

1-1-2013

The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment

Brendan F. Friedman

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Election Law Commons](#)

Recommended Citation

Friedman, Brendan F. (2013) "The Forgotten Amendment and Voter Identification: How the New Wave of Voter Identification Laws Violates the Twenty-Fourth Amendment," *Hofstra Law Review*: Vol. 42: Iss. 1, Article 22.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol42/iss1/22>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

NOTE

THE FORGOTTEN AMENDMENT AND VOTER IDENTIFICATION: HOW THE NEW WAVE OF VOTER IDENTIFICATION LAWS VIOLATES THE TWENTY-FOURTH AMENDMENT

I. INTRODUCTION

On January 23, 1964, South Dakota became the thirty-eighth state to ratify the Twenty-Fourth Amendment, officially banning the use of the poll tax in all federal elections.¹ At the certification ceremony, President Lyndon B. Johnson “hailed” the Twenty-Fourth Amendment and declared that “there can be no one too poor to vote.”² With ratification, the five states that had required voters to pay a direct tax to participate in federal elections were no longer permitted to do so.³

Three years later, in *Harman v. Forssenius*,⁴ the Supreme Court held that a state is prohibited from imposing a material requirement upon voters who refuse to pay a poll tax because doing so would violate the newly enacted Twenty-Fourth Amendment.⁵ Since *Harman*, courts have largely neglected the Twenty-Fourth Amendment, instead relying on the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act (“VRA”)⁶ as their main tools for removing what many thought to be the final barriers to the franchise.⁷

1. U.S. CONST. amend. XXIV, §§ 1–2; Nan Robertson, *24th Amendment Becomes Official*, N.Y. TIMES, Feb. 5, 1964, at 14.

2. U.S. CONST. amend. XXIV §§ 1–2; Robertson, *supra* note 1, at 14.

3. *Anti-Poll Tax Amendment Ratified by the States*, CQ ALMANAC, <http://library.cqpress.com/cqalmanac/cqal64-1304646> (last visited Nov. 23, 2013) [hereinafter *Amendment Ratified*] (noting that Alabama, Arkansas, Mississippi, Texas, and Virginia had poll taxes at the time the Twenty-Fourth Amendment was ratified).

4. 380 U.S. 528 (1965).

5. *Harman v. Forssenius*, 380 U.S. 528, 532–34, 544 (1965) (holding that the Virginia requirement that a voter file a certificate of residence in lieu of a poll tax imposed a material requirement, violating the Twenty-Fourth Amendment).

6. Pub. L. No. 89-110, 79 Stat. 437 (1966) (codified as amended at 42 U.S.C. § 1973 (2006)).

7. See, e.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) (concluding that “allegations of a denial of equal protection present a justiciable constitutional cause of action”); David Schultz & Sarah

In 2002, Congress passed the Help America Vote Act (“HAVA”).⁸ This statute requires voters who have never voted in “an election for Federal office in [a particular] State” to provide proof of identification when registering to vote by mail.⁹ Furthermore, many states have enacted voter-identification provisions stricter than the minimum required by HAVA.¹⁰

Challenges to these voter identification laws on Twenty-Fourth Amendment grounds were largely unsuccessful.¹¹ Courts have found that certain identification provisions imposed merely incidental costs.¹² Since courts upheld identification laws enacted in Indiana, Georgia, Michigan, Arizona, and Missouri, other states have passed strict voter identification laws.¹³ These states include Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin.¹⁴

Part II of this Note will provide the historical background of the Twenty-Fourth Amendment and voter identification laws, and discuss the wave of recently enacted voter identification laws.¹⁵ Part III will argue that these newly enacted voter identification laws, which are stricter than those previously imposed, violate the Twenty-Fourth Amendment because they go beyond the incidental costs of casting a ballot and place material requirements on voters.¹⁶ This thesis will be proved in a number of ways. First, it will be demonstrated that the requirements for compliance with the new wave of identification laws impose real and, in some cases, substantial financial burdens on voters.¹⁷ Second, a look at the legislative history of the Twenty-Fourth Amendment reveals that its purpose, while partly addressing the

Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 375-76 (2011); see also Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (providing a means of enforcing the Fourteenth and Fifteenth Amendments).

8. See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301–15545 (2006)).

9. *Id.* § 15483(b).

10. See *id.* § 15483(b) (requiring voters to provide proof of identification only when registering by mail; *infra* Part II.B.1 (discussing voter identification provisions enacted after the passage of HAVA)).

11. See, e.g., *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827-28 (S.D. Ind. 2006).

12. See, e.g., *id.* (noting that costs associated with obtaining photo identification were incidental).

13. *Voter Identification Requirements*, NAT’L CONFERENCE OF ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated Apr. 29, 2013). In a strict photo identification state, a voter may not cast a ballot without first presenting photo identification. *Id.* Many states require that the identification be government issued. *Id.*

14. *Id.*

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part III.A.

disenfranchisement of black voters in the south, was not so narrowly tailored as to exclude the broader goal of prohibiting state actors from imposing financial barriers to voting.¹⁸ Third, this Note will analyze how courts have validated the argument that the broader goal of preventing financial barriers to voting is the purpose of the Twenty-Fourth Amendment.¹⁹ Though often hesitant, courts have signaled a willingness to take a Twenty-Fourth Amendment approach to removing such barriers, especially in cases of strict voter identification laws.²⁰ Finally, Part III will show that there is data to support the idea that disenfranchisement has been, and will continue to be, realized by the financial burden imposed by voter identification laws.²¹ Part IV will argue that, beyond applying the Twenty-Fourth Amendment to eliminate burdensome voter identification laws through the courts, states can apply a more practical approach to address the broader goals of the Twenty-Fourth Amendment by removing nearly all costs, direct or incidental, imposed by voter identification laws.²²

II. HISTORY OF THE TWENTY-FOURTH AMENDMENT AND VOTER IDENTIFICATION LAWS IN THE UNITED STATES

This Part will present the history of the Twenty-Fourth Amendment and voter identification laws. First, it will discuss litigation challenging poll taxes prior to the ratification of the Twenty-Fourth Amendment;²³ New Deal efforts to eliminate poll taxes;²⁴ the ratification debates and eventual passage of the Twenty-Fourth Amendment;²⁵ and challenges to poll taxes following ratification.²⁶ Second, it will provide a history of voter identification laws, beginning with a discussion of the first wave of

18. See *infra* Part III.B.

19. See *infra* Part III.C.

20. See *infra* Part III.C.

21. See *infra* Part III.D.

22. See *infra* Part IV.

23. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277, 280, 283 (1937) (holding that the poll tax is not an unconstitutional violation of petitioner's privileges and immunities or equal protection rights under the Fourteenth Amendment); *Butler v. Thompson*, 97 F. Supp. 17, 19, 25 (E.D. Va. 1951), *aff'd per curiam*, 341 U.S. 937, 937 (1951) (holding that the poll tax is constitutional under the Fourteenth and Fifteenth Amendments); see also *infra* Part II.A.1.

24. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 71-75 (2009) (discussing the New Deal origins of the Twenty-Fourth Amendment); *infra* Part II.A.2.

25. See Ackerman & Nou, *supra* note 24, at 79-87; see also *infra* Part II.A.3.

26. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that Virginia's poll tax in state elections violated the Equal Protection Clause); *Harman v. Forssenius*, 380 U.S. 528, 533-34, 544 (1965) (holding that the Virginia requirement that a voter file a certificate of residence in lieu of a poll tax imposed a material requirement violating the Twenty-Fourth Amendment); see also *infra* Part II.A.4.

voter identification laws, and the challenges to those laws.²⁷ Next, this Part will examine the new wave of stricter voter identification laws, enacted between 2009 and 2012, and the challenges that have been raised to those laws.²⁸

A. History of the Twenty-Fourth Amendment

By the twentieth century, southern states had enacted barriers to voting specifically designed to block black voters from participating in elections.²⁹ These barriers included property ownership requirements, literacy tests, and poll taxes.³⁰ These requirements, while discriminatory in intent, were not explicitly aimed at any one particular group and, as a result, were “considered neutral and fair by the courts.”³¹

1. Pre-Ratification Court Action

There were numerous unsuccessful challenges to the poll tax prior to the ratification of the Twenty-Fourth Amendment.³² The two cases during this era were *Breedlove v. Suttles*,³³ decided in 1937, and *Butler v. Thompson*,³⁴ decided in 1951.³⁵

In *Breedlove*, the petitioner challenged a Georgia statute requiring male voters aged twenty-one to sixty to pay a one dollar poll tax.³⁶ Petitioner argued that requiring some, but not all, voters to pay a poll tax violated both the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment.³⁷ The Court rejected the equal protection argument, holding that the Equal Protection Clause “does not require absolute equality,” and the exceptions for women, minors, elderly, and the blind were reasonable.³⁸ The Court also rejected

27. See, e.g., GA. CODE ANN. § 21-2-417 (2008); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1345 (11th Cir. 2009); *infra* Part II.B.1–2.

28. See *Voter Identification Requirements*, *supra* note 13 (listing Arkansas, Georgia, Kansas, Indiana, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Wisconsin as states that have enacted, or tightened, voter identification requirements); see *infra* Part II.B.3.

29. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1041 (2009) (discussing the history of the poll tax and other voting prerequisites in the twentieth century).

30. *Id.*

31. *Id.*

32. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277, 280, 284 (1937); *Butler v. Thompson*, 97 F. Supp. 17, 19, 25 (E.D. Va. 1951), *aff’d per curiam*, 341 U.S. 937, 937 (1951).

33. 302 U.S. 277 (1937).

34. 341 U.S. 937 (1951) (*per curiam*).

35. *Butler*, 341 U.S. at 937; *Breedlove*, 302 U.S. at 277.

36. *Breedlove*, 302 U.S. at 279–80.

37. *Id.* at 280.

38. *Id.* at 281. The challenged statute exempted women and blind men from the poll tax. *Id.* at 280.

the petitioner's privileges and immunities argument, on the grounds that the privilege of voting was derived from the states.³⁹ Since only the privileges and immunities derived from the Constitution and the laws of the United States are protected, petitioner's claim could not be sustained.⁴⁰ In addressing the poll tax generally, the Court stated that it was a "reasonable regulation long enforced in many States."⁴¹

In *Butler*, the petitioner challenged the Virginia poll tax claiming that it disenfranchised black voters, violating their equal protection rights.⁴² The District Court held that the poll tax did not violate the Fourteenth Amendment because it was applied equally amongst all citizens of Virginia and was administered to raise revenue.⁴³ In a per curiam opinion, the Supreme Court affirmed the district court's decision to reject the claim.⁴⁴

2. The Effects of the New Deal

In order to enact the progressive policies of the New Deal, President Franklin D. Roosevelt needed the support of southern white voters who, while supportive of economic assistance programs, were disproportionately disenfranchised by poll taxes.⁴⁵ As a result, progressives of the era framed their opposition to the poll tax as a class issue, not a racial one, and sought to remove the more conservative Democrats from the party.⁴⁶ President Roosevelt labeled these southern conservatives as "representatives of 'Polltaxia.'"⁴⁷

This strategy was largely unsuccessful as southern conservatives, who supported the poll tax, held their ground in the 1938 primaries against liberal New Deal challengers.⁴⁸ This forced President Roosevelt to retreat from publically voicing support for the abolition of the poll tax on both the state and federal levels.⁴⁹ Nevertheless, the early anti-poll tax position taken by President Roosevelt and the progressives solidified the

39. *Id.* at 283.

40. *Id.*

41. *Id.* at 283-84.

42. *Butler v. Thompson*, 97 F. Supp. 17, 19 (E.D. Va. 1951), *aff'd per curiam*, 341 U.S. 937, 937 (1951).

43. *See id.* at 22-24.

44. *Butler*, 341 U.S. at 937.

45. Ackerman & Nou, *supra* note 24, at 71-73.

46. *Id.* at 71-72.

47. *Id.* at 72.

48. *Id.*

49. *Id.* (citing STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 57-58 (1976), and Letter from President Franklin Delano Roosevelt, to Aubrey Williams, Dir. of Nat'l Youth Admin. (Mar. 28, 1938) (on file with Franklin D. Roosevelt Presidential Library)).

poll tax as a liberal cause and a class issue, framed the way courts viewed the poll tax, and paved the way for anti-poll tax legislators such as Claude Pepper and Spessard Holland.⁵⁰

3. Congress's Passage of the Twenty-Fourth Amendment and Ratification

While President John F. Kennedy was a supporter of civil rights, he remained uncommitted to ending the poll tax during his election campaign in order to gain the support of southern white voters.⁵¹ Once elected, the President quietly encouraged Congress to take up the cause of ending the use of the poll tax.⁵² Senator Spessard Holland led the fight, utilizing procedural maneuvers to get the measure passed in the Senate.⁵³ It passed by a vote of seventy-seven to sixteen.⁵⁴

The debate on the floor of the Senate "concerned both the substance and the proposed method of eliminating poll taxes."⁵⁵ Holland, making the case in support of the Twenty-Fourth Amendment, stated that the Amendment would "appl[y] to majorities, to minorities, and to every person of every color."⁵⁶ Opponents maintained the position, shared by the Supreme Court in *Butler*, that the poll tax did not discriminate on the basis of race, and was a reasonable, effective voting regulation.⁵⁷ Many staunch supporters of the civil rights movement also opposed the Twenty-Fourth Amendment because they believed that change should occur through the courts and Congress, not by passage of a constitutional amendment.⁵⁸

The debate in the House of Representatives was very similar to that in the Senate.⁵⁹ Supporters argued that the Twenty-Fourth Amendment would encourage voter participation in the five states that still required voters to pay a poll tax.⁶⁰ Opponents either supported the poll tax as a

50. *Id.* at 72-73.

51. *See id.* at 79-80.

52. *See id.* at 80.

53. *Id.* at 80-81.

54. *Congress Recommends Poll Tax Ban*, CQ ALMANAC, <http://library.cqpress.com/cqalmanac/cqal62-1236629> (last visited Nov. 23, 2013).

55. *Id.*

56. Ackerman & Nou, *supra* note 24, at 81-82 (quoting 108 CONG. REC. 4154 (1962) (statement of Sen. Spessard Holland)).

57. *Congress Recommends Poll Tax Ban*, *supra* note 54.

