Consent Order, Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 81-3876 (D.N.J. Nov. 1, 1982); *see also* Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196–200 (3d Cir. 2012) (summarizing enforcement actions under the consent decree from 1982 to 2008). The initial 1982 settlement followed a civil rights lawsuit filed by the Democratic National Committee ("DNC") in a federal district court in New Jersey in response to the Republican National Committee's ("RNC") deployment of uniformed off-duty police officers in Latino and black neighborhoods in New Jersey during the 1981 gubernatorial elections. *See id.* at 196–97 (noting that the off-duty police officers allegedly threatened voters and openly wore their weapons). The modified decree expires on December 1, 2017—although it may be renewed for another eight years—and requires the RNC to pre-clear with the New Jersey district court any "ballot security" related poll monitoring plans within ten days of their implementation. *Id.* at 201.

impact on voters of color is not *per se* unconstitutional.[231] An intentionally discriminatory voting scheme is one that government officials operate in a way that holds voters of color to different standards than white voters[232] or one that lawmakers purposely conceived to target voters because of their race.[233] Courts will often infer discriminatory intent from the unexplained disparate treatment of people of color and where government officials act based on racial stereotypes.[234]

Although less prevalent than in the past, Justice Department consent decrees and federal court decisions from the last decade confirm that election officials continue to intentionally discriminate through racial harassment and disparate treatment. In 2012, officials in Salem County, New Jersey were "[r]equiring more identification from, and turning away Hispanic voters."[235] In 2004, candidates in Long County, Georgia filed groundless challenges to the citizenship of forty-five Spanish-surnamed voters, which led county registrars to

231. *See generally* City of Mobile v. Bolden, 446 U.S. 55, 61–62 (1980) (Stewart, J., plurality) (holding that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); Washington v. Davis, 426 U.S. 229, 238–39 (1976) (addressing proof of intentional discrimination and the Equal Protection component of the Fifth Amendment's Due Process Clause); Whitcomb v. Chavis, 403 U. S. 124, 149 (1971) (holding that multimember districts violate the Fourteenth Amendment if they

were “conceived or racial . . . discrimination”).

operated as purposeful devices to further

232. *See* Louisiana v. United States, 380 U.S. 145, 148–51 (1965) (affirming a district court decision that found the understanding test unconstitutional as- applied “because in the 21 parishes where the . . . test was applied [registrars’] discretion had been exercised to keep [black citizens] from voting because of their race”).

233. *See* Hunter v. Underwood, 471 U.S. 222, 229–33 (1985) (holding that Alabama lawmakers unconstitutionally enacted a felon disenfranchisement law to disenfranchise black and poor white voters).

234. *See* Searcy v. Williams, 656 F.2d 1003, 1009 (5th Cir. 1981), *aff’d mem. sub nom.* Hightower v. Searcy, 455 U.S. 984 (1982) (holding that a facially race- neutral system of appointing school board members was unconstitutional where the appointers used their discretion to exclude black candidates); *see also* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (describing how the strict scrutiny analysis prevents unconstitutional governmental actions based on “illegitimate racial prejudice or stereotype”).

235. Complaint at 6, United States v. Salem Cnty., N.J., et al., No. 1:08-cv- 03276 (D.N.J. July 28, 2008), *available at* http://www.justice.gov/crt/ about/vot/sec_203/documents/pennsgrove_comp.pdf. *See also* Settlement Agreement, United States v. Salem Cnty., N.J., et al., No. 1:08-cv-03276 (D.N.J. July 28, 2008), *available at* http://www.justice.gov/crt/about/vot/ sec_203/documents/pennsgrove_cd.php.

discriminatorily request that these voters prove their citizenship before voting.[236] As noted earlier, a district court found in 2003 that poll workers in Berks County, Pennsylvania were unlawfully demanding photo ID only from Latinos, questioning their right to vote, and unlawfully turning them away.[237] Also in 2003, a federal court found that poll workers in Charleston County, South Carolina had routinely “intimidate[d] and harass[ed] African American voters at the polls.”[238] In 2000, after a private group dedicated to ensuring “pure” elections challenged only Arab-American voters’ citizenship in Hamtramck, Michigan, election

administrators began unlawfully requiring Arab Americans to swear citizenship oaths and show their passports before voting.[239]

Intentional discrimination also occurs where individuals admit to believing that voters of color are somehow different from white voters and, therefore, are subject to special scrutiny. Before the 2012 election, for example, privately funded billboards advertising that voter fraud is a crime appeared in black neighborhoods in Wisconsin and Ohio.[240] While voter fraud is a crime, the billboards falsely stigmatized black people as more likely to commit fraud.[241] That same year, the head of the Maine Republican Party baselessly opined that the mere presence of black voters in rural precincts was a sign of "voter improprieties."[242] These racist notions can consciously or, as described below, unconsciously influence election

236. Consent Decree at 2, United States v. Long Cnty., Ga., No. CV206-040 (S.D. Ga. Feb. 10, 2006), *available at* http://www.justice.gov/crt/about/vot/ sec_2/long_cd.pdf.

237. United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 575–76 (E.D. Pa. 2003).

238. United States v. Charleston Cnty. Council, 316 F. Supp. 2d 268, 286–90 n.23 (D.S.C. 2003) (describing evidence of racial discrimination in voting by election administrators spanning the 1980s, 1990s, and the 2000 presidential election).

239. Consent Decree at 4–5, United States v. City of Hamtramck, No. 00- 73541 (E.D. Mich. Aug. 7, 2000), *available at* http://www.justice.gov/crt/ about/vot/sec_2/hamtramck_cd.pdf.

240. LCCR 2012 Report, *supra* note 216, at 3.
241. *Id.*
242. Lucy Madison, *Citing High Number of Rural Black Voters, Maine GOP*

Chair Suspects "Improprieties" at the Polls, CBS News (Nov. 15, 2012, 2:55 PM), http://www.cbsnews.com/8301-250_162-57550603/citing-high-number-of-rural-black-voters-maine-gop-chair-suspects-improprieties-at-the-polls/. Perhaps relatedly, Alabama State Senators Scott Beason and Benjamin Lewis were recently caught on tape calling black voters "aborigines" and expressing hostility towards black voter turnout. United States v. McGregor, 824 F. Supp. 2d 1339, 1345-46 (M.D. Ala. 2011).

 administrators, political operatives, and other individuals to

selectively target voters of color on or before Election Day.

2. Implicit Bias

Most election officials undoubtedly seek to carry out their duties in a race-neutral manner. Nonetheless, "[m]assive amounts of research support[s] the notion that people engage in unconscious or implicit discrimination—that 'good people often discriminate and they often discriminate without being aware of it.'"[243] Today, racial "discrimination is less likely to result from invidious motivation, the deliberate actions of a bigot, and more likely to result from implicit biases stemming from cultural exposure and normal cognitive processes."[244]

Subconscious racial biases can and do affect the decision-making processes of poll officials acting in good faith, which may generally explain why voters of color are more likely to be asked for ID or subjected to more onerous ID requirements. For instance, even if consciously unbiased, the subconscious minds of poll workers can cause them to react to societal stereotypes about black criminality (and alleged propensity to commit fraud) or to question the citizenship status of "foreign" "looking" or "sounding" voters.[245] In fact, "polling places present a theoretical 'optimal' opportunity for unconscious bias . . . ."[246] Such bias is most likely to affect decision-making where the decider has little time to think, has broad discretion to make a judgment call, and has very little individual information concerning the person about whom they are making the decision.[247] This perfectly describes the situation of many polling places during high turnout elections.[248] The high-pressure environment makes it easier for poll workers to forget or ignore the law and results in their reliance on quick judgments informed by unconscious racial biases.[249] For example, about seventy percent of

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2. Page & Pitts, *supra* note 124, at 3–4 (citation omitted).
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5. *Id.* at 32.
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8. *Id.* at 30–32.
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11. *Id.* at 39.
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14. *Id.* at 34–37.
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17. *Id.* at 35.
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20. *Id.* at 33–34; *see also id.* at 37–38 (listing additional situations in

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which the judgment calls of individual poll workers may affect the franchise).

white people hold implicit negative stereotypes about black people.[250] Therefore, white poll workers are perhaps more likely to leniently enforce ID requirements for white voters while consistently asking for ID or rejecting somewhat faulty ID from black voters. These poll workers may be reflexively asking most black voters, but far fewer white voters, for ID in a sincere (but deeply flawed) effort to comply with the law.

Even people of color can hold and act upon negative societal biases about members of their own particular racial group or other people of color.[251] For example, black poll workers can hold unconscious biases against black or Latino voters. Although many poll workers tend to come from the communities they serve, this will not necessarily prevent them from engaging in racial discrimination. Indeed, the implicit biases of poll workers of color likely explain why the diverse demographics of poll workers in the Boston and New Mexico studies did not decrease the incidence of racial discrimination in the administration of voter ID laws.

V. PREVENTING DISCRIMINATORY ADMINISTRATION

More aggressive measures must be implemented to ensure the unbiased enforcement of voter ID laws and prevent racial biases, conscious or unconscious, from causing election officials to discriminate. This section describes proscriptive measures that local election administrators, state legislatures, and Congress must consider to rein in poll worker discretion and foster the race-neutral administration of elections.

A. Local Administrators

For local election administrators, checking abuses of discretion is more difficult than it appears at first glance. The most obvious administrative solutions are to improve poll worker training, establish routine or standardized voter ID practices, and hire a more diverse cadre of poll workers.[252] Research shows that the operation of

250. *Id.* at 29–32 (noting that the prevalence of implicit negative stereotypes held by white people about black Americans can cause white people to be much more prone to reacting with hostility toward black voters).

251. *Id.* at 29.

252. *See, e.g.*, Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 Urb. Law. 269, 274 (2008) (suggesting that improved training will cause poll workers to be "respectful of the rights of voters");

implicit biases can be reduced by hiring people of color as leaders as well as trainers and offering trainings that emphasize principles of nondiscrimination.[253] The effective monitoring of poll workers with unannounced visits by supervisors can also encourage professionalization and consistent enforcement of voter ID laws.[254]

Unfortunately, the Boston and New Mexico studies did not show that these logical steps could resolve the problems of racially driven poll worker practices. In the Boston Study, the provision of specialized poll worker trainings failed to deter discrimination through unlawful ID requests.[255] Likewise, in both the Boston and New Mexico studies, the racial demographics of poll workers were largely representative of the electorate, but this also did not curb discrimination.[256] Neither trainings nor poll worker diversity are likely to be effective deterrents, in part because even people of color may harbor implicit biases against voters of their own race.[257]

While true reform requires more sweeping legislative action, this does not preclude local efforts to ensure more supervision of election officials. The propagation of administrative policies that increase poll worker oversight and regularize procedures for ID requests, ID validations, and ballot distribution would provide a welcomed diminution of poll worker discretion. However, the more meaningful reforms admittedly must come from above.

B. State Legislatures

Effective measures implemented in select states should be adopted more broadly. These measures fall into two broad categories discussed below: legislative reforms to voter ID laws in general and legislative reforms to the election process.

First, state legislatures can broadly reform voter ID laws. For example, legislatures can use the HAVA list of acceptable IDs as a baseline. Although disparate requests for ID may continue, poll

Samuel P. Langholz, Note,*Fashioning a Constitutional Voter Identification Requirement*, 93 Iowa L. Rev. 731, 789–90 (2008) (suggesting provision of the required ID to voters and greater voter education on standard voter ID requirements will also lead to fewer issues at the polls).

253. Page & Pitts, *supra* note 124, at 42–45.

254. *See* Overton, *supra* note 87, at 680 (suggesting that such independent audits of the entire electoral process would both prevent fraud and improve election administration generally).

255. Boston Study, *supra* note 17, at 3, 23.
256. *See id.* at 8-9; New Mexico Study, *supra* note 194, at 3. 257. Page & Pitts, *supra* note 124, at 29.

workers may be less likely to deny voters a regular ballot if the legislature permits voters to show an expansive array of widely available and easily recognizable forms of photo and non-photo IDs. Legislatures can also avoid confusion and ensure the uniformity of the law across elections by denying their political subdivisions the ability to enact ID requirements that are more stringent than the state requirement.