58. *See id.*

59. *See id.*

60. *Id.*

generally effective and fair regulation, or believed that the Twenty-Fourth Amendment was an improper manner by which to eliminate the poll tax.⁶¹

Ratification of the Twenty-Fourth Amendment by the states took less than two years.⁶² Illinois was the first state to ratify and, by the end of 1963, thirty-six of the thirty-eight states required to ratify the Amendment had done so.⁶³ By late January of 1964, Maine and South Dakota ratified it, marking ratification by three-fourths of the states.⁶⁴ At the Twenty-Fourth Amendment certification signing, President Johnson defined the Amendment as a class-based victory, rather than framing it as a racial issue, stating that, “there can be no one too poor to vote.”⁶⁵

4. Post-Ratification Court Action

Following its ratification, the Twenty-Fourth Amendment was seldom argued by plaintiffs or invoked by courts to oppose barriers to voting.⁶⁶ However, there are some post-ratification cases that have discussed the abolition of the poll tax in a meaningful way.⁶⁷ These cases, *Harman v. Forssenius* and *Harper v. Virginia State Board of Elections*,⁶⁸ were responsible for reinforcing the Twenty-Fourth Amendment on the federal level and extending the abolition of the poll tax to state elections, respectively.⁶⁹

In *Harman*, the first poll tax challenge heard by the Supreme Court after the ratification, petitioners alleged that the Virginia poll tax statute violated the Twenty-Fourth Amendment.⁷⁰ The statute required residents voting in federal elections to file a certificate of residence in order to avoid the poll tax.⁷¹ The Court held that the statute violated the Twenty-Fourth Amendment because Virginia was indirectly denying the right to vote by imposing a “material requirement” on voters in lieu of paying the poll tax.⁷² The filing of a certificate of residence was a “material

61. *See id.*

62. *Amendment Ratified*, *supra* note 3.

63. *Id.*

64. *Id.*

65. *See* Robertson, *supra* note 1, at 14.

66. Schultz & Clark, *supra* note 7, at 414 (explaining how plaintiffs and courts have failed to rely on Twenty-Fourth Amendment jurisprudence in dealing with voting restrictions).

67. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Harman v. Forssenius*, 380 U.S. 528 (1965); *see also supra* note 26 and accompanying text.

68. 383 U.S. 663 (1966); 380 U.S. 528 (1965).

69. *Harper*, 383 U.S. at 666; *Harman*, 380 U.S. at 544.

70. *Harman*, 380 U.S. at 532; *see* Schulz & Clark, *supra* note 7, at 395.

71. VA. CODE ANN. § 24-17 (Supp. 1964); *Harman*, 380 U.S. at 531 (citing 1964 Va. Acts 4-6 (Extra Sess. 1963)).

72. *Harman*, 380 U.S. at 538, 541.

requirement” because it obligated the voter to maneuver through a confusing and burdensome bureaucracy in order to become eligible to vote in the next election.⁷³ According to Chief Justice Earl Warren’s majority opinion, the Twenty-Fourth Amendment “nullifies sophisticated as well as simple-minded modes” of denying the franchise.⁷⁴ Furthermore, he specifically noted the language of the Twenty-Fourth Amendment, which “expressly guarantees that the right to vote shall not be ‘denied or *abridged*.’”⁷⁵

In *Harper*, petitioners challenged a Virginia poll tax in state elections.⁷⁶ Since the Twenty-Fourth Amendment only banned the use of the poll tax in federal elections, the Supreme Court found the Virginia state poll tax to be in violation of the Fourteenth Amendment’s Equal Protection Clause, declaring that, “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”⁷⁷ At this point, states could no longer deny the franchise on the basis of *wealth* in either federal or state elections.⁷⁸

B. History of Voter Identification Laws

HAVA was enacted to improve the overall administration of elections following the 2000 presidential election.⁷⁹ The voter identification provision in HAVA, requiring states to enact a voter-identification system, applied only to registration by mail and did not include a photo identification requirement.⁸⁰ After the passage of HAVA, many states enacted voter identification requirements stricter than those required by the statute.⁸¹ Some states went so far as to

73. *Id.* at 541-42. The statute required that a certificate of residence be filed after October 1 of the year preceding the election, and at least six months prior to the election. VA. CODE ANN. § 24-17. The certificate had to state the voter’s address, that she was a resident of Virginia, and had been since she registered, and that she did not intend to move from the city or county in which she lived. *Id.* Moreover, the certificate had to be either notarized or witnessed. *Id.*

74. *Harman*, 380 U.S. at 540-41 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

75. U.S. CONST. amend. XXIV, § 1; *Harman*, 380 U.S. at 540 (emphasis added).

76. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 & n.1 (1966); see VA. CONST. of 1902, art. VIII, § 173.

77. *Harper*, 383 U.S. at 665-68.

78. Schultz & Clark, *supra* note 7, at 398-99 (citing *Harper*, 383 U.S. at 666).

79. See generally Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-15545 (2006)) (improving election administration by setting standards for polling facilities, voting systems, voter registration, and provisional voting); see also Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 745 (2008).

80. 42 U.S.C. § 15483(a)-(b) (2006) (codifying requirements for voters who register by mail).

81. See, e.g., IND. CODE ANN. § 3-5-2-40.5 (West 2006); Langholz, *supra* note 79, at 748.

require voters to present photo identification at their polling place in order to vote.⁸²

1. The First Wave of Strict Voter Identification Laws

As of 2006, Georgia voters are required to present either a state or federally issued photo identification before being allowed to vote.⁸³ Free voter identification cards are also available.⁸⁴ If a voter does not produce a proper form of photo identification, she is permitted to fill out a provisional ballot and present photo identification to her county's registrar's office.⁸⁵ Georgia's prior voter identification law did not provide for free identification cards.⁸⁶ Instead, voters without an acceptable form of photo identification were required to pay a fee ranging from twenty to thirty-five dollars to obtain a valid voter identification card.⁸⁷

As is the case in Georgia, Indiana requires voters to present government issued photo identification prior to voting.⁸⁸ Indiana's photo identification requirement took effect in late 2005.⁸⁹ If an Indiana voter does not have the proper identification, the voter may cast a provisional ballot, and, upon appearing before the election board, present identification or sign an affidavit identifying that the voter is indigent or has a religious objection to obtaining photo identification.⁹⁰

Michigan amended its voter identification law in 2005.⁹¹ It now requires voters to present photo identification before being issued a ballot.⁹² However, Michigan permits its voters to cast a ballot if the voter signs an affidavit attesting that she does not have photo identification.⁹³

In Arizona, voters must present either photo identification or two other forms of identification that include the voter's name and address.⁹⁴ Acceptable forms of identification without photograph include utility bills and bank statements.⁹⁵ If a voter is unable to provide the proper

82. E.g., GA. CODE ANN. § 21-2-417 (2008); IND. CODE ANN. § 3-5-2-40.5 (West 2006).

83. GA. CODE ANN. § 21-2-417.

84. § 21-2-417(a)(2).

85. § 21-2-417(b).

86. § 21-2-417.1; *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

87. *Billups*, 554 F.3d at 1346.

88. IND. CODE ANN. §§ 3-5-2-40.5, 3-11-8-25.1 (West 2006); *see supra* text accompanying notes 83-87.

89. § 3-11-8-25.1.

90. *See id.*; *Voter Identification Requirements*, *supra* note 13.

91. MICH. COMP. LAWS ANN. § 168.523 (West 2007).

92. § 168.523(1).

93. *Id.*

94. ARIZ. REV. STAT. ANN. § 16-579 (2006).

95. *Id.*

identification, she may cast a provisional ballot.⁹⁶ Arizona enacted the identification requirement in 2004.⁹⁷

Missouri passed a far less strict requirement in 2006.⁹⁸ Though the legislation required that voters present identification at the polls, identifications without photographs were permitted.⁹⁹ It also allowed a voter to cast a ballot without identification if two supervising judges attested that they knew the voter.¹⁰⁰

2. Challenges to the First Wave of Voter Identification Laws

Most challenges to voter identification requirements have been unsuccessful.¹⁰¹ Only two courts have invalidated such a requirement on poll tax grounds.¹⁰² In Georgia, courts have adjudicated both the earlier and more recent voter identification laws.¹⁰³ In *Common Cause/Georgia v. Billups*,¹⁰⁴ the Northern District of Georgia first granted a preliminary injunction against the Georgia voter identification law that did not provide for free identifications.¹⁰⁵ It held that the voter identification provision violated the Equal Protection Clause of the Fourteenth Amendment and, defined as a *poll tax*, violated the Twenty-Fourth Amendment.¹⁰⁶ In finding that the photo identification provision was a poll tax, the court relied on the language of *Harman* and *Harper*.¹⁰⁷ It analogized the “material requirement” standard in *Harman*, which required voters to file a certificate of residency, to the fee for obtaining identification required by the state.¹⁰⁸ The court also referred to *Harper*’s prohibition on “voter qualifications which invidiously discriminate,” and

96. *Id.*

97. *Id.*

98. See MO. ANN. STAT. § 115-427 (West 2003). This statute was found to have violated the Missouri state constitution’s equal protection clause and its guarantee of the right to vote in *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (en banc) (per curiam).

99. § 115-427 (permitting “a current utility bill, bank statement, government check, paycheck or other government document that contains the names and addresses of the voter” to serve as identification).

100. *Id.*

101. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188-89 (2008).

102. See *Weinschenk*, 203 S.W.3d at 213-14; *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366-70 (N.D. Ga. 2005). Following this decision, Georgia amended its voter identification requirement to provide free identification. GA. CODE ANN. § 21-2-417 (2007); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

103. Compare *Billups*, 554 F.3d at 1346 (addressing the more recent voter identification statutory provisions), with *Billups*, 406 F. Supp. 2d at 1328-29 (addressing the previous voter identification statutory provisions).

104. 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

105. *Id.* at 1377-78.

106. *Id.* at 1366-70.

107. *Id.* at 1367-68.

108. *Id.* (citing *Harman v. Forssenius*, 380 U.S. 528, 533-34 (1965)).

Harper's finding that the voter identification fee makes "the affluence of the voter [and] payment of [a] fee an electoral standard."¹⁰⁹ Lastly, the court held that the fee waiver granted by the Department of Driver Services was not satisfactory because so few voters were aware of the potential waiver, and the cost voters incurred to obtain it was a "material requirement" under *Harman*.¹¹⁰

Following the District Court's 2005 *Billups* decision, Georgia amended the statute and began offering free voter identification cards to those without proper identification.¹¹¹ The Northern District of Georgia again heard a challenge to the voter identification requirement, and again enjoined its enforcement.¹¹² However, this 2006 injunction was limited to the upcoming primary election.¹¹³ After an outreach program to inform voters about the requirement, the District Court dismissed the complaint, which sought to obtain a permanent injunction against the amended voter identification statute, for lack of standing and, alternatively, for lacking merit as a claim under the Fourteenth Amendment.¹¹⁴ The Court, however, did not address the Twenty-Fourth Amendment in the 2007 case.¹¹⁵ The case was appealed to the Court of Appeals and affirmed on the basis that, "the legitimate interest of Georgia in preventing voter fraud justified the insignificant burden of requiring voters to present photo identification before they vote in person."¹¹⁶ This decision relied on the Supreme Court's decision in *Crawford v. Marion County Election Board*,¹¹⁷ which will be discussed below.¹¹⁸

Indiana's voter identification requirement was challenged in *Indiana Democratic Party v. Rokita*.¹¹⁹ In *Rokita*, the Southern District of Indiana held that the voter identification law did not violate the state constitution, the VRA, the Fourteenth Amendment, or the Twenty-Fourth Amendment.¹²⁰ In its poll tax analysis, the court rejected the

109. *Id.* at 1368 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966)).

110. *Id.* at 1369-70 (citing *Harman*, 380 U.S. at 542).

111. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

112. *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006).

113. *Billups*, 554 F.3d at 1347.

114. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1363-69, 1374, 1382 (N.D. Ga. 2007).

115. *See id.* at 1382.

116. *Billups*, 554 F.3d at 1355 (citation omitted).

117. 553 U.S. 181, 188 (2008).

118. *Billups*, 554 F.3d at 1355 (citing *Crawford*, 553 U.S. at 188); *see infra* text accompanying notes 120-22.

119. 458 F. Supp. 2d 775, 782 (S.D. Ind. 2006), *aff'd sub nom.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

120. *Id.* at 828, 830, 839, 842.

challengers' argument that "all manner of incidental costs incurred in the process of obtaining the photo identification required by [the statute] constitute a poll tax."¹²¹ These incidental costs include the time and money spent obtaining driver's licenses and the fees incurred when obtaining the underlying documentation to obtain free identification, such as birth certificates.¹²² The court, however, rejected plaintiffs' argument, holding that "the imposition of tangential burdens does not transform a regulation into a poll tax."¹²³ Furthermore, the court noted that, "the need for individuals to pay a fee for a birth certificate is purely speculative and theoretical."¹²⁴

The Court of Appeals affirmed *Rokita* under a different name in *Crawford*, and the Supreme Court granted certiorari.¹²⁵ The Supreme Court, in this voter identification decision, neglected to address the Twenty-Fourth Amendment issue, but found that the Equal Protection Clause was not violated by the Indiana voter identification requirements.¹²⁶ The Court reasoned that the state's interest in imposing the voter identification requirements was not outweighed by the limitation imposed on voters.¹²⁷ This has been the basis for numerous other decisions rejecting challenges to voter identification laws on equal protection grounds.¹²⁸

In Michigan, the state's supreme court granted a request by its House of Representatives to issue an advisory opinion regarding the constitutionality of the state's voter identification law.¹²⁹ The court held that the statute did not violate the state constitution, the Equal Protection Clause, or the Twenty-Fourth Amendment.¹³⁰ In examining the poll tax issue, the court rejected the arguments provided by the challengers by relying on *Harper* and *Harman*.¹³¹ The Michigan Supreme Court held

121. *Id.* at 826-28.

122. *Id.*

123. *Id.* at 827.

124. *Id.*

125. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185-88 (2008).

126. *Id.* at 188-89, 204.

127. *Id.* at 204 ("The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983))).

128. See, e.g., *Gonzalez v. Arizona*, 677 F.3d 383, 407-08 (9th Cir. 2012); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 444 (Mich. 2007).

129. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 447.

130. *Id.* at 447-48; see MICH. COMP. LAWS ANN. § 168.523 (West 2008).

131. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 463-66 (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966), and *Harman v. Forssenius*, 380 U.S. 528, 533-34, 544 (1965)).

that the fees imposed to obtain identification are not a poll tax because “the statute does not condition the right to vote on the payment of any fee.”¹³² A voter without identification can simply sign an affidavit before an election inspector prior to voting if the voter does not have the requisite identification.¹³³ Further, the court stated that “signing an affidavit . . . is simply not an onerous procedural requirement” as envisioned by the Supreme Court in *Harman*.¹³⁴ Also, since the fee for a state identification card can be waived, the court considered the requirement to be optional.¹³⁵ Lastly, in rejecting the poll tax argument, the court followed the reasoning in *Rokita* that the incidental costs associated with obtaining the identification—time and transportation—cannot constitute a poll tax because those same costs are also required for voter registration and in-person voting.¹³⁶

Arizona’s voter identification law was challenged on the grounds that it violated the Fourteenth Amendment, § 2 of the VRA, and the Twenty-Fourth Amendment.¹³⁷ The district court denied the challengers’ preliminary injunction, and the challengers appealed.¹³⁸ The Ninth Circuit, in *Gonzalez v. Arizona*,¹³⁹ affirmed the decision of the district court, holding that the voter identification law was constitutional.¹⁴⁰ On appeal, the appellants argued that the Twenty-Fourth Amendment had been violated since Arizona citizens were required to spend money to obtain the underlying documents necessary to register to vote, making the voter identification law a poll tax.¹⁴¹ The court, in rejecting this argument, compared the instant circumstances with those in *Harman* and found that, “[h]ere, voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote,” as was the case in *Harman*.¹⁴² Therefore, the rights of Arizona voters could

132. *Id.* at 464; see MICH. COMP. LAWS ANN. § 168.523.

133. § 168.523; *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 464-65.

134. § 168.523; *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 464-65 (citing *Harman*, 380 U.S. at 542).

135. *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d at 464-65.

136. *Id.* at 465-66 (citing *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006)).

137. *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007); see ARIZ. REV. STAT. ANN. § 16-579 (2006).

138. *Gonzalez*, 485 F.3d at 1046.

139. 485 F.3d 1041 (9th Cir. 2007).

140. See *id.* at 1052.

141. *Id.* at 1048-49.

142. *Id.* at 1049 (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965)).

not be “abridged” by the failure to pay a tax, since all voters must offer proof of citizenship.¹⁴³

In 2012, the Ninth Circuit reheard *Gonzalez v. Arizona*.¹⁴⁴ The court reaffirmed its 2007 holding that the voter identification requirement was not a poll tax, and did not violate the VRA or the Equal Protection Clause.¹⁴⁵ The court aggressively rejected the poll tax argument, holding that the cost to obtain documents does not constitute a poll tax because it is not a “fee imposed on voters as a prerequisite for voting.”¹⁴⁶ Furthermore, the cost is not a “material requirement” or a “burden imposed on voters who refuse to pay a poll tax,” as was the case in *Harman*.¹⁴⁷

Missouri voters challenged the state statute requiring presentation of photo identification in order to vote in *Weinschenk v. State*.¹⁴⁸ The trial court found the statute unconstitutional and the state supreme court affirmed.¹⁴⁹ The Supreme Court of Missouri addressed the costs of obtaining identification, noting that, while “free” voter identification cards were available, voters who did not already have the requisite identification would incur costs in obtaining the underlying documents—in this case, fifteen dollars for a birth certificate.¹⁵⁰ The court also contrasted the decisions in *Billups* and *Rokita*, expressing its belief that the poll tax claims failed in those instances because “the parties . . . had failed to offer specific evidence of voters who were required to bear these costs in order to exercise their right to vote.”¹⁵¹ In this case, various plaintiffs specifically testified to the costs of obtaining the underlying documents.¹⁵² The court reasoned that these costs were “directly connected to Plaintiffs’ exercise of the right to vote,” and that those “who currently lack the requisite photo ID are generally ‘the least equipped to bear the costs.’”¹⁵³ Lastly, the court analyzed the required time and ability necessary to navigate state bureaucratic procedures in order to vote.¹⁵⁴ The court, quoting *Harman*, referred to the

143. *Id.* (quoting *Harman*, 380 U.S. at 542).

144. 677 F.3d 383, 389-90 (9th Cir. 2012).

145. *Id.* at 388.

146. *Id.* at 407; see ARIZ. REV. STAT. ANN. § 16-579 (2006).

147. *Gonzalez*, 677 F.3d at 407-08 (citing *Harman*, 380 U.S. at 541-42).

148. 203 S.W.3d 201, 204 (Mo. 2006) (en banc) (per curiam).

149. MO. CONST. art. I §§ 2, 25; *id.* art. VIII, § 2; *Weinschenk*, 203 S.W.3d at 204, 219.

150. *Weinschenk*, 203 S.W.3d at 213.

151. *Id.* at 214 (citing *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006), and *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1355, 1370 (N.D. Ga. 2005)).

152. *Id.*

153. *Id.* (quoting *Weinschenk v. State*, Nos. 06AC-CC00656, 06AC-CC00587, slip op. at 9 (Mo. Cir. Ct. Sept. 14, 2006)).

154. *Id.* at 214-15. (citing *Weinschenk*, Nos. 06AC-CC00656, 06AC-CC00587, slip op. at 9).

advanced planning needed to obtain identification as “plainly a cumbersome procedure.”¹⁵⁵

3. Challenges Raised to the New Wave of Voter Identification Laws

Between 2009 and 2012, fifteen states enacted or tightened voter identification requirements.¹⁵⁶ Of those states, Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin have enacted strict photo identification laws.¹⁵⁷ The overall results of challenges to these laws have been unclear, but no decisions have been reached on Twenty-Fourth Amendment poll tax grounds.¹⁵⁸

In Kansas, a strict voter identification requirement was enacted in 2011.¹⁵⁹ Voters are required to present identification at the polls with the exception of physically disabled persons, active military personnel, and those with religious exemptions.¹⁶⁰ Only government issued identifications are permitted, including student identification issued by an accredited Kansas university.¹⁶¹ Voters without proper identification on election day may cast a provisional ballot and have it counted by appearing before the county election officer with the necessary identification after the election.¹⁶² Many have considered this statute to be a success as of the 2012 statewide primary election.¹⁶³

Mississippi passed a voter identification requirement through a ballot initiative in 2011, but the language of the actual provision is not yet in place.¹⁶⁴ When in place, the identification requirement will require voters to present government issued identification before casting their votes.¹⁶⁵ As is the case in most states with identification requirements, voters are permitted to cast a provisional ballot if they do not have the proper identification.¹⁶⁶

155. *Id.* (quoting *Harman v. Forssenius*, 380 U.S. 528, 541 (1965)).

156. *Voter Identification Requirements*, *supra* note 13.

157. *Id.*

158. *See, e.g., Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (per curiam) (vacating the order of the lower court and remanding the action for further proceedings); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 8 (Wis. Cir. Ct. Mar. 12, 2012) (holding a Wisconsin voter identification provision unconstitutional).

159. *Voter Identification Requirements*, *supra* note 13.

160. KAN. STAT. ANN. § 25-2908 (West Supp. 2012); *Voter Identification Requirements*, *supra* note 13.

161. § 25-2908.

162. *Id.* § 25-3002; *Voter Identification Requirements*, *supra* note 13.

163. *See, e.g., Collin Levy, Kansas Voter ID Success*, WALL ST. J., Aug. 9, 2012, <http://online.wsj.com/article/SB10000872396390443971104577575603906522144.html>.

164. MISS. CODE ANN. § 23-15-563 (2012); *Voter Identification Requirements*, *supra* note 13.

165. § 23-15-563(1).

166. § 23-15-563(3)(a); *see, e.g., supra* note 154 and accompanying text.

Pennsylvania passed its voter identification law in 2012.¹⁶⁷ The provision, if codified, will require presentation of a government issued identification at the polls.¹⁶⁸ Pennsylvania will allow for casting of a provisional ballot.¹⁶⁹ Indigent voters who cast a provisional ballot are permitted to submit, in person or by mail, an affirmation stating that [they are the person who attempted to vote and that they are, in fact, indigent].¹⁷⁰

Various individuals and groups challenged the provision claiming that it disenfranchised voters in violation of the state constitution and sought an injunction to prevent it from being enforced.¹⁷¹ In August 2012, the trial court denied the preliminary injunction because the identification provision was not likely to be found facially unconstitutional.¹⁷² On appeal, the Supreme Court of Pennsylvania vacated the decision of the lower court, but remanded the case for a “present assessment of the actual availability of the alternate identification cards . . . since the time the cards became available.”¹⁷³ If voters were to be disenfranchised by the voter identification provision, the trial court was ordered to grant the injunction.¹⁷⁴ In October 2012, the trial court ordered the preliminary injunction as a result of the low number of identifications that had been issued to voters.¹⁷⁵ As a result, voters are not required to show identification at the polls until further review by the courts.¹⁷⁶

In 2011, South Carolina passed a law tightening its existing voter identification requirement.¹⁷⁷ Voters in South Carolina are now required to show government issued photo identification.¹⁷⁸ However, voters are permitted to show a voter registration card without a photograph if they can demonstrate a reasonable impediment to obtaining a photo identification.¹⁷⁹ The list of reasonable impediments is fairly open-ended

167. Act of Mar. 14, 2012, Pub. L. 195, No. 18, sec. 1, PA. ELEC. CODE; *Voter Identification Requirements*, *supra* note 13.

168. Act of Mar. 14, 2012 §1; *Voter Identification Requirements*, *supra* note 13.

169. Act of Mar. 14, 2012 §3; *Voter Identification Requirements*, *supra* note 13.

170. Act of Mar. 14, 2012 §3; *Voter Identification Requirements*, *supra* note 13.

171. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, slip op. at 1-3 (Pa. Commw. Ct. Aug. 15, 2012).

172. *See id.* at 68.

173. *Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (per curiam).

174. *Id.*

175. *See id.* at 5; *see also Applewhite*, No. 330 M.D. 2012, slip op. at 5, 15.

176. *See Applewhite*, 54 A.3d at 5; *Voter Identification Requirements*, *supra* note 13.

177. S.C. CODE ANN. § 7-13-710 (Supp. 2012).

178. § 7-13-710(A).

179. *Id.*

and includes exemptions for religion and disability.¹⁸⁰ South Carolina also permits provisional voting if a voter does not have photo identification, or a voter registration card that does not bear a photograph.¹⁸¹

In Tennessee, voters are required to present a government issued identification.¹⁸² If a voter does not have a permitted identification, the voter may cast a provisional ballot and provide the proper proof of identification at a specified later date.¹⁸³ Tennessee had an identification provision in place prior to 2011 but tightened its requirements with passage of this law.¹⁸⁴ Voters challenged the earlier provision in state court, claiming that it violated both the state and U.S. Constitution, but were denied.¹⁸⁵ On appeal, the court upheld the lower court's decision, but required the state to accept library cards issued by the City of Memphis that include a photo.¹⁸⁶

Texas also sought to tighten its existing identification requirement.¹⁸⁷ The provision, if granted preclearance, would have required voters to present a government issued photo identification before voting.¹⁸⁸ Alternatively, voters would have been permitted to submit a provisional ballot if they did not have the requisite photo identification.¹⁸⁹ However, the provision was denied preclearance by the Department of Justice ("DOJ") in March 2012 for having "the effect of denying or abridging the right to vote on the account of race."¹⁹⁰ In August, the Court of Appeals for the District of Columbia affirmed the DOJ's decision, plainly stating that Texas's voter identification requirement "imposes strict, unforgiving burdens on the poor."¹⁹¹

180. *Voter Identification Requirements*, *supra* note 13.

181. § 7-13-710(C).

182. TENN. CODE ANN. § 2-7-112(a) (Supp. 2012).

183. § 2-7-112(a)(3)(A).

184. *See id.* hist. n.

185. Tim Ghianni, *Tennessee Judge Tosses Challenge to State Voter ID Law*, REUTERS (Sept. 27, 2012, 5:57 PM), <http://www.reuters.com/article/2012/09/27/us-usa-campaign-tennessee-voterid-idUSBRE88Q1U120120927> [hereinafter Ghianni, *Tennessee Judge*].

186. Tim Ghianni, *Tennessee Appeals Court Upholds Voter ID Law, Says Is Constitutional*, CHICAGO TRIBUNE, Oct. 26, 2012, http://articles.chicagotribune.com/2012-10-26/news/sns-rt-us-usa-tennessee-photoidbre89p05t-20121025_1_examples-of-in-person-voter-voter-id-law-voter-impersonation [hereinafter Ghianni, *Tennessee Appeals*].

187. *Voter Identification Requirements*, *supra* note 13.

188. TEX. ELEC. CODE ANN. § 63.0101 (West Supp. 2012). Preclearance, under Section 5 of the VRA, required states to seek approval from the DOJ of any voting practice or procedure. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (1966) (codified as amended at 42 U.S.C. § 1973 (2006)).

189. § 63.011.

190. Terry Frieden, *Federal Court Strikes Down Texas Voter ID Law*, CNN (Aug. 30, 2012, 5:40 PM), <http://www.cnn.com/2012/08/30/politics/texas-voter-id-law/index.html>.

191. *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012). Section 5 of the VRA was

Wisconsin passed a voter identification law in 2011 requiring voters to present a government issued or school photo identification.¹⁹² The provision also permitted voters to cast a provisional ballot.¹⁹³ Voters challenged the law as a violation of the state constitution and sought an injunction against the further enforcement of the provision.¹⁹⁴ The Circuit Court agreed, declaring that the voter identification provision “impermissibly eliminate[d] the right of suffrage altogether for certain constitutionally qualified electors.”¹⁹⁵ The Wisconsin Supreme Court declined to address the issue.¹⁹⁶ As a result, the voter identification provision is currently inoperative.¹⁹⁷

III. THE NEW WAVE OF VOTER IDENTIFICATION LAWS SHOULD BE INVALIDATED UNDER THE TWENTY-FOURTH AMENDMENT

Courts have historically relied heavily on the Equal Protection Clause,¹⁹⁸ the VRA,¹⁹⁹ and state constitutional law²⁰⁰ to invalidate barriers to voting.²⁰¹ On the other hand, the Twenty-Fourth Amendment was narrowly tailored to address only one customary form of the poll tax and, as a result, has been seldom used.²⁰² As Fourteenth Amendment and VRA claims become more difficult to sustain, the Twenty-Fourth

rendered unenforceable when the Supreme Court struck down the preclearance provision in *Shelby County v. Holder*. See No. 12-96, slip op. at 24 (U.S. June 25, 2013).

192. WIS. STAT. ANN. §§ 5.02, 6.79 (West Supp. 2012).

193. § 6.79.

194. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 2 (Wis. Cir. Ct. Mar. 12, 2012).

195. *Id.* at 5.

196. Bob Barnes, *Wisconsin High Court Won't Restore Voter ID Law Before Election Day*, WASH. POST, Sept. 27, 2012, <http://www.washingtonpost.com/blogs/post-politics/wp/2012/09/27/8271>.

197. *Id.*

198. *E.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188-89 (2008); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding a state apportionment scheme unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

199. *E.g.*, *Texas v. Holder*, 888 F. Supp. 2d 113, 143-44 (D.D.C. 2012). Section 4 of the VRA was struck down following the Supreme Court's decision in *Shelby County*. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 24 (U.S. June 25, 2013). This decision rendered Section 5 useless because the preclearance formula was thrown out. See *id.*

200. *E.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (en banc) (per curiam).

201. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that the poll tax in state elections violates the Equal Protection Clause); *Holder*, 888 F. Supp. 2d at 143-14 (invalidating a Texas voter identification law under Section 5 of the VRA); *Weinschenk*, 203 S.W.3d at 211-12 (concluding that the state's identification law violates the Missouri constitution).

202. See *Harper*, 383 U.S. at 664 & n.1 (addressing the customary tax-for-vote scheme); *Schultz & Clark*, *supra* note 7, at 414 (explaining how courts have failed to rely on Twenty-Fourth Amendment jurisprudence in dealing with voting restrictions).

Amendment provides an avenue for voters to challenge economic barriers to voting.²⁰³

Part III will be divided into four sections. First, it will examine how the new wave of voter identification requirements is more burdensome than previous requirements, specifically in regards to the cost to voters and the lack of exceptions.²⁰⁴ Second, it will discuss how legislative and executive histories indicate that the Twenty-Fourth Amendment was intended to be interpreted broadly.²⁰⁵ Third, it will demonstrate how the courts' approach to poll taxes and voter identification requirements is relevant to future Twenty-Fourth Amendment analyses.²⁰⁶ Finally, it will present empirical evidence supporting the proposition that voters are being disenfranchised by the new wave of voter identification requirements.²⁰⁷

A. New Voter Identification Laws Are More Burdensome than the Previous Ones

Courts have generally not been persuaded by arguments that incidental costs associated with obtaining sufficient identification to participate in an election constitute a poll tax.²⁰⁸ Newer voter identification laws impose greater costs than the older ones.²⁰⁹ It is worth revisiting the distinction between the incidental costs of voting and burdens reaching the level of a poll tax.²¹⁰

1. Costs Are No Longer Incidental

While courts in past challenges to voter identification laws have considered the cost of obtaining photo identification purely incidental, the new voter identification statutes present obstacles to voters that exceed those of previous laws.²¹¹ In *Crawford*, the Supreme Court

203. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) (successfully challenging a voter identification law under the Twenty-Fourth Amendment); *see infra* Part IV.A.

204. *See infra* Part III.A.

205. *See infra* Part III.B.

206. *See infra* Part III.C.

207. *See infra* Part III.D.

208. *E.g.*, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006) (declaring that the "imposition of tangential burdens does not transform a regulation into a poll tax"); *see supra* notes 110-11 and accompanying text.

209. *Compare* ARIZ. REV. STAT. ANN. § 16-579 (2006) (permitting use of a utility bill as proof of identification), *with* KAN. STAT. ANN. § 25-2908 (West Supp. 2012) (requiring government issued identification to be shown as proof of identification).

210. *See e.g.*, Act of Mar. 14, 2012, Pub. L. 195, No. 18, PA. ELEC. CODE (imposing a strict voter identification requirement). This has yet to be codified in Pennsylvania's statutory compilation. *See id.*; *supra* notes 110-11 and accompanying text.

211. *Compare Rokita*, 458 F. Supp. 2d at 827 (holding that costs to obtain the underlying

differentiated between incidental costs and burdens.²¹² Because Indiana provides free identification cards to indigent voters, the Court considered “the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph” to be incidental to the act of voting.²¹³ The Court’s logic was that these are the types of costs—time, transportation, and minimal expense—which all voters face when they go to the polls.²¹⁴ Indiana also permits indigent voters to file an affidavit with the county clerk demonstrating their inability to obtain identification.²¹⁵ Transportation to the county clerk’s office, like obtaining the free identification card from the Bureau of Motor Vehicles, is a cost that all voters face.²¹⁶ It can be inferred from *Crawford*, and subsequent voter identification cases, that courts will not treat the costs of obtaining the documents necessary to obtain free identification as burdens.²¹⁷

The documents necessary to attain identification, however, may be very costly.²¹⁸ States will not simply hand a voter free photo identification without sufficient proof of identity.²¹⁹ A voter may be required to purchase a new copy of her birth certificate from her state or country of birth, if that state or country maintains copies or issued them at all.²²⁰ The process of obtaining these underlying documents is cumbersome and involves economic costs as well as costs associated with transportation and time.²²¹ Moreover, many of those without identification are “elderly, disabled, or have certain physical or mental problems,” and will face exceptional difficulties maneuvering through complicated government bureaucracies.²²²

While all states to recently impose identification requirements offer free voter identification to comply with constitutional requirements,

documents needed for identification are incidental), with Act of Mar. 14, 2012 §§ 1–3 (imposing a voter identification requirement that does not permit voting by affidavit).

212. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198–99 (2008).

213. *Id.* at 198.

214. See *id.*

215. *Id.* at 199; see IND. CODE ANN. § 3-11-8-22 (West Supp. 2012).

216. *Crawford*, 553 U.S. at 198–99.

217. See, e.g., *id.* at 198–99; *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007).

218. See Langholz, *supra* note 79, at 764–65 (citing *Gonzalez v. Arizona*, Nos. CV 06-1268-PHX, CV 06-1362-PHX, CV 06-1575-PHX, 2006 WL 3627297, at *5 (D. Ariz. Sept. 11, 2006)).

219. TENN. CODE ANN. § 55-50-336 (2012) (“An applicant for a temporary photo identification license shall submit an application that includes proof of the applicant’s identity, Tennessee residency, and authorized stay in the United States.”).

220. See Langholz, *supra* note 79, at 763–64 (citing *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006)).

221. See *id.* (citing *Rokita*, 458 F. Supp. 2d at 827).

222. See, e.g., *Weinschenk v. State*, 203 S.W.3d 201, 215 (Mo. 2006) (en banc) (per curiam) (quoting *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1347 (N.D. Ga. 2006)).

some courts have considered the burden of obtaining the free identification to be substantial.²²³ This marks a clear shift from the courts' previous treatment of voter identification prerequisites.²²⁴ A Wisconsin court recently held that the state's strict identification requirement "abridge[s] the right to vote."²²⁵ Likewise, in a recent opinion the United States District Court for the District of Columbia harshly stated that the Texas identification requirement imposed "unforgiving burdens on the poor."²²⁶ The language employed in *Holder* marks a clear departure from the Supreme Court's holding in *Crawford*.²²⁷ This dramatic shift can likely be attributed to the practical realization that these incidental costs, taken as a whole, impose real burdens.²²⁸

2. Lack of Statutory Exceptions

Past voter identification laws often include statutory language creating provisional ballot exceptions for indigent voters, or for those who simply lacked identification.²²⁹ In Missouri, for example, a voter may cast a provisional ballot if two election supervisors can attest to the voter's identity.²³⁰ In Michigan, it is even simpler; before voting, a voter may file an affidavit attesting to her identity at the place of polling.²³¹ Another example is Indiana, which only requires a voter to appear before the county clerk and file an affidavit demonstrating her inability to obtain identification.²³² While the provisional ballot exceptions of the first wave of voter identification laws do impose additional expenses on

223. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) ("It imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty."); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 5 (Wis. Cir. Ct. Mar. 12, 2012) ("Its photo ID requirement impermissibly eliminates the right of suffrage altogether for certain constitutionally qualified electors.").

224. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188-90 (2008); see *supra* notes 110-11 and accompanying text.

225. *League of Women Voters of Wis. Educ. Network, Inc.*, No. 11 CV 4669, slip op. at 5 (citing *State ex rel. McGrael v. Phelps*, 128 N.W. 1041, 1047 (Wis. 1910)).

226. *Holder*, 888 F. Supp. 2d at 144.

227. Compare *Crawford*, 553 U.S. at 198-99 ("[T]he 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 . . ."), with *Holder*, 888 F. Supp. 2d at 144 ("It imposes strict, unforgiving burdens on the poor, and racial minorities in Texas are disproportionately likely to live in poverty.").

228. See, e.g., *Holder*, 888 F. Supp. 2d at 144.

229. See, e.g., IND. CODE ANN. § 3-11-8-23 (West Supp. 2012) (establishing provisional ballot procedure for those without photo identification); see also *Voter Identification Requirements*, *supra* note 13.

230. MO. REV. STAT. § 115-427 (West Supp. 2013).

231. MICH. COMP. LAWS ANN. § 168.523 (West 2007).

232. IND. CODE ANN. § 3-11-8-25.1.

voters, the exceptions provided by the new wave of voter identification laws are significantly more burdensome.²³³

The provisional ballot rules in the new wave of voter identification laws often have fewer exceptions and impose greater burdens on voters than their older counterparts.²³⁴ New voter identification provisions do not permit voters without requisite identification to file an affidavit as an alternative and, when a voter does cast a provisional ballot, she must bring photo identification to the clerk within a specified period of time—usually six days after the election.²³⁵ As a result, the voter incurs the incidental cost of going to the polls—which all voters bear—plus the cost of a separate trip to the county clerk’s office and the price of gathering the underlying documents needed to obtain identification.²³⁶

B. Legislative and Executive Histories Indicate Intent to Apply the Twenty-Fourth Amendment Broadly

Congress and President Johnson anticipated that the Twenty-Fourth Amendment would be applied more broadly than only ending the historical tax-for-vote scheme.²³⁷ The Amendment was an effort to provide the franchise to people of all classes, and to eliminate the traditional tax-for-vote scheme as well as constructive poll taxes.²³⁸

233. See *id.*; WIS. STAT. § 6.79 (Supp. 2012).

234. See, e.g., TENN. CODE ANN. § 2-7-12 (Supp. 2012); see also Act of Mar. 14, 2012, Pub. L. 195, No. 18, sec. 3, PA. ELEC. CODE (requiring voters who cast provisional ballots to appear before the county board within six calendar days).

235. Act of Mar. 14, 2012 § 3.

236. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113, 143-44 (D.D.C. 2012); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 2, 5 (Wis. Cir. Ct. Mar. 12, 2012); see *supra* note 214 and accompanying text.

237. See 108 CONG. REC. 4154 (1962) (Statement of Sen. Spessard Holland); Robertson, *supra* note 1, at 14 (reporting that President Johnson stated, “there can be no one too poor to vote” (internal quotation marks omitted)); *Congress Recommends Poll Tax Ban*, *supra* note 54 (discussing Congress’s intent to have the Twenty-Fourth Amendment applied broadly).

238. See U.S. Const. amend. XXIV; Schultz & Clark, *supra* note 7, at 403 (“The debate indicated that poor whites and those in the military were affected by the poll taxes, and that these fees stood as an impediment to democracy good government, and political reform.”); see also President Lyndon B. Johnson, Remarks Upon Witnessing the Certification of the 24th Amendment to the Constitution (Feb. 4, 1964), available at <http://www.presidency.ucsb.edu/ws/?pid=26056#axzz2fdPqqIEe>. David Schultz and Sarah Clark explain that, “[s]ome might argue . . . the Amendment should be read to prevent only the type of taxes that discriminate against people of color.” Schultz & Clark, *supra* note 7, at 416. On the other hand, “[o]ne could interpret the history and the congressional debates as suggesting that the Twenty-Fourth Amendment should be read more expansively, seeking to break the linkage between voting and wealth.” *Id.* In the late 1800s and early 1900s, states, such as Mississippi and Louisiana, enacted poll taxes to prevent blacks from voting through a race neutral statute. LAWSON, *supra* note 49, at 11-12. Voter identification laws, like Jim Crow era poll taxes, are racially neutral statutes that discriminate against minorities. See e.g., TEX. ELEC. CODE ANN. § 63.0101 (West Supp. 2012) (requiring voters

These goals are illustrated by the congressional intent, executive intent, and the text of the Twenty-Fourth Amendment itself.²³⁹

1. Congressional Intent, Executive Intent, and Goals of Enforcement

The potential scope of the Twenty-Fourth Amendment has been narrowed by the notion that its sole purpose was to end the tax-for-vote scheme that had been a customary method of disenfranchising black voters in the South.²⁴⁰ However, Congress and President Johnson, who both sought passage of the Amendment, intended it more broadly to eliminate wealth as a barrier to voting.²⁴¹

When President Roosevelt first sought passage of the Twenty-Fourth Amendment, his goals were largely political.²⁴² If more white southern Democrats could afford to vote, more pro-New Deal legislators could win primaries and implement his agenda.²⁴³ In this losing effort to field more liberal candidates, the poll tax was framed as class issue, and separate from the broader civil rights movement.²⁴⁴

The presentation of the Twenty-Fourth Amendment as an economic issue, and not a racial one, persisted throughout its passage in Congress and subsequent ratification.²⁴⁵ The lead advocates of the Twenty-Fourth Amendment were deliberate in their efforts to treat its passage as benefiting all Americans, and not simply as an imposition of racial equality, which was unpopular among white southerners.²⁴⁶ The Twenty-Fourth Amendment was perceived as being so far beyond the scope of

to present identification without mentioning race); *see also Holder*, 888 F. Supp. 2d at 143-44 (finding that a voter identification statute “imposes strict, unforgiving burdens on . . . racial minorities”).

239. *See infra* Part III.B.1-2.

240. *See* Schultz & Clark, *supra* note 7, at 414-17 (explaining that courts’ narrow interpretation of the Twenty-Fourth Amendment, and its terms “poll tax or other tax,” fails to “address the more subtle means of denying franchise rights” and “encourage[s] subterfuge”); *see also* U.S. Const. amend. XXIV, § 1 (“The right of citizens . . . to vote . . . shall not be denied or abridged by . . . reason of failure to pay any poll tax or other tax.”).