Additionally, states must adopt more forgiving “safety valve” provisions that rightly place the burden of confirming the voter’s identity on the state, not the individual voter or that allow a voter without ID to cast a regular ballot if the voter completes a simple process at the poll site on Election Day. For instance, in South Carolina, a person without photo ID can cast a provisional ballot *if* the person both shows a non-photo voter registration card and signs an affidavit specifying the reason for lacking a photo ID, and that ballot will be counted so long as the state cannot affirmatively prove that the given reason is false.[258] In Rhode Island, a voter without ID can cast a provisional ballot and, if the state can electronically match the signature on that ballot to the signature on the voter’s registration form, then the ballot will count.[259]

Second, state legislatures can remove the ability of individual poll workers to deny any voter a regular ballot or can force poll workers to consult with a neutral arbitrator before turning any potential voter away. For instance, while North Carolina’s HB 589 is in no way a model voter ID law, under it, a North Carolina voter whose photo ID is questioned by an individual poll worker must be allowed to cast a regular ballot

unless the judges of elections[260] present unanimously agree that the photo ID proffered "does not bear any reasonable resemblance to that voter."[261] To prove his or her identity, the voter may present to the judges of election the photo ID and any additional pertinent information.[262] If after construing the voter's evidence in the "light most favorable to the voter," the judges of election unanimously rule against the challenged voter, then the

258. South Carolina v. United States, 898 F. Supp. 2d 30, 40–41(D.D.C. 2012) (explaining the circumstances under which a voter without photo ID can vote in South Carolina under the "reasonable impediment" provision of its voter ID law).

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2. *Voter Identification Requirements*, *supra* note 2 (citation omitted).
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5. The qualifications for being a judge of elections in North Carolina are
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laid out in N.C. Gen. Stat. § 163-166.14(e), (h) (2011).

261. N.C. Gen. Stat. § 163-166.14(a), (c) (2011). 262. *Id.* § 163-166.14(b) (2011).

voter can still cast a provisional ballot.[263] North Carolina county boards of elections also must keep detailed records of all such challenges, including information about the voter, challenged ID, poll worker who challenged the ID, judges of election, and the judges' rulings.[264] Curiously, however, the boards need not record the challenged voter's race. In New Jersey, a prospective voter can challenge a poll worker's decision to deny the voter a regular ballot in an election-day hearing before a state Superior Court Judge.[265] The voter, who can appear pro se or with counsel, can request the hearing without filing paperwork, and can present her or his entire case through oral oaths and signed affidavits that, based on the preponderance of the evidence, may establish the voter's eligibility.[266] In the 2008 election, five New Jersey counties increased the accessibility of these hearing by establishing live video feeds that linked the courtroom in the county seat to various other locations.[267] Judges are good arbitrators of Election Day disputes because, unlike laypeople, they are generally better at mitigating their own biases.[268] Under an

analogous model scheme, all voters would be presumptively entitled to receive a regular ballot, and no individual poll worker could require a voter to cast a provisional ballot. In order to challenge a voter, poll workers would need to call for a hearing with rules similar to the New Jersey example. Poll workers would bear the burden of explaining the insufficiencies of the proffered ID to neutral decision-makers who would be made commonly available in-person or by telephone, video feed, or other electronic means. Election officials would also be required to keep meticulous and publicly available records of the hearings, including information on the race of the challenged voters.

In addition, following the lead of Ohio, election services can be professionalized by offering regular or overtime pay to full-time

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2. *Id.* § 163-166.14(b), (d) (2011).
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5. *Id.* § 163-166.14(g) (2011). The State Board is empowered to make
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further administrative rules, which could include records regarding a voter's race. *Id.* § 163-166.14(i) (2011).

265. N.J. Stat. Ann. § 19:15-18.3 (West 2006); Page & Pitts, *supra* note 124, at 48.

1.

2. N.J. Stat. Ann. § 19:15-18.3 (West 2006).
3.
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5. Am. Civil Liberties Union of N.J. & League of Women Voters of N.J.,
6.

Making Every Vote Count: A Review of the 2008 Elections in New Jersey 6 (2009), *available at* http://www.aclu-nj.org/files/8713/1540/4573/051909voterpt.pdf.

268. *See* Page & Pitts, *supra* note 124, at 48 n.256 (citing Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009)).

public employees to serve as poll workers.[269] There is often very little opportunity or incentive for poll workers to adequately learn the law or improve election administration practices over time because they are volunteers or low-wage recruits with minimal training who work only a few times a year.[270] By using public employees, however, systematic and regularized trainings are easier to coordinate,[271] accountability programs are easier to implement,[272] and there are more opportunities to incentivize good poll workers to serve regularly and others to learn from their mistakes.[273] Instituting an enforceable ethics code for election officials may also improve elections management.[274] Finally, state legislatures can support the efforts of local administrators to deter misconduct by funding or requiring the development of effective standards and training methods.[275]

C. Congress

Congress also can act to protect the right to vote and curb poll worker discretion. If the discriminatory administration of voter ID laws continues, Congress can rely on evidence of racial discrimination to enact a nationwide ban on certain types of voter ID laws or a federal voter ID law that is far more lenient than many existing state laws in order to enforce the constitutional guarantees of

269. Ohio Rev. Code Ann. § 3501.28(G)(1) (West 2012); *see also* U.S. Election Assistance Commission, Successful Practices for Poll Worker Recruitment, Training, and Retention 7, 41–43 (2nd ed. 2007) *available at* http://www.eac.gov/assets/1/workflow_staging/Page/76.PDF (providing tips on recruiting government employees as poll workers).

270. Page & Pitts, *supra* note 124, at 37.
271. *Id.* at 47–48.
272. For example, a public employee who works on a number of elections

without any complaints could receive a monetary bonus, a meaningful credit tied to their full-time job, or a simple certificate acknowledging exceptional service. *See id.* at 47 (outlining the contours of a positive and negative incentives program).

273. *Cf. id.* at 37 ("Poll workers tend to be low wage employees working just a couple of days per year with limited training. . . . [A] poll worker makes generally unreviewable and unevaluated decisions, and rarely has the opportunity to learn from mistakes.").

274. *See* Christian M. Sande, *Where Perception Meets Reality: The Elusive Goal of Impartial Election Oversight*, 34 Wm. Mitchell L. Rev. 729, 743–48 (2008) (describing federal and statewide reforms to increase impartiality in election administration).

275. *See* Page & Pitts, *supra* note 124, at 41–48 (describing potentially effective training methods and punishments).

nondiscrimination.[276] The law could establish a uniform floor of widely available and acceptable non-photo IDs and create fairer election administration standards in all federal, state, and local elections.[277] A federal law would need to incorporate safety valve provisions that allow a person without ID to cast a regular ballot if the person simply signs an affidavit affirming his or her identity, and a New Jersey-like hearing scheme to allow a voter to appeal certain poll worker's decisions, as well as the poll worker training, monitoring, and professionalization measures described above. Alternatively, Congress can use its more limited powers under the Elections Clause to enact such reforms to ID requirements in federal elections.[278]

VI. LEGAL CHALLENGES TO VOTER ID LAWS

Government officials that fail to act to prevent abuses of discretion can be held liable in civil rights lawsuits.[279] The Supreme Court in *Crawford* "consider[ed] only the statute's broad application to all Indiana voters," not racial discrimination claims.[280] It therefore did not foreclose as-applied (or, perhaps, even facial) challenges to voter ID laws that are administered in a racially discriminatory

276. Congress can prophylactically regulate the administration of voter ID laws in all elections if it finds that states are violating the Reconstruction, Nineteenth, or Twenty-Sixth Amendments. *See* Oregon v. Mitchell, 400 U.S. 112, 129 (1970) (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments."); Gray v. Sanders, 372 U.S. 368, 379 (1963) ("The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women."); Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1216–18 (2012) (explaining how the Twenty-Sixth Amendment limits the ability of states to enact strict voter ID laws that discriminate based on age).

277. *See* Advancement Project et al., *Was I Denied My Right to Vote? Uncovering Flaws in Election Administration* 7, 16–17 (2009), *available at* http://www.voteraction.org/files/Report_R5_Final.pdf.

278. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding [federal] Elections . . . shall be prescribed in each State . . . but the Congress may at any time by Law make or alter such Regulations . . . ."); *Mitchell*, 400 U.S. at 130 (opinion of Black, J.) (noting Congress's expansive power over federal elections under the Elections Clause).

279. Individuals that engage in voter intimidation can also be held criminally liable. *See* 18 U.S.C. §§ 241–42 (carrying penalties of fines and imprisonment up to ten years).

280. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–03 (2008).

manner. Below is an outline of an as-applied challenge under the Fourteenth and Fifteenth Amendments, relying on actual evidence of the intentionally discriminatory operation of voter ID laws, as well as challenges based on Section 2 of the VRA, the Civil Rights Act of 1957, and HAVA, which, unlike constitutional claims, do not require proof of discriminatory intent.

This hypothetical class action would seek to enjoin the enforcement of a strict voter ID law that, as written, requires every voter to show ID, but in practice vests election officials and poll workers with the discretion to administer the law so as to specially harass or disenfranchise voters of color.[281] The putative class would consist of all qualified voters of color in the state or jurisdiction. Class representatives would include voters of color who were asked for ID, people of color who lack acceptable forms of ID, and any people of color who are otherwise intimidated by voter ID laws.[282] Organizations that help turn out and assist voters of color could serve as organizational plaintiffs. The hypothetical plaintiffs would have standing based on the cognizable injury of being subjected to more

281. Section 2 violations can also occur in states or jurisdictions with non- strict voter ID laws, under which not all voters are necessarily required to show ID, or even in states or jurisdictions without any voter ID laws. *See, e.g.*, United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 580–81 (E.D. Pa. 2003) (holding that, in a non-voter ID state, poll workers had discriminatorily asked for ID from Latino and non-white voters). However, any remedies in lawsuits challenging discriminatory practices in non-voter ID states would be purely administrative. *See id.* at 583–85 (ordering the appointment of Spanish-speaking election officials, the availability of voting materials in Spanish, and the appointment of federal election observers).

282. Unlike individual as-applied challenges, a class action lawsuit attacking the discriminatory administration of voter ID laws means that attorneys will face neither the problems of identifying notoriously hard to find voters who lack ID, nor the threat of mootness if the plaintiffs later obtain ID. *Cf.* Julien Kern, Note, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board*, 42 Loy. L.A. L. Rev. 629, 647–50, 659–60 (2009) (describing the limitations of individual and class action as-applied constitutional challenges premised on the hardships of people without ID attempting to vote). Unfortunately, and although beyond the scope of this article, the current Supreme Court appears much more hostile to class actions premised on allegations that a policy that provides broad discretion to local decision-makers can result in systematic discrimination. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (holding that the plaintiffs could not be certified as a class due to the lack of commonality behind the rationale for Wal- Mart supervisor's discretionary employment decisions made against individual plaintiff employees, despite significant statistical and anecdotal evidence of disparate treatment).

stringent voter qualifications than white voters.[283] Even if a voter of color is ultimately allowed to cast a ballot, the disparate treatment and harassment of the voter through the selective enforcement of voter ID laws is still injurious.[284] Finally, the defendants would include any local election administrators, poll workers, state executive authorities, including the Governor, Secretary of State, and the Attorney General, in charge of enforcing the voter ID law at issue, and all other governmental actors necessary to curb the law's racially discriminatory administration.[285]

A. Constitutional Claims

While the Supreme Court's analysis of a facial challenge in *Crawford* would certainly be relevant, a facial or as-applied racial discrimination claim operates under a much different constitutional framework. In *Crawford*, the Supreme Court applied the *Burdick* test, which is used to judge the constitutionality of election laws that impose only "nondiscriminatory restrictions" on the franchise.[286] The *Burdick* test is inapplicable, however, where a law allegedly is being

283. The failure to identify voters without the required ID at times presents standing problems. *See, e.g.*, Common Cause v. Billups, 504 F. Supp. 2d 1333, 1374 (N.D. Ga. 2007) (dismissing a challenge to a voter ID law due to a lack of standing where the plaintiffs could not identify any disenfranchised voters). Here, voters of color in states or jurisdictions where voter ID laws are used to harass them (or people of color like them) would undoubtedly have standing. *See, e.g.*, Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1261 (N.D.Miss.1987) (finding that the plaintiffs—unregistered black citizens and organizations assisting them—had standing to oppose a state prohibition on satellite registration that disproportionately burdened the ability of black people to register).

284. "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Ne. Fla. Chapter of the Associated. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) (citing Turner v. Fouche, 396 U.S. 346, 362 (1970)). *See, e.g.*, United States v. Berks Cnty., Pa. (*Berks County I*), 250 F. Supp. 2d 525, 540–41 (E.D. Pa. 2003) (holding that Latino voters' denial of equal access to the electoral system constitutes an irreparable injury); Harris v. Siegelman (*Harris II*), 695 F. Supp. 517, 525–26 (N.D. Ala. 1988) (describing how polling place laws resulted in disparate vote denial and the illegal intimidation of black voters).

285. *See Harris II*, 695 F. Supp. at 527 (finding the state government liable for the discriminatory administration of election laws by local officials, where the state failed to redress the present effects of past discrimination).

286. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190, 202–03 (2008) (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

applied differently to voters based on their race.[287] The Court in *Crawford* also considered only a facial challenge to the Indiana voter ID law at issue.[288] Facial challenges "often rest on speculation" and do not require precise facts about the actual application of the law at issue.[289] "A facial challenge must fail where the statute has a plainly legitimate sweep."[290]

The lawsuit envisioned here would rely heavily on facts that show how, as-applied, voter ID laws operate in a racially discriminatory and, ultimately, unconstitutional manner. Like literacy tests, voter ID laws can be constitutional on their face, but unconstitutional where evidence, not mere speculation, reveals that they are applied to racially discriminate.[291] Therefore, *Crawford* leaves open the constitutional challenge outlined below because a law that in fact results in racial discrimination is automatically "constitutionally suspect,"[292] and the racially "discriminatory application of voting tests [is to be] condemned."[293]

Under the Fourteenth and Fifteenth Amendments, evidence that a governmental action causes a racially disparate impact alone is insufficient to establish a constitutional violation.[294] The Constitution is violated only if officials intentionally differentiate between

287. "[W]hen a state election law provision imposes only 'reasonable, *nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (emphasis added) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

288. *Crawford*, 553 U.S. at 202–03.

289. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008).

290. *Crawford*, 553 U.S. at 202 (citation omitted) (internal quotation marks omitted).

291. *See, e.g.*, United States v. Louisiana, 225 F. Supp. 353, 385–86 (E.D. La. 1963) (noting differences between permissible literacy tests and impermissible understanding tests, which lack "a rational relation with the proper governmental objective of giving the vote only to qualified persons"), *aff'd* 380 U.S. 145 (1965); Davis v. Schnell, 81

F. Supp. 872, 876 (“The States have a right to prescribe a literacy test. . . . However, state action which denies due process or equal protection of the laws . . . is prohibited . . . .”), *aff’d mem.*, 336 U.S. 933 (1949).

292. Bolling v. Sharpe, 347 U. S. 497, 499 (1954).

293. South Carolina v. Katzenbach, 383 U.S. 301, 311–12 (citations omitted).

294. *See* Hunter v. Underwood, 471 U.S. 222, 227 (citing Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264–65 (1977)); City of Mobile, Ala. v. Bolden, 446 U.S. 55, 61–62 (1980).

individuals or groups based on their race.[295] A law or policy is unconstitutional if it was “conceived or operated as [a] *purposeful* devic[e] to further racial . . . discrimination.”[296] “According to the Supreme Court’s use of the disjunctive ‘or’ in the phrase ‘conceived or operated,’ . . . operation *alone* of a statute as a purposeful device to further discrimination may invalidate it.”[297] Therefore, under the burden-shifting test, statistics evidencing a “clear pattern” of *disparate treatment* that is “unexplainable on grounds other than race” can be sufficient to prove a prima facie case of intentional discrimination.[298] Only in the absence of a “stark” pattern of purposeful racial discrimination will courts apply the more demanding *Arlington Heights* factors to probe whether decision-makers deliberately adopted a law or policy with the intent to discriminate.[299] If the plaintiffs can establish a prima facie case that racial discrimination is a “substantial” or “motivating” factor in either the conception or operation of a law or policy, then the burden shifts to the government to show a legitimate, nondiscriminatory reason for election officials’ discriminatory practices.[300]

295. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 238–39 (holding that facially neutral laws are nonetheless constitutional even if they have racially disproportionate impact).

296. *Bolden*, 446 U.S. at 66 (alteration in original) (emphasis added) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149–50 (1971)).

297. Searcy v. Williams, 656 F.2d 1003, 1009–10 (5th Cir. 1981) (emphasis added) (quoting *Bolden*, 446 U.S. at 66), *aff’d mem. sub nom.*, Hightower v. Searcy, 455 U.S. 984 (1982).

298. *Vill. of Arlington Heights*, 429 U.S. at 266.

299. The *Arlington Heights* factors that guide courts in an Equal Protection analysis to probe for decision-makers' discriminatory intent are: (1) "the historical background of the decision"; (2) "[t]he specific sequence of events leading up to the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; and (4) the legislative history of the act. *Id.* at 268; *see also* Rogers v. Lodge, 458 U.S. 613, 617 (1982) (listing the factors designed to probe for discriminatory intent in vote dilution cases).

300. *See* Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) (invalidating Alabama's felon disenfranchisement law because plaintiffs adequately demonstrated a prima facie case of its racially discriminatory purpose and adverse impact); Turner v. Fouche, 396 U.S. 346, 361 (1970) (finding that if there is a "vacuum" of evidence rebutting the prima facie case of discrimination, "it is one which the State must fill, by moving in with sufficient evidence").

It is unclear what level of constitutional scrutiny courts will apply in voting cases alleging the systematic discriminatory administration of a voter ID law. Professor Tokaji suggests "that the government should be required to show the challenged practice is narrowly tailored to a compelling government interest. This high standard tracks that of constitutional race discrimination claims and will

To establish a prima facie case, the Supreme Court historically gives more deference to statistics indicating systematic racial discrimination where the "but-for" cause of the statistical disparity is the racially motivated administration of an otherwise uniform and race-neutral law.[301] The Court is particularly deferential to statistical evidence of racial discrimination in cases where decision-makers exercise broad discretion to treat an identifiable racial group in a disparate manner.[302] The Court has primarily elaborated on the use of statistics as prima facie evidence of unconstitutional conduct in the burden shifting test used in the

prevent the government from asserting pretextual justifications." *The New Vote Denial*, *supra* note 17, at 726.

301. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."); *Searcy,* 656 F.2d at 1009–10 (holding that a facially race-neutral school board appointment scheme unconstitutionally operated to exclude all black candidates); *Turner*, 396 U.S. at 360 (holding that evidence showing that black citizens composed 60 percent of the county, but only 37 percent of the names on the jury list was strong indicia of discrimination); Louisiana v. United States, 380 U.S. 145, 153 (1965) (relying on evidence showing that all black people, "even some with the most advanced education and scholarship, were declared by voting registrars" to have failed the understanding test); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (striking down a facially race-neutral law that as-applied systematically denied business permits to all Chinese launders).

302. *See, e.g.*, *Batson*, 476 U.S. at 96 (holding that a prosecutor's "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'"); *Searcy,* 656 F.2d at 1011 ("The segregative effect of the past has been perpetuated by this statute that permitted the original all-white Board absolute discretion in choosing its own new members."); *Turner*, 396 U.S. at 360 ("[T]he disparity [between the percentages of black residents on the jury list and those in the county as a whole] originated . . . in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria."); *Louisiana*, 380 U.S. at 150–51 (affirming district court determination that "[t]he interpretation test . . . vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not"); *Yick Wo*, 118 U.S. at 366 (finding the challenged law gave officials "not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent").

Even where there are no allegations of racial discrimination, the Court has decried voting related schemes that vest election officials with broad discretion because "once [the state] grant[s] the right to vote on equal terms, the [s]tate may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Bush v. Gore, 531 U.S. 98, 104–06 (2000) (holding that the Florida recount was unconstitutional because Florida failed to provide recount teams with objective state-wide criteria for interpreting ballot marks).

jury-selection cases.[303] However, both the burden shifting test and statistical evidence of disparate treatment have long been used to root out intentional discrimination in voting,[304] employment, [305] and other contexts.[306] Borrowing from *Castaneda v. Partida*,[307] a jury-selection case, three factors tend to demonstrate a prima facie case of the unconstitutional discriminatory administration of a facially neutral law:[308] (1) that the complainant's group "is a

303. *See* Castaneda v. Partida, 430 U. S. 482, 495 (1977) (invalidating a jury-selection process with a 2-to-1 disparity between Mexican-Americans in county population and those summoned for grand jury duty); Alexander v. Louisiana, 405 U.S. 625, 629–30 (1972) (holding a jury-selection process unconstitutional where black residents were underrepresented on the jury list because, despite the lack of any direct evidence that the commissioners had "consciously selected [jurors] by race," the commissioners had culled Blacks at "two crucial steps" in the process).

304. *See, e.g.*, *Hunter*, 471 U.S. at 228 ("Once racial discrimination is shown to have been a . . . factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."); United States v. Alabama, 192 F. Supp. 677, 680 (M.D. Ala. 1961) (finding that blacks were "invariably" required to complete a writing test whereas whites were not), *aff'd*, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) ("The essential inevitable effect of this

redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 [black] voters while not removing a single white voter or resident."); Davis v. Schnell, 81 F. Supp. 872, 876 (S.D. Ala. 1949) ("Board of Registrars required [black] applicants . . . to attempt to explain at least some article of the United States Constitution, while no such requirement was exacted of white applicants."); United States v. Ramsey, 353 F.2d 650, 655 (5th Cir. 1965) ("[I]t is frequently the comparison of applications [for registration] accepted and those denied which starkly reveals the unlawful activity."); United States v. Duke, 332 F. 2d 759, 765–66 (5th Cir. 1964) ("The state made no effort to refute the strong prima facie case [based on statistics showing that no black person was registered to vote] that the registration officials had not freely and fairly registered qualified [Blacks]." (citation omitted) (internal quotation marks omitted)).

305. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 337–40 (1977) (holding, in a Title VII case, that statistical evidence of disparate treatment can establish a prima facie case of intentional discrimination); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

306. *See, e.g.*, *Yick Wo*, 118 U.S. at 374 (applying the burden shifting test to hold unconstitutional the wholesale denial of business permits to Chinese launders).

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2. *Castaneda*, 430 U.S. at 482.
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5. Admittedly, applying the *Castaneda* standard to cases involving the
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discriminatory administration of voting qualifications is a fairly novel interpretation of Supreme Court precedent. *But see Duke*, 332 F.2d at 766

recognizable, distinct class, singled out for different treatment under the laws," (2) that the complainant's group is significantly underrepresented as the beneficiaries of a law or overrepresented as subject to a law, and (3) that, because decision-makers exercise extensive discretion, the challenged law "is susceptible of abuse or is not racially neutral."[309]

Here, strict voter ID laws present a compelling case. As written, the laws are neutral on their face and require everyone equally to show a particular form of ID before voting. However, although the full extent of the hypothetical plaintiffs' statistical and anecdotal evidence of discrimination is unknown, the evidence summarized heretofore demonstrates that voter ID laws generally are not universal requirements and instead disproportionately operate as qualifications for voters of color. Accordingly, there would be a substantial evidentiary basis for a court relying on the *Castaneda*

(applying the jury-selection burden shifting test in a challenge to discriminatorily administered voter qualifications); *The New Vote Denial*, *supra* note 17, at 725–26 (arguing that the jury-selection burden shifting test should be used in Section 2 disparate impact cases). However, because the Supreme Court has been willing to employ a comparably relaxed proof of discriminatory intent standard in both the voting and jury-selection context, it is clearly an apt comparison. *See* Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1137 (1989) (describing how the Supreme Court makes it more difficult to prove intent in housing and employment discrimination than in cases involving voting, education, and jury selection).

Additionally, the "nature" of the voter qualification process largely mirrors that of the juror-selection process as both require decision-makers to uniformly administer ostensibly universal and objective qualifications. *See* McCleskey v. Kemp, 481 U.S. 279, 295 n.14 (1987) (noting that, although statistics are unhelpful in constitutional challenges to the death penalty because there is no "common standard by which to evaluate all defendants who have or have not received the death penalty," the existence of homogeneous juror qualifications does permit such an inference based on statistics in jury-selection cases); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 & n.13 (1977) (noting, in a housing discrimination case, that it was "[b]ecause of the nature of the jury-selection task" that the Court in *Turner* and *Simms* found a "constitutional violation even when the statistical pattern [did] not approach the extremes of *Yick Wo* or *Gomillion*"). Indeed, the discriminatory administration of both the jury-selection and voter qualification processes violates the same individual right "to be considered for public service without the burden of invidiously discriminatory qualifications." Turner v. Fouche, 396 U.S. 346, 362 (1970); *see also* Louisiana v. United States, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . , which leave the voting fate of a citizen to the passing whim or impulse of an individual . . . .").

309. *Castaneda*, 430 U.S. at 494.

 factors to infer a prima facie case of unconstitutional discriminatory

intent.

As to the first two *Castaneda* factors, it is evident that poll workers selectively enforce the laws so that voters of color, an easily identifiable and constitutionally protected group, are significantly more likely than white voters to be asked to show ID or are otherwise subject to more stringent ID requirements. This quintessentially suggests the disparate treatment of similarly situated voters of color versus white voters and is abhorrent to the Constitution, which "prohibits [the] selective enforcement of the law based on

considerations such as race."[310] Again, the literacy tests cases are instructive. In *Lassiter*, the disparate impact of the literacy test on black people, a disproportionate number of whom were illiterate, was not enough alone to deem the test unconstitutional on its face.[311] However, in *Louisiana*[312] and *Schnell*,[313] the excessive discretion given to registrars and registrars' subsequent disparate treatment of black voters led the Court to strike down understanding tests as-applied. Other ostensibly universal voter qualifications were also held unconstitutional as-applied where registrars required nearly all Blacks and anywhere from just twenty-five percent[314] to fifty-three percent[315] of whites to meet the otherwise race-neutral requirements. Like voter ID laws, these preregistration requirements were

310. Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Rogers v. Lodge, 458 U.S. 613, 626 (1982) (holding that, although a state's at-large electoral system had a neutral origin, the system had been unconstitutionally used for invidious purposes).

311. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959) ("The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex . . . .").

312. 380 U.S. at 155 ("Most if not all of those white voters had been permitted to register on far less rigorous terms than [black] applicants whose applications were rejected.").

313. Davis v. Schnell, 81 F. Supp. 872, 876 (S.D. Ala.1949) ("The members of the defendant board generally required [black] applicants to explain or interpret provisions of the Federal Constitution, and did not generally require white applicants to do so.").

314. *See* United States v. Ramsey, 353 F.2d 650, 654–55 (5th Cir. 1965) (holding that a registrar had discriminatorily required all black applicants and only twenty-five percent of white registrants to take the interpretation test).

315. *See* United States v. Atkins, 323 F.2d 733, 736 (5th Cir. 1963) ("Whites were not always required to fill out application forms themselves or to understand the questions thereon. Of the applications surveyed, . . . 47 [percent] of the white applications accepted were filled out . . . by someone other than the person signing as the applicant . . . .").

selectively applied in a "manner which . . . impose[d] a heavier burden" upon voters of color because of their race.[316] In the New Mexico study, for instance, ninety-two percent of Latino male voters and only

sixty-nine percent of the average non-Latino voter were required to show ID.[317] This twenty-three point difference is comparable to the statistical disparities in past voting rights cases[318] and jury selection cases[319] where courts have found that statistics were compelling prima facie evidence of extensive and unconstitutional disparate treatment. “In the problem of racial discrimination, statistics often tell much, and Courts [must] listen.”[320]

Next, relying on the third *Castaneda* factor, credible anecdotes and plaintiff testimonials can bring “the cold numbers convincingly to life”[321] to show how election officials are wielding their

316. United States v. Ward, 222 F. Supp. 617, 620 (W.D. La. 1963), *rev’d on other grounds*, 349 F.2d 795 (5th Cir. 1965).

317. New Mexico Study, *supra* note 194, at 70.

318. *Cf.* United States v. Parker, 236 F. Supp. 511, 515–17 (M.D. Ala. 1964) (holding that the rejection of 26.9 percent of black applications and just 8.6 percent of similar white applications for registration constituted unlawful discrimination); United States v. Alabama, 192 F. Supp. 677, 680, 685–86 (M.D. Ala. 1961) (finding that no white applicant, but all black applicants were discriminatorily required to take a writing test, and that only half of black applicants passed), *aff’d*, 304 F.2d 583, 586 (5th Cir. 1962), *aff’d*, 371 U.S. 37 (1962); United States v. Penton, 212 F. Supp. 193, 196–97 (M.D. Ala. 1962) (“The defendants registered over 96 percent of the white applicants and rejected for registration over 75 percent of the [black] applicants . . . .”); *see also Atkins*, 323 F.2d at 736–38 (ordering certain prospective injunctive relief where registrars accepted ninety-two percent of white applications and just sixty-two percent of comparable black applications).

These cases were decided on constitutional and Section 1971 grounds before the clear establishment of the Constitution’s intent requirement, nonetheless, consistent with later Supreme Court precedent, the cases correctly define discrimination as “disparate treatment without an adequate basis.” *Ramsey*, 353 F.2d at 655.

319. Turner v. Fouche, 396 U.S. 346, 359 (1970) (holding that evidence showing that black citizens composed 60 percent of the county, but only 37 percent of the names on the jury list was strong indicia of discrimination).

320. United States v. Alabama, 304 F.2d 583, 586 (5th Cir.), *aff’d*, 371 U.S. 37 (1962); *see also* Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 n. 24 (1979) (“Proof of discriminatory intent must necessarily usually rely on objective factors . . . . The inquiry is practical. What a [decision-maker] is ‘up to’ may be plain from the results its actions achieve, or the results they avoid.” (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977))); Washington v. Davis, 426 U.S. 229, 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another.”).

321. Teamsters v. United States, 431 U.S. 324, 339 (1977).

discretion to single out otherwise qualified citizens of color.[322] Indeed, successful challenges to Louisiana's understanding test[323] and voucher test[324] relied on witness testimony to prove that these "universal" prerequisites were in fact applied differently to black versus white applicants. Here, anecdotes can likewise illustrate how "nondiscriminatory" voter ID laws are intentionally used by poll workers to unnecessarily burden only people of color,[325] to turn such people away,[326] to racially harass,[327] or to otherwise deter people of color from voting.[328] Further, voter ID laws that lack any effective method for a wronged citizen to redress election officials' arbitrary decisions are particularly susceptible to constitutional attacks.[329]

322. *See* Tanner, *supra* note 219, at 54–55 (2009) ("A careful litigator should act on the assumption that significant victim testimony is essential to . . . a successful [voting rights] case.").

323. *See* United States v. Louisiana, 225 F. Supp. 353, 383–84 (E.D. La. 1963) (describing anecdotes of how white applicants were given easier tests or were shown the tests' answers beforehand and of how black applications were unfairly rejected despite adequate answers), *aff'd*, 380 U.S. 145 (1965).

324. *See* United States v. Manning, 205 F. Supp. 172, 173 (W.D. La. 1962) (describing how at least eighteen black applicants had tried on seven different occasions to register to vote, but all but one were denied even the opportunity to fill out an application).

325. The unexplainable disparate treatment of voters of color constitutes a "[d]eparture[] from the normal procedural sequence," *Arlington Heights*, 429 U.S. at 267, and is strong circumstantial evidence of intentional discrimination. Hadnott v. Amos, 394 U.S. 358, 364 (1969) ("Unequal application of the same law to different racial groups has an especially invidious connotation.").

326. *See, e.g.*, United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 575 (E.D. Pa. 2003) (finding that poll workers illegally used disparate requests for ID to prevent Latinos from voting); *see also* Tanner, *supra* note 219, at 59 (summarizing trial court testimony of how poll workers in Springfield, Massachusetts were needlessly turning away Latino voters because they allegedly lacked proper ID).

327. Racial appeals and verbal racial harassment by election administrators constitute "contemporary statements by members of the decisionmaking body" that can be evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 268. *See also* United States v. Brown, 494 F. Supp. 2d 440, 450–55 (S.D. Miss. 2007) (finding that an election administrator's history of racial appeals was evidence of intentional discrimination), *aff'd*, 561 F.3d 420 (5th Cir. 2009); *Berks County II*, 277 F. Supp. 2d at 575 ("Poll officials . . . made hostile statements about Hispanic voters attempting to exercise their right to vote . . . .").

328. *See, e.g.*, Rogowski & Cohen, *supra* note 12, at 4 (finding that 17.3 percent of black nonvoters under age thirty, 8.1 percent of Latino nonvoter youth, and only 4.7 percent of young white nonvoters said that voter ID laws kept them from voting).

329. *Cf.* Louisiana v. United States, 380 U.S. 145, 152 (1965) (holding the understanding test unconstitutional in part because it failed to provide an

 Where there is viable evidence of discrimination, all three *Castaneda*

factors would point to a prima facie case of discrimination.

Once the hypothetical plaintiffs establish a prima facie case of discrimination, the government must offer a valid justification for the inequitable administration of the law at issue.[330] It is difficult to imagine any reasonable, nondiscriminatory explanation for why a strict voter ID law, which, as written, requires all voters to show ID, is in practice substantially more likely to be applied to voters of color than to white voters.[331] While the state can rely on concerns about voter fraud and election integrity to justify enacting a voter ID law, these concerns cannot explain a law's discriminatory administration.[332] "The fact that the law is fair upon its face is not a defense if it is administered in a discriminatory manner."[333] Mere assurances from election officials that a challenged law or policy is being fairly administered cannot overcome a prima facie case.[334] A valid constitutional claim also does not necessarily require proof of "malicious prejudice,"[335] and the presence of people of color as decision-makers—here, as poll workers—will not preclude a finding of unconstitutional discrimination.[336] Instead, a prima facie case is

"effective method whereby arbitrary and capricious action by registrars . . . may be prevented or redressed"); *see, e.g.*, *supra* Part III.B (describing the lack of effective methods for voters to challenge arbitrary or discriminatory decisions by poll workers who illegally request ID or who reject possibly valid ID).

330. *See supra* note 309 and accompanying text.

331. *See supra* Part IV.C (arguing there are no legitimate explanations for the racially biased, discriminatory application of strict voter ID laws).

332. *Cf.* Crawford v. Marion Cnty Election Bd., 553 U.S. 181, 204 (upholding voter ID statute insofar as it was a "nondiscriminatory" and "supported by valid neutral justifications").

333. Mitchell v. Wright, 154 F.2d 924, 927 (5th Cir. 1946).

334. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 94 (1986) ("The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties."); Turner v. Fouche, 396 U.S. 346, 361 & n.21 (1970) ("The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case.").

335. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.").

336. *See* Castaneda v. Partida, 430 U. S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."); *see also id.* at 503 (Marshall, J., concurring) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the

rebuttable by either discrediting the plaintiffs' statistical analyses[337] and anecdotal evidence[338] or by providing a compelling race-neutral reason for the disparate treatment of people of color under the law that is a valid exercise of election officials' discretion.[339] As in any disparate treatment case, the party alleging intentional discrimination carries the ultimate burden of persuasion.[340] However, if the prima facie case is not rebutted, then the law or practice will be held unconstitutional.[341]

The *Santillanes* case provides an excellent example of how actual evidence of racial discrimination might alter a court's view on the constitutionality of a voter ID law and greatly bolster the abstract claims raised by the district court.[342] In the original challenge to Albuquerque's voter ID ordinance, the district court relied on the mere *possibility* of the disparate treatment of similarly situated

group, even to the point of adopting the majority's negative attitudes towards the minority.").

337. *Cf., e.g.*, Bazemore v. Friday, 478 U.S. 385, 397–98 (1986) (explaining that, in Title VII cases, the defendant can rebut the plaintiffs' prima facie case of disparate treatment with its own counter analysis). The parties in voting rights cases also regularly present competing statistical data. *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d 113, 138 (D.D.C. 2012) (describing the parties' rival statistical studies about people of color's rates of ID ownership), *vacated*, 133 S. Ct. 2886 (2013) (mem.).

338. *See* Davis v. Gallinghouse, 246 F. Supp. 208, 211–13 (E.D. La. 1965) (rejecting a challenge to a preregistration voter ID law where the plaintiffs' own witness testified that the registrar operated the law on a non-discriminatory basis).

339. *Cf.* Hernandez v. New York, 500 U.S. 352, 361–63 (1991) (plurality opinion) (holding that a prosecutor who disproportionately struck prospective Latino jurors because they were bilingual had offered a "race-neutral"

explanation for his actions); *see also Adarand*, 515 U.S. at 226 (noting that strict scrutiny is designed "to 'smoke out' illegitimate uses of race" and prevent classifications based on "illegitimate racial prejudice or stereotype").

340. *See* Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("[T]he burden is . . . on the defendant who alleges discriminatory [jury] selection . . . to prove the existence of purposeful discrimination." (citation omitted) (internal quotation marks omitted)); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981) (holding that the ultimate burden is on the plaintiff in Title VII cases).

341. *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 363–64 (1970) (finding that the state had offered an insufficient explanation for the apparent racially discriminatory administration of its jury-selection process); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding a law unconstitutional where there was no reason given for its discriminatory enforcement).

342. Am. Civil Liberties Union of N.M. v. Santillanes, 506 F. Supp. 2d 598 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

voters as its basis for enjoining the ordinance.[343] The Tenth Circuit reversed the district court because it was "not persuaded that [the ordinance was] inherently confusing or difficult to apply . . . ."[344] Neither the district court, nor the Tenth Circuit considered the as-applied racial discrimination claim described above. Thus, actual evidence demonstrating that in practice the confusing nature of the ordinance leads to the disparate treatment of a constitutionally protected group, e.g., Latino voters, would make a much more compelling case for the Albuquerque ordinance's unconstitutionality.