241. *See* 108 CONG. REC. 5076 (1962) (statement of Sen. Spessard Holland); Robertson, *supra* note 1, at 14 (reporting that President Johnson stated that, “there can be no one too poor to vote” (internal quotation marks omitted)); *Congress Recommends Poll Tax Ban*, *supra* note 54 (discussing Congress’s intent to have the Twenty-Fourth Amendment apply broadly).

242. Ackerman & Nou, *supra* note 24, at 71.

243. *Id.* at 71 (citing LAWSON, *supra* note 49, at 57-58).

244. *See id.* at 72-73.

245. *Id.* at 80-82 (citing 108 CONG. REC. 4154 (1962) (statement of Sen. Spessard Holland)); *see* Robertson, *supra* note 1, at 14.

246. *See* Ackerman & Nou, *supra* note 24, at 81-82. Senator Holland, making the case in support of the Twenty-Fourth Amendment, stated that the Twenty-Fourth Amendment would “appl[y] to majorities, to minorities, and to every person of every color.” *Id.* (quoting 108 CONG. REC. 4154 (1962) (statement of Sen. Spessard Holland) (internal quotation marks omitted)).

the Civil Rights movement that the National Association for the Advancement of Colored People opposed its passage, fearing that amending the Constitution would hamper civil rights groups' efforts to effect change through more practical tools—acts of Congress and court-made rules.²⁴⁷ At the signing ceremony following the Amendment's passage, President Johnson, a supporter of the Civil Rights Movement, embraced the Twenty-Fourth Amendment like its supporters had as early as the 1930s—as an issue of class, rather than race.²⁴⁸

Despite the political motivations for disguising the controversial, racially divisive Amendment behind broad class-based language, many politicians nonetheless supported it because they believed their poor, white constituents would benefit from the Amendment.²⁴⁹ The intentions of the Twenty-Fourth Amendment's early supporters are relevant in analyzing the voter identification laws of the present.²⁵⁰ If the goals of the Twenty-Fourth Amendment were strictly aimed at eliminating the historical pay-for-vote exchange, then it is less appropriate to defeat identification provisions that impose non-traditional costs.²⁵¹ However, since the Twenty-Fourth Amendment was presented as a means by which to end wealth-based voting classifications, its potential reach is far greater than the courts have let on, and may encompass costly voter identification requirements.²⁵²

2. Text of the Twenty-Fourth Amendment

The text of the Twenty-Fourth Amendment indicates that the drafters intended for the Twenty-Fourth Amendment to apply more broadly than it has been thus far.²⁵³ Section 1 of the Twenty-Fourth Amendment states:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall

247. See *Congress Recommends Poll Tax Ban*, *supra* note 54 (“[T]he amendment ‘would provide an immutable precedent for shunting all further civil rights legislation to the amendment procedure.’”).

248. See Ackerman & Nou, *supra* note 24, at 71-72; Robertson, *supra* note 1, at 14.

249. 108 CONG. REC. 5076 (1962) (statement of Sen. Spessard Holland) (“The increase in voting was almost three times as great as the increase in Florida population. This was an increase in the participation of white citizens in voting.”).

250. See *supra* Part II.A.2-3.

251. See Schultz & Clark, *supra* note 7, at 414-15 (discussing how courts have narrowly interpreted the Twenty-Fourth Amendment, limiting its potency and making the Amendment “a great constitutional silence”).

252. See *id.* at 414-17.

253. See U.S. CONST. amend. XXIV, §§ 1-2; Schultz & Clark, *supra* note 7, at 415-20; see also *supra* note 249 and accompanying text.

not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.²⁵⁴

There are two separate, textual indications that the Twenty-Fourth Amendment was intended to encompass more than just deliberate, pay-to-vote schemes.²⁵⁵ First, as noted in *Harman*, the terms “denied or abridged” indicate that the Amendment extends to more than just the direct denial of the right to vote.²⁵⁶ According to Chief Justice Warren, the inclusion of the word “abridged” demonstrates that the Twenty-Fourth Amendment “nullifies sophisticated as well as simple-minded modes” of impairing the franchise.²⁵⁷ Voter identification laws, while certainly not a complete “denial” of the franchise, should fall squarely within Chief Justice Warren’s broad definition of an “abridge[ment]” of the right to vote.²⁵⁸

Second, the language “poll tax or other tax” is important in determining whether the Twenty-Fourth Amendment can invalidate voter identification laws.²⁵⁹ These terms can be read either narrowly or broadly.²⁶⁰ A narrow reading defines “tax” in the most literal and direct sense, for example, the \$1.50 poll tax required of Virginia residents to vote at the time of *Harper*.²⁶¹ However, this is not necessarily the most appropriate interpretation of the language given the additional terms in the Amendment.²⁶² The words “any” and “other” lend support to the idea that the Twenty-Fourth Amendment’s scope is not so limited and may be used to address other forms of monetized payment.²⁶³ Such forms of monetized payment reasonably include the costs associated with voter identification laws: for example, payments to obtain underlying documents from the state and the time committed and money spent

254. U.S. CONST. amend. XXIV, § 1. Section 2 of the Twenty-Fourth Amendment provides Congress with the “power to enforce [section 1] by appropriate legislation.” *Id.* § 2.

255. *Id.* § 1; see also Schultz & Clark, *supra* note 7, at 415-23.

256. U.S. CONST. amend. XXIV, § 1; *Harman v. Forssenius*, 380 U.S. 528, 540 (1965).

257. U.S. CONST. amend. XXIV, § 1; *Harman*, 380 U.S. at 540-41 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

258. U.S. CONST. amend. XXIV, § 1; see *Harman*, 380 U.S. at 540-41; Schultz & Clark, *supra* note 7, at 417-19.

259. U.S. CONST. amend. XXIV, § 1; see Schultz & Clark, *supra* note 7, at 416-21.

260. See Schultz & Clark, *supra* note 7, at 417.

261. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); see also Schultz & Clark, *supra* note 7, at 416.

262. See U.S. CONST. amend. XXIV, § 1; Schultz & Clark, *supra* note 7, at 416; see also *supra* text accompanying note 256.

263. See Schultz & Clark, *supra* note 7, at 417 (citing Allison Hayward, *What Is an Unconstitutional “Other Tax” on Voting? Construing the Twenty-Fourth Amendment*, 8 ELECTION L.J. 103, 117 (2008)).

maneuvering through the state bureaucracy.²⁶⁴ While these burdens do not fit neatly into the rigid definition of “poll tax,” the Amendment’s language does not foreclose the possibility that burdensome identification requirements are “any poll tax” or some “other tax.”²⁶⁵

C. The Courts

Case law will play a major role in the unclear future of voter identification laws.²⁶⁶ As of now, few courts have even considered the possibility of voter identification laws violating the Twenty-Fourth Amendment.²⁶⁷ Nevertheless, various prior decisions of the Supreme Court and lower courts support the notion that the new wave of voter identification laws may violate the Twenty-Fourth Amendment.²⁶⁸

1. The Importance of *Harman* and *Harper*

Both *Harman* and *Harper* provide support for the broader application of the Twenty-Fourth Amendment.²⁶⁹ The “material requirement” standard established in *Harman* is the basis upon which future Twenty-Fourth Amendment challenges should rest, since the costs associated with obtaining identification and the provisional ballot scheme are “material requirements” according to the *Harman* court.²⁷⁰ The facts of *Harman* are certainly not perfectly analogous to the circumstances presented to courts dealing with the new wave of voter identification requirements.²⁷¹ In *Harman*, voters had the choice of either paying a direct tax to the state or filing a residency requirement—the “material requirement”—in order to vote.²⁷² However, the new, stricter

264. See *supra* Part III.A (discussing the burdens of voter identification requirements).

265. See U.S. CONST. amend. XXIV, § 1 (emphases added); Schultz & Clark, *supra* note 7, at 419.

266. See, e.g., *Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (per curiam) (holding that the state must ensure that identification cards are readily available before the statute becomes effective).

267. See, e.g., *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) (invalidating a voter identification law on poll tax grounds); *Weinschenk v. State*, 203 S.W.3d 201, 213-14 (en banc) (per curiam) (Mo. 2006).

268. See, e.g., *Harman v. Forssenius*, 380 U.S. 528, 533-34 (1965); *Weinschenk*, 203 S.W.3d at 213-14.

269. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966); *Harman*, 380 U.S. at 533-34.

270. See *Harman*, 380 U.S. at 541-42.

271. Compare *id.* (requiring that voters prepare a certificate or pay the poll tax), with *Billups*, 406 F. Supp. 2d at 1368-69 (requiring that voters obtain underlying documents before getting a free voter identification).

272. *Harman*, 380 U.S. at 541-42. In order to avoid the poll tax, voters were required to file a witnessed or notarized certificate attesting to their residence. See *id.*

voter identification laws leave little choice for voters.²⁷³ Under the new wave of statutes, a voter is either equipped with the appropriate identification or must go through various steps to obtain such identification—steps that, taken together, amount to a “material requirement.”²⁷⁴

Despite this difference, the cumbersome nature of filing a residency requirement is not unlike the nature of obtaining identification required to vote.²⁷⁵ In *Harman*, Virginia required voters who chose not to pay the poll tax to obtain a certificate of residence from local election officials or to prepare it themselves, then file the notarized or witnessed certificate in person with the city or county treasurer six months prior to the election.²⁷⁶ Under the new wave of voter identification statutes, voters who need photo identification but do not have it face requirements that are just as cumbersome.²⁷⁷ The voter, though entitled to a form of free identification, must first obtain the underlying documentation to prove her identity.²⁷⁸ This often includes considerable expense, time, and travel, depending on the particular circumstances involved.²⁷⁹ Courts, in considering the new wave of voter identification laws, should apply the standard set out in *Harman*.²⁸⁰ If the requirements for obtaining identification reach the “material” threshold of *Harman*, courts should consider invalidating the statute under the Twenty-Fourth Amendment.²⁸¹

While *Harper* did not review a challenge to voter identification laws under the Twenty-Fourth Amendment, the *Harper* court indicated its opposition to voter qualifications that have a “relation to wealth” or relate “to paying or not paying . . . any tax.”²⁸² *Harper* was decided under the Equal Protection Clause, not the Twenty-Fourth

273. See, e.g., MISS. CODE ANN. § 23-15-563 (West 2012); *Billups*, 406 F. Supp. 2d at 1368-69.

274. See MISS. CODE ANN. § 23-15-563 (2011); *Billups*, 406 F. Supp. 2d at 1368-69. Such burdens include purchasing underlying documentation and appearing before the county clerk after voting provisionally. See *supra* Part III.A.1-2.

275. Compare *Billups*, 406 F. Supp. 2d at 1368-69 (requiring voters to obtain identification by navigating the absentee voting process, paying for an identification card, and completing an affidavit), with *Harman*, 380 U.S. at 541-42 (requiring voters to file residency certificate).

276. *Harman*, 380 U.S. at 541-42.

277. See *supra* Part III.A (discussing the burdens of the new wave of voter identification requirements); see also *Harman*, 380 U.S. at 541-42.

278. See *supra* Part III.A. It is important to note that it is those “very people outside the mainstream of society who are the least equipped to bear the costs or navigate the many bureaucracies necessary to obtain the required documentation.” *Weinschenk v. State*, Nos. 06AC-CC00656, 06AC-CC00587, slip op. at 9 (Mo. Cir. Ct. Sept. 14, 2006).

279. See *supra* Part III.A.

280. See *Harman*, 380 U.S. at 541.

281. See *id.*; *infra* notes 282-88.

282. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

Amendment.²⁸³ However, the Supreme Court's analysis in *Harper* is relevant to future Twenty-Fourth Amendment inquiries.²⁸⁴ Justice William Douglas's majority opinion focused on wealth-classifications interfering with the fundamental right to vote, which required strict scrutiny from the courts.²⁸⁵ This distinction is important in determining whether the Twenty-Fourth Amendment prohibits strict voter identification provisions.²⁸⁶ If the focus of courts is on righting historical wrongs—for example, the money-for-vote poll tax—the scope of their analysis may be limited as such.²⁸⁷ However, if the focus is on protecting the fundamental right to vote regardless of wealth, the analysis may be broadened to include more sophisticated forms of voter suppression, such as strict voter identification provisions, which indirectly impose costs on voters.²⁸⁸

2. Previous Challenges to Voter Identification Laws

There have been numerous challenges to voter identification laws on poll tax grounds.²⁸⁹ While only two challenges have been successful on those grounds, courts have at least been willing to consider these claims in cases such as *Gonzalez*, *Rokita*, and *Billups*.²⁹⁰ This indicates that there are circumstances in which the poll tax argument is appropriate and may be applied.²⁹¹

One of the two courts to invalidate a voter identification requirement on poll tax grounds was the Supreme Court of Missouri in *Weinschenk*.²⁹² It found that, "[i]n this case, Plaintiffs proved that [] costs must be incurred for citizens who lack the [statutorily] mandated photo IDs to exercise their right to vote."²⁹³ The court made it clear that

283. *Id.*

284. *See id.*

285. *Id.* at 666, 670 ("[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.").

286. *See id.*; *supra* text accompanying notes 280-81.

287. *Compare Weinschenk v. State*, 203 S.W.3d 201, 215 (en banc) (per curiam) (Mo. 2006) (finding state voter identification law imposed a poll tax), *with Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (finding state voter identification law did not violate the Twenty-Fourth Amendment).

288. *See Harper*, 383 U.S. at 670 (indicating courts' aversion to voter qualifications that stand upon "wealth or fee paying"); *see supra* Part III.A.1.

289. *E.g.*, *Gonzalez*, 677 F.3d at 388; *see also supra* Part II.B.2.

290. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005); *Weinschenk*, 203 S.W.3d at 215; *see also Gonzalez*, 677 F.3d at 408.

291. *See, e.g.*, *Gonzalez*, 677 F.3d at 408; *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1377-80 (N.D. Ga. 2007); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826-28 (S.D. Ind. 2006).

292. *Weinschenk*, 203 S.W.3d at 214.