Under the above framework, a court can find that a facially nondiscriminatory voter ID law is unconstitutionally administered in a discriminatory manner.[345] "[The Constitution] nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by [people of color] although the abstract right to vote may remain unrestricted as to race."[346] Thus, because the Constitution "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions,"[347] a court would likely enjoin a voter ID law's discriminatory enforcement where there is persuasive evidence of its unconstitutional application.[348]

343. *Id.* at 640–42 ("[I]t is possible for entire groups of voters to be arbitrarily disenfranchised . . . . Such arbitrary or random results do not advance a legitimate state interest in any meaningful way.").

344. Am. Civil Liberties Union of N.M. v. Santillanes, 546 F.3d 1313, 1323–25 (10th Cir. 2008).

345. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 616 (1982) (holding that while an at-large election scheme was racially neutral when adopted, it was ultimately maintained for unconstitutional purposes); United States v. Louisiana, 225 F. Supp. 353, 362–63 (E.D. La. 1963) (explaining that courts must look beyond a law's face to determine whether it is being fairly administered), *aff'd*, 380 U.S. 145 (1965).

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2. Lane v. Wilson, 307 U.S. 268, 275 (1939).
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5. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008) (alteration in
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original) (quoting Hayes v. Missouri, 120 U.S. 68, 71–72 (1887)).

348. Louisiana v. United States, 380 U.S. 145, 149–50 (1965) (striking down, as-applied and on its face, a discriminatorily administered understanding test). *See also* Davis v. Schnell, 81 F. Supp. 872, 876 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949) (holding a requirement that voters be able to explain various sections of the Constitution unconstitutionally discriminatory).

 B. Section 2 of the Voting Rights Act

Section 2 of the VRA prohibits voting qualifications and practices that intentionally discriminate[349] or that result in the denial or abridgement of the right to vote on account of race.[350] The statutory analysis of intent tracks the constitutional one, and courts have held that officials' intentional abuses of discretion are actionable under Section 2.[351] More importantly, however, Section 2 also prohibits "permanent" or "episodic" policies and practices that "result in the denial of equal access to any phase of the electoral process."[352] Further, unlike constitutional claims, Section 2 lawsuits do not require proof of intent, and a violation can generally be proven by "showing discriminatory effect alone."[353] Still, many courts now hold that "a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected."[354] This

349. "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State of political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or status as a language minority. 42 U.S.C. § 1973(a) (2012). "Plaintiffs must either prove [discriminatory] intent, or, alternatively, must show that the challenged system or practice

. . . results in minorities being denied equal access to the political process." McMillan v. Escambia Cnty., Fla., 748 F.2d 1037, 1046 (5th Cir. 1984) (quoting S. Rep. No.

97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205).
350. "A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of

their choice." 42 U.S.C. § 1973(b) (2012).
351. *See, e.g.*, United States v. Brown, 561 F.3d 420, 426–430 (5th Cir.

2009) (affirming district court finding of intentional discrimination against minority voters where officials illegally obtained the absentee ballots of majority group voters, prevented valid challenges to said ballots, and permitted improper voter assistance only for majority group voters); Dillard v. Town of N. Johns, 717 F. Supp. 1471, 1472 (M.D. Ala. 1989) (holding that a mayor intentionally discriminated against black, but not white candidates in distributing election forms); Harris v. Siegelman (*Harris II*), 695 F. Supp. 517, 522–27 (M.D. Ala. 1988) (finding a Section 2 violation where a poll worker appointment scheme was purposefully enacted and operated to preclude black people's appointment).

352. *Harris II*, 695 F. Supp. at 527 (citing S. Rep. No. 97-417, at 30).

353. Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (citing S. Rep. No. 97-417, at 28).

354. Gonzalez v. Arizona, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d

causation requirement largely reflects that a Section 2 discriminatory effects or "results" claim also involves a thorough examination of the "totality of the circumstances."[355]

The "results" or "totality of the circumstances" test entails "a searching practical evaluation of the past and present reality" to ascertain whether an electoral law or practice causes an inequality in electoral opportunities.[356] This evaluation begins with examining the nine "Senate factors," which include: (1) the history of voting-related discrimination in the state or jurisdiction; (2) the degree of racial polarization of

voting in the state or jurisdiction; (3) whether voting practices in the state or jurisdiction tend to "enhance the opportunity for discrimination"; (4) whether minorities have been excluded from the candidate slating process; (5) the extent to which minorities in the state or jurisdiction "bear the effects of [past] discrimination" in education, employment, health and other socioeconomic indicators that hinder their present ability to effectively participate in the political process; (6) the use of racial appeals in political campaigns; (7) whether minorities have been elected to public office in the state or jurisdiction; (8) whether local politicians and officials are responsive to the concerns of minorities; and (9) whether the policy underlying the state's or jurisdiction's law or practice is tenuous.[357] These factors are neither comprehensive nor exclusive, and there is

586, 595 (1997) (internal quotation marks omitted) (rejecting a Section 2 challenge to Arizona's voter ID law because there was no evidence of disparate rates of ID ownership between Latino and white citizens).

355. 42 U.S.C. § 1973(b) (2012). *See also* Ortiz v. City of Phila., 28 F. 3d 306, 310–12 (3d Cir. 1994) (describing the causation requirement as coming from the recognition that "there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote" (citing *Gingles*, 478 U.S. at 47)). However, a better way to think of the causation requirement is as recognition of the *Gingles* Court's three prerequisites to a Section 2 vote dilution claim attacking a districting scheme: (1) the minority group must be sufficiently large; (2) the minority group must be geographically compact enough to form a district; and (3) the majority votes sufficiently as a bloc to enable it to defeat the minority preferred candidate. 478 U.S. at 50–51. While these *Gingles* prerequisites are inapplicable in the context of vote denial claims attacking legal preconditions to voting, *Harris II* reinterpreted them as a causation requirement. *See Harris II*, 695 F. Supp. at 528 & n.11 (holding that the minority group must first show that it "experiences substantial difficulty in gaining full access to the political process," and "that the minority be able to demonstrate that its difficulty is in some measure attributable to the challenged election practice"); *see also The New Vote Denial*, *supra* note 17, at 724–25 (suggesting a similar conceptual framework).

356. *Gingles*, 478 U.S. at 45–46 (quoting S. Rep. No. 97-417, at 30). 357. *Id.* at 45.

no requirement that any particular number of factors be proven or that a majority of them point one way or the other.[358] Rather, the factors to be considered will vary depending on the nature of the claim presented.[359] Thus, Section 2 prohibits laws or administrative practices that "work in conjunction with racial bias in the community to allow . . . *decisions based on race or color*" to hinder people of color's exercise of the franchise.[360]

Most results cases involve vote dilution claims—e.g., challenges to at-large electoral districts—but the Senate factors have also been applied in vote denial cases,[361] including challenges to voter ID laws[362] and voter registration laws.[363] In considering recent Section 2 challenges to voter ID laws that were premised solely on disparate impact theory (i.e., that people of color are less likely to possess valid ID than white people), courts and commentators have looked to Senate factors that are helpful, but not wholly applicable or dispositive in a disparate treatment claim. For instance, in addressing a challenge to an Arizona voter ID law, the Ninth Circuit affirmed the use of three Senate factors: (1) the history of state-sanctioned racial discrimination in voting; (2) the extent to

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2. *Id.* at 45 (citing S. Rep. No. 97-417, at 28–29).
3.
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5. *Id.* at 45.
6.
7.

8. *See* Solomon v. Liberty Cnty., Fla., 899 F. 2d 1012, 1032 (11th Cir.
9.

1990) (en banc) (Tjoflat, C.J., concurring) (emphasis added).

361. "Section 2 prohibits all forms of voting discrimination, not just vote

dilution." *Gingles*, 478 U.S. at 45 n.10. Some courts have questioned the Senate factors' applicability outside of vote dilution cases. *See* Simmons v. Galvin, 575 F.3d 24, 42 n.24 (1st Cir. 2009) (citing commentary that "[w]hile *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge . . . [and] the Supreme Court's seminal opinion in *Gingles* . . . is of little use in vote denial cases." (quoting *The New Vote Denial*, *supra* 17, at 709)); *but see* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F. 3d 586, 596 n.8 (9th Cir. 1997) (noting that the Senate factors first arose in and, therefore, are applicable in the vote denial context).

Professor Tokaji suggests an alternative burden-shifting standard for Section 2 vote denial challenges to laws with a *disparate impact*. Curiously, however, his proposed standard relies in part on the jury-selection *disparate treatment* standard described in Part VI.A above. *See The New Vote Denial*, *supra* note 17, at 718–26.

362. *See* Gonzalez v. Arizona, 677 F. 3d 383, 405–07 (9th Cir. 2012) (affirming a district court decision that applied the Senate factors when denying a Section 2 results challenge to Arizona's voter photo ID law).

363. *See* Miss. State Chapter, Operation Push v. Allain (*Operation Push*), 674 F. Supp. 1245, 1262–68 (N.D. Miss. 1987) (applying each of the relevant Senate factors in a successful challenge to a voter registration law), *aff'd sub nom.* Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

which voting in the state is racially polarized; and (3) the extent to which members of the minority group continue to bear the effects of discrimination in such areas as education, employment, and health.[364] And at least one commentator suggests that courts should consider three additional factors: (4) the existence of voting-related practices that tend to enhance the opportunity for discrimination; (5) whether minorities have been elected to public office in the jurisdiction; and (6) whether the policy underlying the procedure is tenuous.[365]

Because the Senate factors vary depending on the nature of the claim, courts will likely find the following four factors material to a disparate treatment claim attacking a voter ID law that authorizes poll workers to discriminatorily abuse their discretion: (1) a state or jurisdiction's history of official discrimination; (2) the existence of discriminatory voting-related practices; (3) the present effects of educational and socioeconomic disparities on voters of color; and (4) the tenuousness of the policy justifications for the discriminatory aspects of the law.[366] Lastly, courts will use the Senate

1.
2. *Gonzalez,* 677 F.3d at 405–06 (quoting *Gingles*, 478 U.S. at 36–37).
3.
4.
5. *See* Kathleen Stoughton, Note, *A New Approach to Voter ID*
6.

Challenges: Section 2 of the Voting Rights Act, 81 Geo. Wash. L. Rev. 292, 321–27 (2013) (describing the applicability of the Senate factors in a Section 2 challenge to voter ID laws).

366. *See The New Vote Denial*, *supra* note 17, at 723–26 (suggesting reliance on a similar set of Senate factors for vote denial cases). The other Senate factors may also be probative, but not dispositive.

Racially polarized voting in the jurisdiction is unlikely to be dispositive in a vote denial case. *See, e.g.*, *Gonzalez*, 677 F.3d at 406–07 (noting the failure of the plaintiffs to adduce a causal connection between racially polarized voting and the voter ID law at issue); *Operation Push*, 674 F. Supp. at 1264 ("[V]oting behavior is not germane to the challenged voter registration procedures at issue here."). The candidate slating process is also irrelevant in vote denial cases. *See, e.g.*, *id.* at 1264 ("Any candidate slating process is clearly beyond the scope of the court's consideration of Mississippi's voter registration statutes.").

However, the use of racial appeals in political campaigns, particularly appeals that associate people of color with voter fraud, can explain the intent behind the challenged discriminatory practices. *See, e.g.*, United States v. Brown,

494 F. Supp. 2d 440, 450–55 (S.D. Miss. 2007) (finding that an election administrator's history of racial appeals was evidence of intentional discrimination), *aff'd*, 561 F.3d 420 (5th Cir. 2009). For example, Lt. Governor Dewhurst's 2012 Republican primary campaign related his support for voter ID to his support for restrictions on immigration. Attorney General's Proposed Findings of Fact and Conclusions of Law, *supra* note 115, ¶ 189.

Next, while the Court has said that the ability of voters of color to elect candidates of their choice is the "most important" factor in a Section 2 *vote dilution* claim, *Gingles*, 478 U.S. at 48 n.15, it is unlikely to be dispositive in a vote denial case. *See* Farrakhan v. Gregoire, 590 F. 3d 989, 1006–07 & n.25 (9th

 factors to examine the causation between the discretion vested in poll

workers and the discriminatory operation of the law.

1. History of Official State Discrimination

Under the first Senate factor, a court must consider "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."[367] Courts can adopt the factual findings of prior decisions to determine whether the state or jurisdiction has a history of purposeful discrimination.[368] A state or jurisdiction's history of permitting registrars to overtly administer literacy, understanding, good moral character, or voucher tests as tools of disenfranchisement can indicate that voter ID laws are merely covert means of achieving the same discriminatory results.[369] Therefore, states or jurisdictions with such histories are particularly vulnerable to claims that the voter ID laws enable comparable arbitrary abuses of discretion.

Cir.) ("Even if a majority of the elected officials in the jurisdiction were members of the minority group, it would still violate [Section] 2 to deny minority citizens the right to vote on discriminatory grounds."), *rev'd en banc on other grounds* 623 F.3d 990 (9th Cir. 2010) (per curiam).

Finally, "evidence demonstrating that . . . officials are unresponsive to the particularized needs of the members of the minority group" may also be important. *Gingles*, 478 U.S. at 45. Evidence of unresponsiveness includes legislators' willful disregard for a voter ID law's disparate impact on people of color, and election administrators' unwillingness to ease legal burdens on voters of color. *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012) (noting, in a Section 5 effects case, that the legislature failed to consider ameliorating amendments to the voter ID bill), *vacated*, 133 S. Ct. 2886 (2013) (mem.); *Operation Push*, 674 F. Supp. at 1265–66 ("The efforts of [B]lacks to become more involved in the political process . . . are frustrated by predominantly white voter registration officials . . . .").

367. *Gingles*, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205–06).

368. *See Operation Push*, 674 F. Supp. at 1250–51 (taking judicial notice of Mississippi's history of discrimination).

369. *See, e.g.*, *Operation Push*, 674 F. Supp. at 1257 (finding that evidence that registrars had historically used their discretion to discriminate was evidence that registrar discretion under the similar dual registration system at issue had a discriminatory effect); Harris v. Siegelman *(Harris II*), 695 F. Supp. 517, 527–29 (M.D. Ala. 1988) (finding that state laws regulating polling place practices were both historically and contemporaneously used to discriminate).

 2. Practices that Enhance the Opportunity for

Discrimination

Next, evidence of "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group" is a particularly important factor here.[370]

The primary practice or policy at issue here is the discretion inherent in voter ID laws that allows officials to make unappealable decisions that might be motivated by racial animus or permit unexplained disparate treatment. Numerous courts have held that Section 2 is violated when government officials make discretionary decisions or selectively enforce voting laws in a manner that results in racial discrimination even where there was no evidence of discriminatory intent.[371] Hence, voter ID laws that authorize poll workers to unilaterally and arbitrarily decide whether to ask a voter for ID, whether a proffered ID is acceptable, or whether a voter will

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2. *Gingles*, 478 U.S. at 45.
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5. *See, e.g.*, Toney v. White, 488 F.2d 310, 311–13 (5th Cir. 1973) (en
6.

banc) (holding that the registrar violated Section 2 where he overzealously, but unintentionally purged black and not white voters from the absentee voter rolls); Black v. McGuffage, 209 F. Supp. 2d 889, 892–94, 896–97 (N.D. Ill. 2002) (weighing statistical evidence that people of color were more likely to use defective voting systems to save a Section 2 claim from a motion to dismiss); Goodloe v. Madison Cnty. Bd. of Election Comm'rs, 610 F. Supp. 240 (S.D. Miss. 1985) (finding a Section 2 violation where an election board rejected 250 ballots cast by black voters when only four of those ballots were actually invalid); Brown v. Dean, 555 F. Supp. 502, 504–06 (D.R.I. 1982) (finding that the

decision to locate a polling site in an area substantially less accessible to the black community resulted in the "constructive disenfranchisement" of black voters); James v. Humphreys Cnty. Bd. of Election Comm'rs, 384 F. Supp. 114, 131–32 (N.D. Miss. 1974) (holding that poll officials had unlawfully assisted mostly white disabled voters and not mostly black illiterate voters); Coal. for Educ. in Dist. One v. Bd. of Elections of N.Y.C., 370 F. Supp. 42, 51–56 (S.D.N.Y.) (invalidating an election where discriminatory practices, including poll workers requiring ID only at polling sites servicing predominantly voters of color, resulted in delays and disparate vote denial), aff'd, 495 F.2d 1090 (2d Cir. 1974); Brown v. Post, 279 F. Supp. 60, 64–65 (W.D. La.1968) (finding that registrars illegally solicited absentee ballots from white, but not black voters). *Toney* and *Post* were decided before the 1982 amendments to Section 2 that removed the intent requirement, but the 1982 Senate Report, No. 97-417, cited both cases with approval. *See* Welch v. McKenzie, 765 F.2d 1311, 1315–16 (5th Cir. 1985).

"But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through [the] [Senate] factors that the challenged practice denies minorities fair access to the process." S. Rep. No. 97- 417, at 27 n. 117 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 207 n.117.

 receive a provisional or regular ballot, are very susceptible to Section

2 results-based challenges.[372]

Indeed, in two landmark Section 2 results cases, *Mississippi State Chapter, Operation Push, Inc. v. Allain*[373] and *Harris v. Siegelman*,[374] the plaintiffs successfully challenged state election laws that gave local election officials broad administrative discretion. In *Operation Push*, the plaintiffs attacked Mississippi's voter registration system, which gave county registrars "the uncontrolled discretion" to decide whether and when to hold satellite registration.[375] The *Operation Push* court held the system violated Section 2 in part because the absence of a standard for establishing satellite registration led to "widespread variations among counties in voter registration practices, . . . result[ing] in the unequal treatment of similarly situated persons."[376] In *Harris*, the plaintiffs alleged that two Alabama polling place laws—one requiring illiterate voters, who were mostly Black, to swear an oath in order to receive help from poll workers and another limiting voters to five minutes in the polling booth—were discriminatorily conceived and continued to operate in a discriminatory manner.[377] Although the two laws were race-neutral, the *Harris* plaintiffs established a results claim by showing that the laws lacked uniform rules of poll worker conduct and permitted poll workers to selectively enforce the laws to harass, intimidate, and deny the right to vote to black people.[378] Like voter ID laws, the laws

372. For example, the district court in *Ward* found that the registrar's practice of asking only applicants she did not know, i.e., black applicants, to meet an ID requirement and limiting acceptable forms of ID was unconstitutional. United States v. Ward, 222 F. Supp. 617, 618–20 (W.D. La. 1963). If poll workers today are engaging in comparable practices then this is certainly strong evidence of discrimination. *See, e.g.*, United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 575, 581 (E.D. Pa. 2003) (finding a Section 2 violation where poll workers requested photo ID only from Latino voters).

373. 674 F. Supp. 1245 (N.D. Miss. 1987).
374. Harris v. Siegelman (*Harris II*), 695 F. Supp. 517 (M.D. Ala. 1988). 375. *Operation Push*, 674 F. Supp. at 1257–59.
376. *Id.* at 1267–69. The court in *Operation Push v. Allain* considered the

issue of registrar discretion under the Senate factor addressing the tenuousness of policy justifications, but, whether considered there or elsewhere, the issue of discretion weighs heavily against many voter ID laws. *Id.*

377. *Harris II*, 695 F. Supp. at 520, 529.

378. *Id.* at 525 ("Witnesses detailed numerous instances of where white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters."); *see also id*. at 527–29 (holding that the plaintiffs had established a Section 2 results claim and

at issue in *Operation Push* and *Harris* gave officials some guidance about implementation and, as written, were equally applicable to all citizens. However, these laws violated Section 2 because, in practice, the laws were executed so as to specially burden black voters.

Here, plaintiffs would present evidence that lax oversight and inconsistent administrative procedures allow poll workers to apply voter ID laws differently to voters of color and that such "[u]nfettered discretion in [the implementation of voter ID] procedures unnecessarily restricts access to the political process."[379] Additionally, the discriminatory effects of voter ID laws can also be enhanced through the failure to hire and adequately train a racially diverse cadre of election officials[380] and the validation of partisan or private groups' discriminatory challenges to the identity of voters of color.[381]

3. The Effects of Socioeconomic Disparities

Third, a court would likely consider the extent to which voters of color "bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process."[382] Indeed, the "essence of a [Section] 2 claim" is whether a law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [people of color] and white voters to elect their preferred representatives."[383] Communities of color with lower than average

finding that striking down the two polling place laws and "establishing standards of conduct for poll officials would certainly help").

379. *Operation Push,* 674 F. Supp. at 1267.

380. *See, e.g.*, United States v. Berks Cnty., Pa. (*Berks County I*), 250 F. Supp. 525, 529–30, 539–40 (E.D. Pa. 2003) (holding that the failure to recruit and train Latino poll workers was evidence of a Section 2 violation); Harris v. Graddick (*Harris I*), 593 F. Supp. 128, 133 (M.D. Ala. 1984) ("[B]lack persons are grossly underrepresented among poll officials, with the result that polling places across the state continue to be viewed by many [B]lacks as areas circumscribed for whites and off-limits for [B]lacks.").

381. *See, e.g.*, United States v. Brown, 561 F.3d 420, 429 (5th Cir. 2009) (finding that minority voters were intimidated when a partisan official threatened to challenge their eligibility at the polls); *see also* Abby Rapoport, *Voter Intimidation in Houston? The View from Acres Homes*, Texas Observer (Oct. 29, 2010, 10:59 AM), http://www.texasobserver.org/floor-play/inside-one-harris- county-polling-station (describing how the actions of Tea Party activists led some elderly black voters to feel uncomfortable voting).

382. Thornburg v. Gingles, 478 U.S. 30, 44–45 (1985).

383. *Id.* at 47. The court in the Texas Section 5 case held that evidence demonstrating that the burdens of obtaining valid ID law fell hardest on the poor and that people of color are overrepresented amongst the poor were sufficient to

levels of literacy, educational attainment, or English language proficiency are more susceptible to discrimination and misinformation campaigns.[384] A 2012 Pew Research Center poll found that registered Latino voters in voter photo ID states are ten percent less likely than the average voter to know about the ID requirement.[385] Another recent study found that officials are less responsive to email inquiries about ID requirements when sent by Spanish-surnamed people.[386]

Moreover, successful plaintiffs would *not* necessarily need to prove that voters of color lack valid ID at lower rates than white voters.[387] While evidence of lower ID possession rates amongst people

establish the Texas law's discriminatory effect. Texas v. Holder, 888 F. Supp. 2d 113, 127 (D. D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (mem.).

384. *See, e.g.*, United States v. Berks Cnty., Pa. (*Berks County I*), 277 F. Supp. 2d 570, 580–81 (E.D. P.A. 2003) (finding that low socioeconomic indicators for the Latino community increased the likelihood of discrimination); Harris v. Siegelman (*Harris II*), 695 F. Supp. 517, 529 (M.D. Ala. 1988) (noting elderly and undereducated black citizens were reluctant to vote because of poll officials' intimidation through the selective enforcement of polling place laws). Notably, in 2012, the district court monitoring the RNC consent decree found that "[s]ome voters—especially in minority districts where the legacy of racism and history of clashes between the population and authorities has given rise to a suspicion of police and other officials—may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified, especially if the verification process becomes confrontational." Democratic Nat'l Comm. v. Republican Nat'l Comm., 671 F. Supp. 2d 575, 612 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012).

385. Mark Hugo Lopez & Ana Gonzalez-Barrera, *Latino Voters Support Obama by 3-1 Ratio, But Are Less Certain than Others about Voting*, Pew Research Center, Oct. 11, 2012, *available at* http://www.pewhispanic.org/files/2012/10/2012_NSL_latino_vote_report_FINAL_1 0-18-12.pdf.

386. *See* Julie K. Faller et al., *What Do I Need to Vote? Bias in Information Provision by Local Election Officials* 26–27 (Sept. 18, 2013) (unpublished manuscript), *available at* http://scholar.harvard.edu/files/jfaller/files/fallernathanwhite_voteridexp_sept2013.pdf.

387. *See* Stoughton, *supra* note 365, at 324–25 (explaining how lower levels of ID ownership amongst voters of color corresponds to a history of discrimination in education and employment). In fact, the production of admissible evidence of disparate rates of ID ownership has consistently proven to be difficult in civil rights lawsuits challenging voter ID laws solely based on the allegation that people of color own valid ID at rates lower than white people. *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 407 (9th Cir. 2012) ("Gonzalez alleged that 'Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to . . . cast a ballot,' but produced no evidence supporting this allegation."); *Texas*, 888 F. Supp. 2d at 138 ("[N]o party has submitted reliable evidence as to the number of Texas voters who lack photo ID, much less

of color would surely increase the disenfranchising effect of the discriminatory administration of a voter ID law, this hypothetical suit's ultimate success would not hinge on offering such data. Even if all voters possess ID at equal rates, a voter ID law that leads to poll workers waiving the ID requirement for white voters considerably more often than for voters of color axiomatically results in racial discrimination.[388]

4. Tenuous Policy Justifications

The final pertinent factor is whether the policy underlying the state or jurisdiction's use of voter ID laws is tenuous.[389] "The tenuousness of the justification may . . . indicate that the procedure is unfair."[390] Here, while it is significant to note that voter ID laws are justified as fraud prevention measures, the lack of substantiated evidence of in-person fraud alone does not demonstrate that fraud is a mere pretext for intentional discrimination.[391] The Supreme Court has instructed courts to give considerable deference to states' valid interest in ensuring electoral integrity, even where there is no proof that fraud is a substantial issue.[392]

the rate of ID possession among different racial groups."); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006) ("Apparently, despite their best efforts, Plaintiffs have been unable to uncover any evidence of racial discrimination flowing from the enforcement of [the Indiana voter photo ID law]."). *But see* South Carolina v. United States, 898 F. Supp. 2d 30, 40 ("[T]he evidence reveals an undisputed racial disparity [in photo ID possession rates] of at least several percentage points . . . .").