293. *Id.*

the costs of obtaining underlying documents were real costs, not theoretical ones.²⁹⁴ The court distinguished *Weinschenk* from Indiana and Georgia cases which considered similar challenges, finding that “the parties [in Indiana and Georgia] had simply presented theoretical arguments and had failed to offer specific evidence of voters who were required to bear these costs.”²⁹⁵ In *Weinschenk*, however, the plaintiff was capable of demonstrating “the costs associated with birth certificates and other documentation to acquire a photo ID and vote.”²⁹⁶ If future courts are to invalidate voter identification provisions on poll tax grounds, specific testimony regarding costs incurred or to be incurred by voters will surely play an important role.²⁹⁷

The other court to invalidate a voter identification statute on poll tax grounds was the Northern District of Georgia.²⁹⁸ In *Billups*, the court held that the twenty dollar fee to obtain an identification card violated the Twenty-Fourth Amendment, declaring that “most voters who do not possess other forms of Photo ID must obtain a Photo ID card to exercise their right to vote,” and “requiring those voters to purchase a Photo ID card effectively places a cost on the right to vote.”²⁹⁹ Furthermore, the court, relying on *Harman*, attacked Georgia’s fee waiver affidavit option as a material requirement because “the voter must arrange for transportation to a . . . service center or the . . . bus, if that option is available, and must navigate the lengthy waiting process successfully.”³⁰⁰

While states have since recognized that charging a fee for identification is not going to withstand Twenty-Fourth and Fourteenth Amendment challenges, the rationales provided by the Northern District of Georgia may be persuasive in invalidating the new wave of voter identification requirements.³⁰¹ For example, many courts have been hesitant to consider incidental costs—such as transportation—in voter identification cases, whereas the Northern District of Georgia embraced them.³⁰² Also, the Northern District of Georgia did not draw a distinction

294. *Id.*

295. *Id.* (distinguishing the facts of *Weinschenk* from those of *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006), and *Rokita*, 458 F. Supp. 2d at 775).

296. *Id.*

297. *See id.* at 213-15.

298. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005). In this case, the Northern District of Georgia invalidated the version of the statute requiring that voters pay for identification cards. *Id.*

299. *Id.* at 1369-70.

300. *Id.* at 1367-70 (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965)).

301. *See id.*; *see also* *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1343 (N.D. Ga. 2007), *supra* note 298 and accompanying text.

302. *Billups*, 406 F. Supp. 2d at 1370; *see, e.g., Crawford v. Marion Cnty. Election Bd.*, 553

between requiring voters to purchase the offered voter identification and requiring voters to pay for the documents necessary to obtain an identification card.³⁰³ It simply held that Georgia's process "effectively places a cost on the right to vote."³⁰⁴

Following this decision, the Georgia legislature amended the law, providing identification free of charge.³⁰⁵ This time, however, the challenge to the amended law provided no poll tax argument, and the court relied on the Supreme Court's decision in *Crawford* to uphold the statute.³⁰⁶ The Eleventh Circuit's decision in *Billups*, like that in *Crawford*, was driven by a fact-intensive analysis.³⁰⁷ Both the Eleventh Circuit in *Billups* and the Supreme Court in *Crawford* found that the challengers were unable to demonstrate that the voter identification statutes would actually burden any voters.³⁰⁸ However, the fact that the courts even looked to the laws' effects on actual voters is important for future challenges under the Twenty-Fourth Amendment.³⁰⁹ If challengers can demonstrate that voters were, or will be, disenfranchised or forced to incur substantial burdens in order to vote, courts will be more willing to invalidate the provisions.³¹⁰

While the Supreme Court in *Crawford* did not consider the poll tax argument, the Southern District of Indiana in *Rokita* did.³¹¹ In denying the poll tax claim, the court reasoned that incidental costs do not impose sufficient burdens on voters to be considered a poll tax.³¹² However, the court did indicate that the cost to obtain a birth certificate could "plausibly" reach the level of a poll tax.³¹³ The court deflated this argument because the challengers failed to present "evidence to demonstrate that anyone will actually be required to incur this cost in

U.S. 181, 198 (2008).

303. *Billups*, 406 F. Supp. 2d at 1369.

304. *Id.*

305. GA. CODE ANN. § 21-2-417.1 (West 2012); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1346 (11th Cir. 2009).

306. *Billups*, 554 F.3d at 1352-55 (citing *Crawford*, 553 U.S. at 196-201).

307. *Id.* at 1354-55; see *Crawford*, 553 U.S. at 201-02.

308. *Crawford*, 553 U.S. at 201-02; *Billups*, 554 F.3d at 1354-55.

309. See *infra* Part III.D.

310. See, e.g., *Billups*, 554 F.3d at 1354-55. Part III.D of this Note will address the availability of empirical evidence to prove substantial burdens on voters. See *infra* Part III.D.

311. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826-29 (S.D. Ind. 2006); see generally *Crawford*, 553 U.S. 181 (holding that the Indiana voter identification law does not violate equal protection).

312. *Rokita*, 458 F. Supp. 2d at 827.

313. *Id.* ("The only incidental cost which might plausibly approach being a poll tax is the fee assessed to obtain a birth certificate, which in turn is used to obtain a photo identification from the [Bureau of Motor Vehicles].").

order to vote.”³¹⁴ This is similar to the factual analysis conducted by the courts in *Billups* and *Crawford* regarding the need for challengers to demonstrate actual burdens.³¹⁵ The *Rokita* court also posited that since the federal government issued certain permissible forms of identification—for example, passport—the costs of obtaining identification were out of Indiana’s control.³¹⁶ *Rokita* left open the possibility that demonstrative proof of voters actually needing to obtain a birth certificate could have been sufficient to establish the poll tax claim; future challengers should ensure that they present veritable evidence of burdens on voters.³¹⁷

The new wave of voter identification laws has not yet been challenged on poll tax grounds.³¹⁸ However, courts have been scrutinizing these provisions, which is important for future poll tax analyses.³¹⁹ The Supreme Court of Pennsylvania stalled implementation of the state’s voter identification provision because of the arduous process of obtaining the necessary identification.³²⁰ The court specifically singled out the underlying documents, a sign that such costs might be considered burdens in future cases.³²¹ Moreover, the court placed special importance on the vulnerability of specific groups—such as the elderly—that would have been disenfranchised by implementation of the Pennsylvania statute.³²²

In Tennessee, an appellate court upheld the state’s voter identification provision.³²³ However, the court required that election officials accept Memphis library cards as appropriate, alternative identification.³²⁴ This is an important step in the evolving view of the courts regarding identification provisions.³²⁵ The court, while permitting

314. *Id.* at 827-28 (finding that “Plaintiffs’ contention about the need of individuals to pay a fee for a birth certificate is purely speculative and theoretical”).

315. *Crawford*, 553 U.S. at 201-02; *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354-55 (11th Cir. 2009); *Rokita*, 458 F. Supp. 2d at 827-28.

316. IND. CODE ANN. § 3-5-2-39 (West 2006); *Rokita*, 458 F. Supp. 2d at 827.

317. *Rokita*, 458 F. Supp. 2d at 827-28.

318. *See, e.g., Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012) (per curiam) (challenging state voter identification law on state constitutional grounds); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 2 (Wis. Cir. Ct. Mar. 12, 2012) (challenging state voter identification law on state constitutional grounds).

319. *See, e.g., Applewhite*, 54 A.3d at 5; *League of Women Voters of Wis. Educ. Network, Inc.*, 11 CV 4669, slip op. at 5.

320. *Applewhite*, 54 A.3d at 3-5.

321. *Id.* at 3.

322. *Id.* at 4.

323. *City of Memphis v. Hargett*, No. M2012-02141-COA-R3-CV, 2012 WL 5265006, at *13 (Tenn. Ct. App. Oct. 25, 2012).

324. *Id.* at *12-13.

325. *See id.*; *see also infra* text accompanying notes 322-24.

the provision as a whole, paid close attention to the burdens placed on Memphis residents who used library cards as poll identification.³²⁶ If courts begin to view such burdens as universal, and not so isolated as to only affect library-goers in one city, poll tax challenges are more likely to be successful.³²⁷

The decision reached in Wisconsin regarding its voter identification law is one of the strongest rebukes of such a statute to date.³²⁸ The court held that the statute's "photo ID requirements impermissibly eliminate the right of suffrage altogether for certain constitutionally qualified electors."³²⁹ This strong language indicates the court's willingness to consider voter identification to be an absolute barrier to voting for some residents.³³⁰ In future challenges to voter identification laws, a substantial burden will be necessary to meet *Harman's* "material requirement" standard or the precedents set by the Northern District of Georgia and Missouri Supreme Court.³³¹

D. Voter Identification Laws and Real Consequences for Voters

A great deal of the analysis done by courts in upholding voter identification laws involves a lack of evidence to support the challenges.³³² Challengers have often been incapable of demonstrating actual burdens on real voters.³³³ As voter identification statutes gain more traction in the media and politics, more data will become available.³³⁴ This data will be necessary to demonstrate when real burdens placed on voters have reached the level of a poll tax.³³⁵

326. See Ghianni, *Tennessee Appeals*, *supra* note 186.

327. See *id.*

328. See *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, slip op. at 5 (Wis. Cir. Ct. Mar. 12, 2012).

329. *Id.*

330. See *id.*

331. *Id.*; see *Harman v. Forssenius*, 380 U.S. 528, 541 (1965); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) (en banc) (per curiam); *Weinschenk v. State*, 203 S.W.3d 201, 214 (Mo. 2006).

332. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201-02 (2008) (failing to find sufficient evidence that actual voters would be burdened).

333. See, e.g., *id.* (explaining that the mere potential for voters to be burdened is insufficient to establish that a statutory provision is a poll tax).

334. See generally R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* (Cal. Inst. of Tech., Div. of Humanities & Soc. Sci., Working Paper No. 1267R, 2008), available at <http://jkatz.caltech.edu/research/files/wp1267R.pdf> (discussing the recent trends in voter identification data, which only became available after the 2006 general election).

335. See *id.* at 20.

1. Empirical Data on Lower Voter Turnout

While there is no consensus within the social science community, studies have shown that voter identification laws do impact turnout.³³⁶ Courts might be willing to consider the poll tax argument more seriously if these studies can demonstrate real burdens.³³⁷ In a California Institute of Technology study, the researchers concluded that, “the stricter requirements—requirements more than merely presenting a non-photo identification card—are significant negative burdens on voters, relative to a weaker requirement, such as merely signing a poll-book.”³³⁸ Furthermore, the study found that strict voter identification laws lead to lower turnout of “registered voters with lower levels of educational attainment or lower levels of income”—across all racial and ethnic groups.³³⁹

From 2011 to 2012, the Brennan Center for Justice prepared a report extensively detailing the substantial costs to voters in states with voter identification requirements.³⁴⁰ The study highlights some of the specific constraints to voters in obtaining identification.³⁴¹ For example, the study addresses voters’ distance from offices that issue identification, limited transportation to those offices, short hours of operation of those offices, and the high costs of obtaining necessary documents.³⁴² Overall, the report indicates that millions of Americans living in states with strict voter identification laws will have more difficulty voting.³⁴³ Data on the subject, while not necessarily abundant, does exist.³⁴⁴

336. See, e.g., *id.*

337. See *id.*

338. *Id.* at 17.

339. *Id.* at 20.

340. Keesha Gaskin & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CENTER FOR JUST., at 2, http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf (last updated July 29, 2012).

341. See *id.* at 3-15.

342. *Id.*

343. *Id.* at 1-2.

344. See, e.g., Shelly de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 202 (2009) (finding that “states with voter ID laws experienced a 1.6 to 2.2 percentage point decline in 2006 voter turnout,” and therefore, “3 to 4.5 million voters were disenfranchised by the laws”); Alvarez et al., *supra* note 334; Matt A. Barreto et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 16 (Wash. Inst. for the Study of Ethnicity & Race, Working Paper, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf (“Our results suggest that . . . minority, low-income, and less educated Indiana residents are less likely to have access to valid photo identification.”); Brad T. Gomez, *Uneven Hurdles: The Effect of Voter Identification Requirements on Voter Turnout* 1-3 (Apr. 2008) (unpublished manuscript), available at http://myweb.fsu.edu/bgomez/Gomez_VoterID_2008.pdf; M.V. Hood III & Charles S. Bullock, III, *Worth a Thousand Words?: An Analysis of Georgia’s Voter Identification Statute* 19 (June 2007) (unpublished manuscript), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/>

2. Studies Indicating the Potential for Disenfranchisement

While evidence of lower turnout resulting from voter identification laws is limited, there are studies that have examined the potential for future disenfranchisement, especially among minority voters, that will result from the new wave of voter identification laws.³⁴⁵ Courts may be moved to consider the poll tax argument if real burdens can be demonstrated through these studies.³⁴⁶ In *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters*, researchers determined that their “results clearly suggest that voting laws which require specific or multiple forms of identification will disproportionately impact racial and ethnic minorities, immigrant populations, and those with lower incomes.”³⁴⁷ This study was not unique in its assessment—as the new wave of voter identification laws becomes further implemented, more researchers and commentators are considering its impact.³⁴⁸

In another study, *Uneven Hurdles: The Effect of Voter Identification Requirements on Voter Turnout*, researchers determined that, while photo identification requirements had minimal effect on overall turnout, “[voter identification] laws may decrease the turnout of Latino populations, and [photo identification] laws may affect black populations similarly. The evidence also indicates that [voter identification] laws may also widen the income gap associated with voter turnout.”³⁴⁹

IV. SOLUTIONS FOR NEW VOTER IDENTIFICATION LAWS

Part IV will be divided into three Subparts.³⁵⁰ First, it will explain how the Twenty-Fourth Amendment is the appropriate cause of action

responsetoemergmotionexA.pdf (“Registered voters are significantly less likely to possess a driver’s license if they are from minority groups, especially blacks and Hispanics, and if they are older.”); Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It?: The Effects of Voter Identification Requirements on Turnout* 14 (Aug. 31, 2006) (unpublished manuscript), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_50903.pdf (identifying the possibility “that strict voter identification requirements, designed to promote legitimate election results, could actually undermine that legitimacy instead”).

345. See, e.g., Matt A. Barreto et al., *Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters* 21 (Sept. 1, 2007) (unpublished manuscript) [hereinafter Barreto et al., *Voter ID*], available at http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf.