388. *See, e.g.*, United States v. Ward, 349 F.2d 795, 799 (5th Cir. 1965) ("Since [the registrar] knows most of the white people in the parish and very few of the [black people], this policy [of waiving the ID requirement for people she knows] alone inevitably operated to discriminate . . . ."); *cf. Texas*, 888 F. Supp. 2d at 138–43 (finding that a voter ID law is discriminatory, even assuming equal rates of ID ownership, where it uniquely burdens the poor who are disproportionately people of color).

389. Thornburg v. Gingles, 478 U.S. 30, 37 (1986).

390. Stoughton, *supra* note 365, at 326 (citing United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984)).

391. Explicit statements from prominent officials confirming that the prevention of voter fraud was a mere pretext for discrimination are rare, but such statements can bolster discrimination claims. For example, the former state GOP chair's admission that changes to Florida's early voting were designed to discourage black voters and that fraud prevention was a "marketing ploy" is evidence of fraud as a pretext for discrimination. *See* Firestone, *supra* note 105.

392. For example, the court reviewing the Texas voter ID law under Section 5 rejected "the argument, urged by the United States at trial, that the absence of documented voter fraud in Texas somehow suggests that Texas's

However, the provision of significant discretion cannot be explained away as simply a means of preventing fraud. Courts often are reluctant to find that vesting local officials with broad discretion is justifiable when that discretion is plainly used to discriminate. In 2007, for instance, a district court considering a challenge to discriminatory election administration practices—whereby poll workers illegally only offered help to voters of one race—held that "[t]enuousness is . . . manifest, for the practices in which defendants engaged have no arguably legitimate purpose."[393] Still, defenders of voter ID laws may argue that: (1) as written, the laws define the acceptable types of ID, and require all voters to show such ID;[394] (2) poll worker "discretion is necessary because local officials are more familiar with local conditions;"[395] and (3) alternative measures would be too costly, cumbersome, or otherwise undermine efficiency.

The defendants' prospective arguments are unavailing, however. The first argument can be countered with the extensive evidence from Part IV, which demonstrates that, contrary to how the law is written, the discretion that the law vests in poll workers regularly leads to discrimination. The second argument can be rebutted by showing that local discretion is ripe for abuse and is unnecessary because reasonable alternatives, as described in Part VI, exist.[396] Concerning the third argument, while checks on discretion

interests in protecting its ballot box and safeguarding voter confidence were 'pretext.' A state interest that is unquestionably legitimate for Indiana—without *any* concrete evidence of a problem—is unquestionably legitimate for Texas as well." *Texas*, 888 F. Supp. 2d at 125.

393. United States v. Brown, 494 F. Supp. 2d 440, 484 (S.D. Miss. 2007), *aff'd,* 561 F.3d 420 (5th Cir. 2009). While ultimately reversed on appeal, the *Santillanes* district court also held that a voter ID law that led to "arbitrary or random results [did] not advance a legitimate state interest in any meaningful way." Am. Civil Liberties Union of N.M. v. Santillanes, 506 F. Supp. 2d 598, 640 (D.N.M. 2007), *rev'd*, 546 F.3d 1313 (10th Cir. 2008).

394. *See* Am. Civil Liberties Union of N.M. v. Santillanes, 546 F. 3d 1313, 1323–25 (holding that a voter photo ID law was not unconstitutionally vague on its face, despite giving broad discretion to election judges, because the law contained a non-exclusive list of acceptable ID, and the terms "current" and "valid" were not inherently confusing or difficult to apply).

395. *See* Miss. State Chapter, Operation Push v. Allain (*Operation Push*), 674 F. Supp. 1245, 1267 (N.D. Miss. 1987), *aff'd sub nom*. Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991) (rejecting arguments that registrar discretion was necessary in the implementation of satellite voter registration programs).

396. The risk of racial discrimination in voting "exists whenever local authorities enjoy unlimited discretion to administer elections." Cunningham, *supra* note 20, at 399. *See, e.g.*, *Operation Push*, 674 F. Supp. at 1267–68 ("[T]he

will create more bureaucracy and limit the kinds of voter ID laws that are enacted, our Constitution enshrines "the right to exercise the franchise in a free and unimpaired manner,"[397] and this right ultimately means "any racial discrimination in voting is too much."[398] "Mere inconvenience to the state is no justification for burdening citizens in the exercise of their protected right . . . to vote."[399] Furthermore, any argument that the need to prevent fraud is absolute relies on the utterly false presumption "that racially discriminatory abuse of discretion by local officials . . . is *not* voting fraud."[400] As Part II makes evident, racial discrimination in voting is historically the most pervasive kind of fraud, and states or jurisdictions with a history of such discrimination have an affirmative obligation to stamp it out.[401]

5. Causation

Even if the Senate factors point toward a Section 2 violation, the potential plaintiffs still must show that the challenged law actually causes unequal electoral access for voters of color.[402] A voting law causes racial discrimination where two elements are present:

court finds no legitimate reason for failure to require polling place registration on a regular basis.").

397. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).
398. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).
399. *Operation Push*, 674 F. Supp. at 1266.
400. Cunningham, *supra* note 20, at 397. Further, "in order to effectively

combat [such] election fraud, guidelines must be given to the states to limit the plenary discretion of local officials in administering elections." *Id*. at 403.

401. *See* Harris v. Siegelman (*Harris II*), 695 F. Supp. 517, 527 (M.D. Ala. 1988) ("[A] government guilty of discrimination must 'do more than abandon its prior discriminatory purpose,' the government has the 'affirmative responsibility' of also redressing any adverse effects of its discriminatory conduct." (citations omitted) (quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979))); Lapidus, *supra* note 56, at 104–09 (collecting cases and discussing states' affirmative duty to redress racial discrimination in voting).

402. The failure to show causation, e.g., how a law substantially burdens voters of color or that election officials will use their discretion under the law in a discriminatory manner, can defeat a Section 2 claim. *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 407 n.34 (ruling that there was no causation because the plaintiffs failed to show how the voter ID law would lead Latino voters to fear discrimination); Brown v. Detzner, 895 F. Supp. 2d 1236, 1255 (M.D. Fla. 2012) (denying a preliminary injunction to prevent the reduction in early voting hours because while "the new law gives the county supervisors limited discretion to set the number of early voting hours, . . . Plaintiffs have provided no evidence to suggest that the supervisors will set voting hours in a discriminatory manner . . . .").

"(1) a voting scheme or process that allows racial bias to be expressed and (2) racial bias in the voting community."[403] The causal connection can be drawn from evidence showing how the discretion afforded election officials under voter ID laws (i.e., a voting scheme) works in conjunction with their explicit or implicit racial biases to cause voters of color to face unfair barriers. Regression analysis can demonstrate that the disparate treatment of voters of color evident in survey data could only result from racial discrimination.[404] Most importantly, the plaintiffs must show how the racial administration of the challenged voter ID law denies voters to color the equal opportunity to vote or to otherwise cast effective ballots. For example, racially disparate requests for ID very likely result in voters of color disproportionately casting provisional ballots, which, because such ballots are much less likely to be counted, can cause racially disparate rates of vote denial.[405] Of further importance are voter testimonials about their reluctance to go to the polls for fear of disparate treatment,[406]

403. Solomon v. Liberty Cnty., 899 F.2d 1012, 1031–32 (11th Cir. 1990). *See also* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 596 (9th Cir. 1997) (dismissing a Section 2 challenge to a voter property requirement where "the parties stipulated to the absence of circumstances which might indicate discrimination under virtually all of [the Senate] factors").

404. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 394 (1986) (using regression analysis as a method for demonstrating that statistical disparities are the result of intentional racial discrimination in Title VII disparate treatment cases). Again, courts are not strangers to using regression and other statistical analyses in Section 2 cases. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 61–74 (1986) (accepting the use of multiple regression analysis as evidence for racially polarized voting in North Carolina).

405. *See* Boston Study, *supra* note 17, at 31 (hypothesizing that one harm associated with the racial administration of voter ID laws is that "minorities may be disproportionately deprived of the right to cast an effective ballot. . . . [P]rovisional balloting induced by ID requirements may possibly be associated with a lower rate of valid voting than provisional balloting induced by non-ID requirements. The potential of racially differential exposure to this lower rate is thus troubling."); *cf., e.g.*, *Gonzalez*, 677 F.3d at 442–43 (Pregerson, J., concurring in part and dissenting in part) ("Latino voters were overrepresented by 200 [percent] to 500 [percent] in ballots that were uncounted because of insufficient identification.").

406. *See, e.g.*, United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003) ("The adverse impact of hostility toward minority voters on equal access to polling places is severe."); Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1250 (taking judicial notice of "the effects of the historical official discrimination in Mississippi presently impede[d] black voter registration and turnout"), *aff'd sub nom.* Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991); Harris v. Graddick

statistical studies showing that voter ID laws positively correlate with depressed turnout,[407] or surveys like the 2012 poll of voters under age thirty showing that black youth are 3.5 times less likely to vote than white youth due to their perceived lack of proper ID.[408] From this evidence, courts can find that the racial administration of voter ID laws unlawfully infringes upon people of color's right to vote and causes a violation of Section 2.[409]

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In sum, strict voter ID laws, which, as written, should apply equally to everyone, but that nonetheless allow poll workers to selectively or discriminatorily enforce the law, are vulnerable to a Section 2 claim. The totality of the circumstances would weigh heavily in favor of a court ruling that, in practice, the discretion inherent in many voter ID laws results in unlawful racial discrimination.

C. Federal Enforcement of Section 1971 and HAVA

The Justice Department is specifically empowered to enforce the Civil Rights Act of 1957, codified as Section 1971 of Title 42 of the United States Code (Section 1971), and HAVA, which both prohibit discrimination in election administration. Section 1971 requires that:

No person acting under color of law shall . . . in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same . . . political

(Harris I), 593 F. Supp. 128, 131 (M.D. Ala. 1984) (finding that instances of voter intimidation discouraged black people from voting).

407. *See, e.g.*, de Alth, *supra* note 4, at 199–200, 202 ("[V]oter ID laws impose a real burden on voter turnout.").

408. Rogowski & Cohen, *supra* note 12, at 4.

409. *See, e.g.*, Stewart v. Blackwell, 444 F. 3d 843, 878–79 (6th Cir. 2006) (remanding Section 2 claim based on statistical data and regression analysis showing that black voters were much more likely to use deficient voting systems); Boston Study, *supra* note 17, at 31 (discussing potential basis of and causation in a vote denial claim).

 subdivision who have been found by

State officials to be qualified to vote.[410]

This provision was initially enacted and used to combat the selective applicability of literacy tests.[411] The Justice Department can likewise sue to enjoin voter ID laws or any other procedure where there is a "pattern or practice" of the disparate treatment of similarly situated voters.[412] Yet, whether Section 1971 contains a private right of action[413] or extends beyond racial discrimination[414] is unresolved.

Additionally, the photo and non-photo ID requirements within HAVA must be implemented "in a uniform and nondiscriminatory manner."[415] The Justice Department can certainly enforce this guarantee,[416] and at least one court has found a private right of action in HAVA.[417] However, only a claim contesting the

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2. 42 U.S.C. § 1971(a)(2)(A) (2012).
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5. *See* South Carolina v. Katzenbach, 383 U.S. 301, 312–13 nn.11–15
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(1966) (collecting cases showing discriminatory application of literacy tests).

412. 42 U.S.C. § 1971(e) (2012).

413. *See* 42 U.S.C. § 1971(c) (2012) ("Whenever any person has engaged . . . in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States . . . a civil action . . . ."). *Compare* Schwier v. Cox, 340 F. 3d 1284, 1294–97 (11th Cir. 2003) ("[T]he provisions of [S]ection 1971 . . . may be enforced by a private right of action under [Section] 1983."), *with* McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000) ("Section 1971 is enforceable by the Attorney General, not by private citizens.").

414. Section 1971 has been used to declare the disparate treatment of women and students illegal. *See, e.g.*, Ball v. Brown, 450 F. Supp. 4, 7 (N.D. Ohio 1977) (analyzing allegations of gender-based voting discrimination under Section 1971); Frazier v. Callicutt, 383 F. Supp. 15, 20 (N.D. Miss. 1974) (ruling that Section 1971 prohibited the application of stricter standards for black students in registration for voting); Sloane v. Smith, 351 F. Supp. 1299, 1304–05 (M.D. Pa. 1972) (holding that college students were deprived of their right to vote by residency requirement policies); Shivelhood v. Davis, 336 F. Supp. 1111, 1115 (D. Vt. 1971) (holding that requiring students to fill out additional questionnaires regarding their domicile violated Section 1971). However, a Section 1971 challenge to

Indiana's voter ID law premised solely on the alleged disparate treatment of in-person versus absentee voters was explicitly rejected by the *Crawford* district court. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 839–42 (S.D. Ind. 2006).

415. 42 U.S.C. § 15483(b)(1) (2012).

416. 42 U.S.C. § 15511 (2012) ("The Attorney General may bring a civil action against any State or jurisdiction . . . to carry out the uniform and nondiscriminatory election technology and administration requirements . . . of this title.").

417. *See* Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565, 572 (6th Cir. 2004) (finding a private right of action in HAVA); Am. Civil Liberties Union of Minn. v. Kiffmeyer, No. 04-CV-4653, 2004 WL 2428690, at *2 (D. Minn.

disparate treatment of voters of color under HAVA can be brought using this provision, not a lawsuit challenging a state's voter ID law.[418]

D. Judicial Remedies

Ultimately, in the event that a district court rules that a voter ID law operates in violation of constitutional or statutory rights, then the court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[419] The scope of the remedy or decree will depend on the extent to which the law at issue is found to either cause or permit racially discriminatory practices. There are at least three routes that a court can take: (1) enjoin the future enforcement or enactment of any voter ID law; (2) block the law at issue, but define the contours of an acceptable, nondiscriminatory replacement law; and (3) avoid enjoining the law, but mandate other actions to seek the fair administration of the law.

First, to declare all voter ID laws unlawful, the plaintiffs must demonstrate that the laws can never be enforced in a race-neutral manner because conscious or implicit biases always infect election officials' decisions and no reasonable alternative voter ID regime could prevent or substantially reduce discrimination.[420] The lack of any reasonable alternatives could be demonstrated by relying on the Boston Study, which found that poll worker trainings

Oct. 28, 2004) (granting relief in HAVA-based lawsuit brought by private plaintiffs); *but see* Brunner v. Ohio Republican Party, 129 S. Ct. 5 (2008) (reversing the issuance of an injunction because the plaintiffs were unlikely to successfully argue that HAVA includes a private right of action).

418. Boston Study, *supra* note 17, at 29–31 (noting the legal implications of the study).

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2. Louisiana v. United States, 380 U.S. 145, 154 (1965).
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5. In *United States v. Salerno*, the Supreme Court stated, "[a] facial
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challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). *Compare* Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 335–37 (1970) (declining to strike down a facially race-neutral, but discriminatorily administered jury selection law because federal courts are able to "fashion detailed and stringent injunctive relief that will remedy any discriminatory application of the statute"), *with* United States v. Louisiana, 225 F. Supp. 353, 391–92 (striking down the understanding test because it was "incapable of equal enforcement"), *aff'd*, 380 U.S. 145 (1965).

are largely an ineffective method of curbing abuses of discretion.[421] Both the Boston and New Mexico studies also found that a racially diverse poll worker force does not deter selective enforcement of the law.[422] Additionally, in light of such studies, the court must be satisfied that the alleged universal potential for discrimination considerably outweighs the legitimate interests of states in ensuring election integrity.[423] Therefore, like Louisiana's understanding test, strict voter ID laws that lack objective administrative standards—such as the laws in Alabama, Alaska, and Missouri[424]—and that are discriminatorily enforced are potentially unconstitutional on their face and as-applied.

421. *See* Boston Study, *supra* note 17, at 29 ("Although the matter deserves further study, we are skeptical that easy-to-administer training programs are likely to be an effective option in the current United States. The new training program . . . did not mitigate the associations we observed.").

422. *Id.* at 8–9; New Mexico Study, *supra* note 194, at 71.

423. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191–198 (2008) (holding that states may enact voter ID laws to deter and detect voter fraud, to improve and modernize election procedures, and to preserve voter confidence).

424. *Voter Identification Requirements*, *supra* note 2 (citations omitted). Alabama, Alaska and Missouri explicitly permit poll workers to waive ID requirements on Election Day if poll workers "know" the voter. *Id*. These laws likely run afoul of the Voting Rights Act's prohibition on "any test or device" that requires a voter to "prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973aa(b)(4) (2012). The unfortunate reality of the segregated social lives of many Americans was largely the basis upon which the court in United States v. Ward, 349 F.2d 795, 807 (5th Cir. 1965), and later Congress, Davis v. Gallinghouse, 246 F. Supp. 208, 217 (E.D. La. 1965), determined that the voucher test was discriminatory and illegal as-applied. The continued potential for such voucher tests to result in the disparate treatment of voters of color by certain poll workers is evident in light of a recent Reuters/Ipsos online poll finding that forty percent of white Americans do not have friends of another race. Lindsay Dunsmuir, *Many Americans Have No Friends of Another Race: Poll*, Reuters (Aug. 8, 2013, 10:05 AM) http://www.reuters.com/ article/2013/08/08/us-usa-poll-race-idUSBRE97704320130808. Perhaps unsurprisingly, the South has the lowest percentage of people with more than five acquaintances from races other than their own. *Id*.

Further, and in light of the ban on voucher tests, the Missouri law's lack of any non-voucher-like safety valve provision that permits citizens without ID to cast a regular or provisional ballot, Mo. Rev. Stat. § 115.427 (2006), may make it constitutionally suspect on its face. *See Crawford*, 553 U.S. at 199 (upholding a photo ID law in part because "[t]he severity of [the] burden [of a photo ID requirement] is mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted."). *But see id.* at 209 (Scalia, J., concurring) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.").

Alternatively, and more likely, if the court finds that a strict voter ID law is being discriminatorily applied, then the court may enjoin only that law. However, in recognition of a state or jurisdiction's valid governmental interests in operating a nondiscriminatory voter ID law,[425] the court can direct the state legislature to amend the law in order to include specific remedial elements, such as those described in Part V.B, that limit poll worker discretion. For example, the district court in *Operation Push*, which struck down a Mississippi voter registration law that gave registrars broad discretion to conduct satellite registration, ordered the state legislature to enact remedial legislation that included specific statutory

safeguards to ensure compliance with the VRA.[426] The remedial legislation went into effect only after the court determined that the legislation adequately remedied the violation.[427] In affirming this approach, the Fifth Circuit noted that states have principal dominion over election administration and that independent judicial remedial action is appropriate only where a state fails to comply with judicial determinations.[428]

Third, if the court finds that the episodic practices of election officials, but not the voter ID law itself, are violative of civil rights law, then it can attempt to devise a remedial plan to ensure the homogenous application of the law.[429] Initially, a court can order the

425. *See, e.g.*, Texas v. Holder, 888 F. Supp. 2d 113, 125–26 (D.D.C. 2012) (recognizing the applicability of *Crawford* in a Section 5 case, even where the challenged voter ID law was ultimately held to have a racially discriminatory effect), *vacated*, 133 S. Ct. 2886 (2013) (mem.).

426. Miss. State Chapter, Operation Push v. Allain (*Operation Push*), 674 F. Supp. 1245, 1269–70 (N.D. Miss. 1987), *aff'd sub nom*. Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

427. Miss. State Chapter, Operation Push, Inc. v. Mabus (*Mabus*), 717 F. Supp. 1189, 1191–93 (N.D. Miss. 1989), *aff'd*, 932 F.2d 400 (5th Cir. 1991). The plaintiffs argued that the remedial legislation did not go far enough and asked the court to require mail-in registration. *Id.* at 1190. The court rejected this argument, however, noting that while "better" alternatives might exist, the court was required only to "ascertain whether the current voter registration procedures violate Section 2 of the Voting Rights Act. . . . [T]his court can discern—based solely on the evidence presented in this case—no constitutional or statutory flaws in the 1988 legislation." *Id.* at 1192.

428. *Mabus*, 932 F.2d at 405–06.

429. Section 2 "prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207. "'[T]he ultimate test [is] . . . whether, in the particular situation, the (episodic) practice operated to deny the minority (plaintiff) an equal opportunity to participate and to elect

appointment of more people of color as poll workers, the development and use of effective training methods, and setup judicial sanctions for noncompliance.[430] However, the Boston and New Mexico Studies suggest that these options are unlikely to provide adequate remedial relief, and therefore are no relief at all. Going further then, a court can order poll workers to accept an expanded list of photo or non-

photo IDs that people of color are more likely to possess,[431] and appoint federal observers to monitor compliance with any remedial order.[432] If, despite these actions, election officials continue to discriminate, a court can also temporarily appoint a Referee-Election-Administrator and bar the offending election officials from managing or participating in future elections.[433]

candidates of their [sic] choice.'" United States v. Jones, 846 F. Supp. 955, 964 (S.D. Ala. 1994) (quoting S. Rep. No. 97-417, at 30).

430. *See, e.g.*, United States v. Berks Cnty. (*Berks County II*), 277 F. Supp. 2d 570, 583–85 (E.D. Pa. 2003) (ordering the appointment of Spanish-speaking poll workers, and the appointment of federal election observers); Harris v. Graddick (*Harris I*), 593 F. Supp. 128, 132–35 (M.D. Ala. 1984) (requiring the hiring of more black poll workers); *see also supra* Part V.A (outlining ameliorative administrative actions).

431. *See, e.g.*, Am. Civil Liberties Union of Minn. v. Kiffmeyer, No. 04-CV-4653, 2004 WL 2428690, at *3–4 (D. Minn. Oct. 28, 2004) (modifying state law so as to require registrars to accept tribal photo ID cards for the purpose of Election Day Registration from Native Americans who do not reside on reservations); United States v. Ward, 349 F.2d 795, 806–07 (5th Cir. 1965) (requiring a registrar who was discriminatorily administering a voucher test to accept a broader range of ID); United States v. Manning, 205 F. Supp. 172, 174–75 (W.D. La. 1962) (ruling that it was unconstitutional for a registrar not to accept a broad range of "reasonable proof of identity" for black citizens attempting to register to vote); *see also* South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012) (requiring poll workers to permit people with non-photo voter registration cards to vote if they sign an affidavit citing the reason that they have not obtained a photo ID).

432. 42 U.S.C. § 1973a(a) (2012) (permitting the appointment of federal observers as remedies for violations of the Voting Rights Act). *See, e.g.*, *Berks County II*, 277 F. Supp. 2d at 581–83 (ordering the appointment of federal observers).

433. 42 U.S.C. § 1971(e) (2012); *see also* United States v. Brown, 561 F.3d 420, 437–38 (5th Cir. 2009) (holding that, where county officials were intentionally manipulating state election laws to the detriment of minority voters, the court properly appointed a Referee-Administrator). In *Brown*, the court appointed a referee only when officials continued to discriminatorily administer the laws, even after the court had held that their actions violated Section 2. 561 F.3d at 430–31.

The district courts have myriad options for employing their equitable powers in pursuit of reasonable remedies that both respect valid governmental interests and protect the right to vote.

VII. CONCLUSION

The history of American democracy is a contested one, and both literacy tests and voter ID laws are consistent with this story of broad expansions of the franchise followed by swift contractions. In order to circumvent the Reconstruction Amendments, legislators used the specter of voter fraud to give election officials the discretion to discriminatorily implement facially race-neutral literacy, understanding, good moral character, and voucher tests. Although these tests were banned by the VRA, troubling new evidence suggests that voter ID laws are now being discriminatorily and selectively enforced in a similar manner.

Voter ID laws therefore reflect our national legacy of racial discrimination in voting and the continued willingness of dominant political classes to manipulate the electorate to maintain power. Even without addressing the other inequitable aspects of voter ID laws, election administrators and state legislatures must act to restrict or eliminate election officials' discretion. Election officials cannot be allowed to continue to discriminatorily act as laws unto themselves. Where states fail to act, the courts must provide voters of color with recourse under the Constitution or federal civil rights laws.

Together, administrators, legislators, and judges can and must fulfill their dual responsibilities of securing the vote and ensuring that elections are equally accessible to Americans of every race.