346. See *supra* notes 332-35 and accompanying text.

347. Barreto et al., *Voter ID*, *supra* note 345, at 21-22.

348. See, e.g., *Voter Identification: First, Show Your Face*, *ECONOMIST*, Sept. 17, 2011, at 30, 30 (“More than 178,000 registered voters in South Carolina lack such formal identification. Opponents of the bill claim it discriminates against black and poor voters.”); see also *supra* note 340.

349. Gomez, *supra* note 340, at 20.

350. See *infra* Part IV.A–B.

for challenging voter identification requirements by detailing how the Equal Protection Clause and the VRA are not likely to provide favorable outcomes.³⁵¹ Second, it will discuss possible solutions to ensuring the franchise to those currently without identification.³⁵²

*A. Choosing the Twenty-Fourth Amendment over
Equal Protection or the VRA*

Courts should utilize the Twenty-Fourth Amendment to dismantle barriers to voting.³⁵³ Courts commonly apply the Equal Protection Clause or the VRA to voter identification laws when challengers seek to have these laws invalidated.³⁵⁴ However, the Twenty-Fourth Amendment provides the best cause of action against states with strict voter identification requirements.³⁵⁵

The Supreme Court decided *Crawford* in 2008.³⁵⁶ *Crawford*, considered a landmark decision on Equal Protection Jurisprudence, will not likely be overruled quickly.³⁵⁷ The Court held that the voter identification statute did not violate the fundamental right to vote and therefore was upheld.³⁵⁸ Furthermore, the Court had little regard for the alleged burdens on voters and instead focused heavily on the need to protect against voter fraud.³⁵⁹ Since the Court was so steadfast in its holding, attacking voter identification laws under the Equal Protection Clause is not likely to be successful in the near future.³⁶⁰

Section 5 of the VRA has been applied broadly to prevent disenfranchisement.³⁶¹ Courts have successfully defeated strict voter identification requirements with relative ease under the statute.³⁶² While this was a viable option in the past for invalidating voter identification laws in jurisdictions covered by the VRA, the Supreme Court has

351. See *infra* Part IV.A.

352. See *infra* Part IV.B–C.

353. See U.S. CONST. amend. XXIV, §§ 1–2.

354. E.g., *Baker v. Carr*, 369 U.S. 186, 237 (1962) (finding a state apportionment scheme unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012).

355. See *supra* Part III.

356. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 181 (2008).

357. See *id.*; Press Release, ACLU, Supreme Court Hears ACLU's Landmark Voter ID Case (Jan. 9, 2008), available at <https://www.aclu.org/voting-rights/supreme-court-hears-aclus-landmark-voter-id-case>.

358. See *Crawford*, 553 U.S. at 204.

359. *Id.* at 194–200.

360. See *id.* at 204.

361. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (1966) (codified as amended at 42 U.S.C. § 1973 (2006)); see, e.g., Frieden, *supra* note 190.

362. See, e.g., Frieden, *supra* note 190.

effectively ended the use of Section 5.³⁶³ On November 9, 2012, the Supreme Court granted Shelby County's writ of certiorari to answer the limited question of "whether . . . Section 5 of the Voting Rights Act . . . exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated . . . the United States Constitution."³⁶⁴ On June 25, 2013, the Supreme Court struck down the preclearance provision, deflating the most powerful tool to combat restrictive voting practices.³⁶⁵

Ending preclearance requirements under Section 5 will have widespread effects on the franchise, particularly in covered jurisdictions with strict voter identification requirements.³⁶⁶ Texas's voter identification scheme was denied preclearance in March 2012 for "having the effect of denying or abridging the right to vote on the account of race."³⁶⁷ The Court of Appeals affirmed the DOJ's decision, stating in plain words that the requirement "imposes strict, unforgiving burdens on the poor."³⁶⁸ In South Carolina, preclearance was granted, but implementation was denied by the DOJ until 2013.³⁶⁹ In Mississippi, preclearance is still required.³⁷⁰

Without Section 5 of the VRA, the voter identification landscape will likely be different, with states like Texas retaining their voter identification requirements.³⁷¹ In fact, states can now impose even stricter requirements without the fear of repercussions from the DOJ.³⁷² With the VRA unavailable and the Supreme Court likely unwilling to reconsider *Crawford*, the most common means of attacking voter identification requirements are no longer available to the courts.³⁷³ The

363. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 24 (U.S. June 25, 2013).

364. *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

365. *Shelby Cnty.*, No. 12-96, slip op. at 24.

366. See Eric Holder, U.S. Attorney Gen., Remarks on the Supreme Court Decision in *Shelby County v. Holder* (June 25, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130625.html>.

367. See Frieden, *supra* note 190.

368. *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012).

369. *Voter Identification Requirements*, *supra* note 13.

370. *Id.*

371. See Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); Frieden, *supra* note 190.

372. See, e.g., Act of Mar. 14, 2012, Pub. L. 195, No. 18, sec. 1, PA. ELEC. CODE (imposing a strict voter identification requirement). Pennsylvania was not a covered jurisdiction under Section 5. *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Nov. 23, 2013) (listing the states and counties requiring preclearance under Section 5).

373. See *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 24 (U.S. June 25, 2013); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008); see also *Planned Parenthood of S. Eastern Penn. v. Casey*, 505 U.S. 833, 854 ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition,

Twenty-Fourth Amendment will stand as the most viable option to defeat identification requirements.³⁷⁴

B. A New Advocate for Reform

In light of the *Shelby County* decision, which removed the DOJ's authority to unilaterally deny preclearance, there is a need for greater voting rights advocacy.³⁷⁵ Currently, there are many organizations actively involved in voting rights litigation and legislation.³⁷⁶ Many of these organizations, while engaged in voting rights work, have broad sets of progressive goals, and are not concerned exclusively with voting rights.³⁷⁷ Some, like the ACLU, are concerned with civil liberties, while others, such as the NAACP, focus on civil rights for minorities.³⁷⁸

While these efforts to protect voting rights in general are commendable, they will not be adequate to combat new voter identification laws in the face of pro-voter identification politicians and the weakening of the DOJ's authority.³⁷⁹ The groups that currently engage in voting rights advocacy do not center their efforts exclusively on voter identification laws.³⁸⁰ In the absence of Section 5 of the VRA,

indispensable.”).

374. See U.S. CONST. amend. XXIV, §§ 1–2.

375. *Shelby Cnty.*, No. 12-96, slip op. at 24.

376. E.g., *About*, AMERICA VOTES, <http://www.americavotes.org/about> (last visited Nov. 23, 2013); *About the Voting Rights Project*, LAW. COMM. FOR CIVIL RTS. UNDER L., http://www.lawyerscommittee.org/projects/voting_rights (last visited Nov. 23, 2013); *About the NAACP's Civic Engagement Program Programs*, NAACP, <http://www.naacp.org/pages/civic-engagement-about> (last visited Nov. 23, 2013) (“The NAACP has worked on election reform issues for all of its 101 years.”); *Voting Rights*, ACLU, <https://www.aclu.org/voting-rights> (last visited Nov. 23, 2013) (“The ACLU works to protect and expand the freedom to vote through legislation, litigation, and voter education in all 50 states and Congress.”); *Voting Rights and Elections*, BRENNAN CENTER FOR JUST., <http://www.brennancenter.org/issues/voting-rights-elections> (last visited Nov. 23, 2013) (“The Brennan Center is at the center of the fight to preserve and expand the right to voter for every eligible citizen.”).

377. See, e.g., *Issues*, BRENNAN CENTER FOR JUST., <http://www.brennancenter.org/issues> (last visited Nov. 23, 2013) (highlighting efforts in multiple areas including civil liberties and money in politics).

378. *About the ACLU*, ACLU, <https://www.aclu.org/about-aclu-0> (last visited Nov. 23, 2013) (explaining how the organization's goals are to protect constitutional rights); *Our Mission*, NAACP, <http://www.naacp.org/pages/our-mission> (last visited Nov. 23, 2013) (“The mission of the [NAACP] is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.”).

379. See e.g., *Voting Rights*, *supra* note 376; see also, e.g., *Justice Department Challenges North Carolina Voter ID Law*, POLITICO, <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html> (last updated Jul. 30, 2013) (discussing North Carolina Governor Pat McCrory's view that “common practices like boarding an airplane and purchasing Sudafed require photo ID, and we should expect nothing less for the protection of our right to vote”).

380. See *supra* note 376 and accompanying text.

these existing groups will be unable to advocate vigorously for those disenfranchised specifically by voter identification laws.³⁸¹ To compensate for the lack of DOJ authority, those in the voter protection community should form an advocacy group specifically for advocating against voter identification laws.³⁸²

This organization, like many of the existing advocacy groups, could play a role in litigating voter identification challenges and lobbying state and federal government to reform their laws.³⁸³ However, unlike those other groups, this organization would focus exclusively on voter identification, which would enable it to operate at the cutting edge of the issue.³⁸⁴ This group's specific focus and understanding of the issue could develop Twenty-Fourth Amendment jurisprudence, and would become the best means to invalidate voter identification laws in the post-*Shelby County* environment.³⁸⁵

C. Removing Barriers to Voting Without the Courts

There are numerous ways to create a voter identification law without violating the Twenty-Fourth Amendment.³⁸⁶ These methods include providing all the necessary documentation free of charge, better educating voters, and exempting certain voters.³⁸⁷ In his article in the *Michigan Law Review*, Spencer Overton lays out possible supplements and alternatives to photo identification requirements.³⁸⁸

Overton discusses a number of ways to verify a voter's identification without imposing harsh burdens on voters.³⁸⁹ These include permitting identification without photographs, allowing registration at the polls, utilizing signature comparisons, and providing voters with the opportunity to sign an affidavit attesting to their identity.³⁹⁰ These ideas, however, would require changing existing statutes, an unlikely goal.³⁹¹

381. *Shelby Cnty.*, No. 12-96, slip op. at 24; see also *supra* Part III.D (outlining empirical evidence of disenfranchisement as a result of voter identification laws).

382. See *Shelby Cnty.*, No. 12-96, slip op. at 24.

383. See, e.g., *About the ACLU*, *supra* note 378 (explaining the organization's role in handling cases and lobbying politicians).

384. See *supra* note 376 and accompanying text.

385. See *supra* Part III (discussing how the Twenty-Fourth Amendment is a viable option to invalidate voter identification laws).

386. Langholz, *supra* note 79, at 788.

387. *Id.*

388. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 674-80 (2007).

389. *Id.* at 675-80.

390. *Id.* at 678-80.

391. See *id.* at 678-79.

Within the confines of a strict voter identification requirement, the best way to ensure the franchise is through outreach and education.³⁹² One outreach program implemented by Georgia utilized a mobile bus to reach out to voters without identification.³⁹³ That program, while a positive step, provided identification to fewer than five hundred voters.³⁹⁴

Beyond the unique mobile bus solution, states should better utilize simple education efforts.³⁹⁵ These efforts include “a media campaign by election officials, personal letters to registered voters who appear not to have a driver’s license, and organized outreach with community organizations.”³⁹⁶ While these seem to be basic, common sense efforts, courts in a number of states have postponed implementation of voter identification provisions because of unsuccessful educational efforts.³⁹⁷

Many advocates for voting rights have campaigned for a national identification card.³⁹⁸ This plan would allow the federal government to issue a multi-purpose identification card to all citizens.³⁹⁹ It would avoid the problems faced by voters without identification and has already been implemented in many countries, such as Germany.⁴⁰⁰ Critics, however, cite privacy as their main concern.⁴⁰¹

The Carter-Baker Commission, selected to present a bipartisan election reform plan, recommended use of “REAL ID” cards as an alternative to a national identification card.⁴⁰² This proposal would require states to modify the identifications they currently issue to comply with federal standards of uniformity.⁴⁰³ These cards would provide proof of citizenship but voters would not be required to show them for the first two elections following implementation of the system.⁴⁰⁴ The plan was passed in the House of Representatives but not in the Senate.⁴⁰⁵ The

392. See Langholz, *supra* note 79, at 789-90.

393. Overton, *supra* note 388, at 676.

394. *Id.*

395. See Langholz, *supra* note 79, at 789-90.

396. *Id.* at 790.

397. *Id.* at 789-90; e.g., *Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (per curiam).

398. Kevin Drum, *The Quick Way to End the Vote-Fraud Wars?: A National ID Card*, MOTHER JONES (July 3, 2012, 3:00 AM), <http://www.motherjones.com/politics/2012/07/national-id-card-voter-fraud-solution>.

399. *Id.*

400. *Id.*

401. *Id.*

402. Langholz, *supra* note 79, at 751.

403. See *id.*

404. *Id.* at 751-52.

405. *Id.* at 754.

national identification card and the “REAL ID” card are both strong alternatives to state specific voter identification requirements.⁴⁰⁶

V. CONCLUSION

The Twenty-Fourth Amendment has been applied too narrowly.⁴⁰⁷ Given the present and stagnant nature of equal protection jurisprudence and the looming end of the VRA, the Twenty-Fourth Amendment is more important than ever.⁴⁰⁸ Use of the Twenty-Fourth Amendment is appropriate in light of the escalating burdens imposed by voter identification laws; the intent of the drafters of the Amendment; case precedent considering the poll tax; and the actual consequences that identification laws have on voters.⁴⁰⁹ These justifications provide a thorough basis for reintroducing the forgotten Amendment.

*Brendan F. Friedman**

406. Drum, *supra* note 398; see Langholz, *supra* note 79, at 751.

407. See Schultz & Clark, *supra* note 7, at 414-15 (explaining how courts have failed to rely on Twenty-Fourth Amendment jurisprudence in dealing with voting restrictions).

408. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Adam Liptak, *Justices to Revisit Voting Act in View of a Changing South*, N.Y. TIMES, Nov. 10, 2012, at A1.

409. See *supra* Part III.

* J.D. candidate, 2014; Maurice A. Deane School of Law, Hofstra University; B.A., 2011, University of Michigan. This Note is dedicated to my grandfather, Hyman Mendelson, who practiced law in New York for over half a century, and encouraged me to be a lawyer from the moment I could speak. I would like to thank my parents and two fantastic attorneys, Cindy and Edward Friedman, for their love and support. They have been as invaluable in my legal education as any professor and I am forever grateful. Thanks to Miriam Sternberg, and all my friends and family, for being supportive and understanding throughout this arduous process; to Professor Grant Hayden for introducing me to voting rights and for being willing to challenge my beliefs and assumptions on the subject; to my Notes & Comments Editor, Anna Getiashvili, for the thorough feedback and encouragement; and to the entire Board of the *Hofstra Law Review*, with special thanks to Brian Sullivan, Tyler Evans, Sarah Freeman, James O'Connor, and Michal Ovadia for their hard work and dedication.

Hofstra Law School

LL.M. Programs



American Legal Studies

This degree is for lawyers trained outside of the U.S. With an LL.M. in American Legal Studies, attorneys are able to take the New York Bar Exam or practice in their home countries.

Family Law

Family Law LL.M. students undertake a specialized program in advanced family law, combining research, skills development, policy analysis and traditional classroom instruction.



law.hofstra.edu/LLMadmissions

HOFSTRA LAW REVIEW

Volume 42, No. 2
Winter 2013

HEMPSTEAD, NEW YORK 11549

The *Law Review* is pleased to consider unsolicited manuscripts for publication. All manuscripts should conform to *The Bluebook: A Uniform System of Citation*, 19th Edition. Manuscripts should be addressed to: Managing Editor of Articles, *Hofstra Law Review*, Maurice A. Dean School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549. Unsolicited manuscripts will not be returned except upon specific request at time of submission.

The *Hofstra Law Review* (ISSN 0091-4029) is published quarterly by the Hofstra Law Review Association. Maurice A. Dean School of Law at Hofstra University, 121 Hofstra University, Hempstead, NY 11549. Periodicals postage is paid at Hempstead, NY, and additional mailing offices. The current subscription rate is thirty-five dollars per volume. Postmaster: Send address changes to *Hofstra Law Review*, Maurice A. Dean School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549.

Individual issues are available from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, (800) 828-7571. Orders may also be placed by fax, (716) 883-8100, or by e-mail: order@wshein.com. Subscription renewals will be automatic unless notice to the contrary is received. All communications should be addressed to Business Editor, *Hofstra Law Review*, Maurice A. Dean School of Law at Hofstra University, 121 Hofstra University, Hempstead, New York 11549.

© 2013 by the Hofstra Law Review Association.

HOFSTRA LAW REVIEW

Volume 42, No. 2

Winter 2013

Editor-in-Chief
BRIAN W. SULLIVAN

Managing Editor of Articles
TYLER D. EVANS

Managing Editor of Staff
SARAH FREEMAN

*Senior
Articles Editor*
JEANNE M. WATERS

*Senior
Research Editor*
W. THOMAS HUGHES

*Senior
Notes & Comments Editor*
JAMES R. O'CONNOR

Articles Editors
CHERIE N. BROWN
EVA SCHWECHTER
SAM SMITH

Research Editors
MEGAN LAW
MICHAL E. OVADIA

Notes & Comments Editors
BRENDAN F. FRIEDMAN
ERIK HARMON
RACHEL J. KATZ

Business Editor
DANIELLE A. AUSTIN

Alumni Affairs Editor
SCOTT B. BRENNER

JOEL PIETZRAK

Senior Associate Editors
KRISTIN RIZZI

MIRIAM STERNBERG

ALEXANDER ANOLIK
PETER R. BARBIERI JR.
ALLISON L. BAXTER
JESSICA M. FILDES
ALYSSA E. GALINSKY

Associate Editors
MATTHEW GUERRA
RYAN HOM
TINGTING LIU
WILLIAM LUCIANI
MATTHEW M. McDONAGH

JASON S. MENCHER
LAURA J. ROBBINS
BARRY RONNER
HUIDI SHU
BENJAMIN P. SIEGEL

JEFFREY ANAND
ALLYSON BEACH
LAUREN BERNSTEIN
MICHAEL BILLET
TAYLOR ANNE CALOGRIAS
MELISSA CEFALU
BILAL CHAUDRY
BRYAN CIMALA
JAMES FARRIS
ALLISON FLOOD
KRISTEN FUSCO
SANDRA FUSCO

Staff
ASHLEY N. GUARINO
RAEHEL HOROWITZ
SALIM KATACH
ADDIE KATZ
CAROLYN J. KIM
COURTNEY H. KLAPPER
COURTNEY KOZICZ
ANDREW LAURIA
ALEXANDER LOVEJOY
THOMAS J. MCGOWAN
JAMES MEEHAN
KATHERINE MUSERILLI
MARA O'MALLEY

RILEY PERRY
CHELSEA PLUSHANSKI
OLGA POLIVODA
ADAM PRELLER
JON SALM
AMANDA SENSKE
RACHEL SUMMER
RYAN SWEENEY
NEWTAN B. THEVARAJAH
JACLYN WATERS
RICHARD WOLF
AARON ZUCKER

MAURICE A. DEANE SCHOOL OF LAW HOFSTRA UNIVERSITY

ADMINISTRATIVE OFFICERS

Eric Lane, B.A., M.A., J.D., LL.M., *Dean and Eric J. Schmertz Distinguished Professor of Public Law and Public Service*
Ronald Colombo, B.S., J.D., *Associate Dean for Academic Affairs and Professor of Law*
Jennifer A. Gundlach, B.A., J.D., *Senior Associate Dean for Experiential Education and Clinical Professor of Law*
Tobie-Lynn Accardi, B.F.A., *Creative Director*
Toni L. Aiello, B.A., J.D., M.S.L.S., *Reference Librarian*
Adonza S. Anderson, *Director of Enrollment Management*
Gerard Anderson, B.A., M.A., *Director of Financial Aid*
Yvonne V. Atkinson, B.S., M.S., *Office Manager/Paralegal, Law School Clinical Program*
Jessica Backman, B.A., *Help Desk Manager*
Andrew E. Berman, B.A., M.B.A., *Director of Communications*
Lisa Berman, B.A., *Assistant Dean for External Relations*
Judith N. Black, B.A., *Director of Special Events and Director of CLE*
Christopher Caruso, B.A., J.D., *Associate Dean for Career Services*
Peter S. Casalino, B.S., J.D., *Prospect Research and Database Manager*
John Chalmers, B.A., *Associate Dean for Enrollment Management*
Chaio Peter Chao, B.A., M.L.S., M.A., *Catalog Librarian*
Marin Dell, B.S., J.D., M.L.I.S., M.S/M.I.S., *Reference/Electronic Services Librarian*
Shane Dizon, B.A., J.D., *Assistant Director and Visiting Assistant Professor of Academic Support*
Dimitrios M. Doussi, B.A., *Assistant Registrar*
Scott C. Filipkowski, B.B.A., *Assistant Director of Information Technology Services*
Scott J. Glick, B.A., J.D., *Director of the Hofstra Law in D.C. Externship Program and Special Professor of Law*
Mary Godfrey-Rickards, B.A., J.D., M.L.S., *Reference/Access Services Librarian*
Samantha R. Hankins, B.A., J.D., *Associate Director of Student Affairs*
Teresa Harrington, B.A., M.A., *Operations Manager — Personnel*
Vernadette Horne, B.A., J.D., *Director of Career and Professional Development*
Aisha L. Joseph, B.A., J.D., *Director of Career and Professional Development*
Shikha Gupta Joseph, B.A., J.D., M.S.L.S., *Reference Librarian*
Brian T. Kaspar, B.S., M.B.A., *Assistant Dean for Academic Records and Registrar*
Patricia A. Kasting, B.A., M.L.S., J.D., *Reference Librarian*
Laura Lanzillotta, *Executive Assistant to the Dean*
Rou Chia P. Lin, B.A., M.L.S., *Acquisitions Librarian*
Michele LoFaso, B.A., J.D., *Director of Student Affairs*
Maricia “Kathy” McCoy, *Recruiter/Counselor for Enrollment Management*
Megan Meighan, B.A., J.D., *Assistant Director of Enrollment Management*
Lisa Monticciolo, B.A., J.D., *Associate Dean for Students and Administration*
Mark Padin, B.A., M.S., J.D., *Director of the Academic Success Program and Visiting Associate Professor of Academic Support*
Eric Post, B.A., M.A., *Annual Fund Manager*
Steven Richman, B.A., J.D., *Director of Global Initiatives*
Mary T. Ruggilo, B.A., J.D., *Associate Dean for Finance*
Linda P. Russo, B.A., M.L.S., *Assistant Director for Technical Services*
Franca Sachs, B.A., J.D., *Executive Director of Pro Bono, Externship and Fellowship Programs*
Courtney Selby, B.A., J.D., M.L.I.S., *Associate Dean for Information Services, Director of the Law Library & Associate Professor of Law*
Kenneth J. Selvester, B.A., M.A., *Associate Director for Publications*
Kevin Shelton, B.A., M.A., J.D., M.S.L.I.S., *Reference and Government Documents Librarian*
Lisa A. Spar, B.A., J.D., M.S., *Assistant Director for Reference and Instructional Services*
Jodie D. Sperico, B.A., M.S.Ed., *Director of Alumni Relations*
Daphne E. Telfeyan, B.A., J.D., *Director of Employer Outreach*
Akshay D. Tripathi, B.E., M.B.A., *Director of Information Technology Services*
Khara Tusa, B.S., J.D., *Director of Career and Professional Development*
Michael G. Wagner, B.S., *Webmaster*

FACULTY

- Miriam Albert, B.A., J.D., M.B.A., LL.M., *Professor of Skills and Faculty Advisor for the J.D./M.B.A. Program*
- Barbara S. Barron, B.A., M.A., J.D., *Professor of Skills, Director of the Trial Techniques Program, Director of Student Advocacy Programs and Faculty Advisor to Moot Court Board*
- Yishai Boyarin, B.A., J.D., LL.M., *Associate Clinical Professor of Law*
- Alafair S. Burke, B.A., J.D., *Professor of Law*
- Robert A. Baruch Bush, B.A., J.D., *Harry H. Rains Distinguished Professor of Arbitration and Alternative Dispute Settlement Law*
- Allison Caffarone, B.A., J.D., *Visiting Assistant Professor of Law*
- Juli Campagna, B.A., M.A., J.D., LL.M., *Assistant Professor of Legal Writing and Assistant Faculty Director of International Programs*
- Robin Charlow, A.B., J.D., *Professor of Law*
- J. Scott Colesanti, B.A., J.D., LL.M., *Associate Professor of Legal Writing*
- J. Herbie DiFonzo, B.S., J.D., M.A., Ph.D., *Professor of Law*
- Janet L. Dolgin, B.A., M.A., Ph.D., J.D., *Jack and Freda Dicker Distinguished Professor of Health Care Law; Professor of Science Education, Hofstra North Shore-LIJ School of Medicine; Co-director, Hofstra Bioethics Center; and Director, Gitenstein Institute for Health Law and Policy*
- Akilah N. Folami, B.A., J.D., *Associate Professor of Law and Associate Dean for Intellectual Life*
- Susan Fortney, B.A., J.D., LL.M., J.S.D., *Howard Lichtenstein Distinguished Professor of Legal Ethics and Director of the Institute for the Study of Legal Ethics and John DeWitt Gregory Research Scholar*
- Eric M. Freedman, B.A., J.D., M.A., *Maurice A. Deane Distinguished Professor of Constitutional Law*
- Monroe H. Freedman, A.B., LL.B., LL.M., *Professor of Law*
- Leon Friedman, A.B., LL.B., *Joseph Kushner Distinguished Professor of Civil Liberties Law*
- Linda Galler, B.A., J.D., LL.M., *Professor of Law*
- Mitchell Gans, B.B.A., J.D., *Rivkin Radler Distinguished Professor of Law*
- Elizabeth M. Glazer, B.A., M.A., J.D., *Associate Professor of Law*
- Daniel J. H. Greenwood, A.B., J.D., *Professor of Law*
- Joanna L. Grossman, B.A., J.D., *Sidney and Walter Siben Distinguished Professor of Family Law*
- Michael Haber, B.A., M.A., J.D., *Visiting Associate Clinical Professor of Law*
- Grant M. Hayden, B.A., J.D., M.A., *Professor of Law*
- James E. Hickey, Jr., B.S., J.D., Ph.D., *Professor of Law*
- Susan H. Joffe, B.A., M.A., J.D., *Professor of Legal Writing*
- Lawrence Kessler, B.A., J.D., *Richard J. Cardali Distinguished Professor of Trial Advocacy*
- Fred Klein, B.A., J.D., *Visiting Assistant Professor of Law*
- Stefan Krieger, B.A., J.D., *Professor of Law, Director of Center for Applied Legal Reasoning and Director Emeritus of Hofstra Clinical Programs*
- Julian Ku, B.A., J.D., *Professor of Law and Faculty Director of International Programs and John DeWitt Gregory Research Scholar*
- Katrina Fischer Kuh, B.A., J.D., *Associate Professor of Law and Associate Dean for Intellectual Life*
- Theo Liebmann, B.A., J.D., *Clinical Professor of Law and Director of Clinical Programs*
- Irina D. Manta, B.A., J.D., *Associate Professor of Law*
- Serge Martinez, B.A., J.D., *Clinical Professor of Law*
- Kevin McElroy, B.A., J.D., *Assistant Professor of Legal Writing*
- Richard K. Neumann, Jr., B.A., Dipl., J.D., LL.M., *Professor of Law*
- Elizabeth M. Nevins, B.A., J.D., *Assistant Clinical Professor of Law*
- Ashira Ostrow, B.A., J.D., *Associate Professor of Law*
- Curtis Pew, B.A., M.P.P.A., J.D., *Visiting Clinical Professor of Law*
- Alan N. Resnick, B.S., J.D., LL.M., *Benjamin Weintraub Distinguished Professor of Bankruptcy Law*
- James Sample, B.A., J.D., *Associate Professor of Law*
- Andrew Schepard, B.A., M.A., J.D., *Max Schmertz Distinguished Professor of Law and Director of the Center for Children, Families and the Law*
- Courtney Selby, B.A., J.D., M.L.I.S., *Associate Dean for Information Services, Director of the Law Library & Associate Professor of Law*
- Norman I. Silber, B.A., M.A., Ph.D., J.D., *Professor of Law*
- Barbara Stark, B.A., J.D., LL.M., *Professor of Law*
- Amy R. Stein, B.A., J.D., *Professor of Legal Writing, Assistant Dean for Adjunct Instruction, and Coordinator of the Legal Writing Program*
- Vern R. Walker, B.A., M.A., Ph.D., J.D., *Professor of Law and Director of the Research Laboratory for Law, Logic and Technology*
- Lauris Wren, B.A., J.D., *Clinical Professor of Law and Director for the LGBT Fellowship*