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# Better Safe than Sorry: How Strong Voter Identification Laws Can Protect Louisianans Against the Double-Sided Coin of Voter Disenfranchisement

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## **Better Safe than Sorry: How Strong Voter Identification Laws Can Protect Louisianans Against the Double-Sided Coin of Voter Disenfranchisement**

*Voting in the names of the dead, and the nonexistent, and the too-mentally-impaired to function, cancels out the votes of citizens who are exercising their rights—that’s suppression by any light. If you doubt it exists, I don’t; I’ve heard the peddlers of these ballots brag about it, I’ve been asked to provide the funds for it, and I am confident it has changed at least a few close local election results.*<sup>1</sup>

- Congressman Artur Davis

### INTRODUCTION

Since the 2000 presidential election, voter fraud has earned a permanent spot in the political discourse.<sup>2</sup> Some claim the problem is nonexistent,<sup>3</sup> while others point to history<sup>4</sup> and criminal

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1. Artur Davis, *I Should Have Supported Voter ID Law*, RECOVERING POLITICIAN (Oct. 21, 2011), <http://therecoveringpolitician.com/contributors/adavis/artur-davis-i-should-have-supported-voter-id-law> [<http://perma.cc/QD8V-LAHE>] (archived Apr. 5, 2014). The Honorable Artur Davis is a former U.S. congressman from Alabama’s 7th Congressional District.

2. See John Harwood, *Fixing the Electoral System: Lessons From States Hold Hope for Reform*, WALL ST. J., Dec. 22, 2001, at A1; Randall Forsyth, *Crucial Choice*, BARRON’S, Nov. 1, 2004; Laurence Hammack, *Appalachia’s Ex-Mayor Convicted Of 243 Felonies*, ROANOKE TIMES (Dec. 1, 2006), <http://ww2.roanoke.com/politics/fraud/wb/93904> [<http://perma.cc/T455-DQM8>] (archived Apr. 5, 2014); Kenneth R. Bazinet, *Both Sides Target Voter Fraud, Abuse*, DAILY NEWS WASH. BUREAU (Nov. 02, 2008), <http://www.nydailynews.com/news/politics/sides-target-voter-fraud-abuse-army-lawyers-article-1.333750> [<http://perma.cc/PS9G-KHD7>] (archived Apr. 5, 2014).

3. See John Wasik, *Voter Fraud: A Massive, Anti-Democratic Deception*, FORBES (Nov. 6, 2012), <http://www.forbes.com/sites/johnwasik/2012/11/06/voter-fraud-a-massive-anti-democratic-deception/> [<http://perma.cc/5WDA-5LLE>] (archived Apr. 5, 2014).

4. See Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 278–79 (2005) (reviewing the allegations of Lyndon Johnson’s “famed theft of his 1948 U.S. Senate Democratic primary with Ballot Box 13” and Mayor Daly’s “long-rumored stuffing of ballots in Chicago on behalf of John Kennedy”); Matthew Haye Brown, *Democrat Withdraws from 1st District Congressional Race After Allegations She Voted in Two States*, BALTIMORE SUN (Sept. 14, 2012), [http://articles.baltimoresun.com/2012-09-14/news/bs-md-wendy-rosen-withdraws-20120910\\_1\\_general-election-voter-fraud-vote-on-local-issues](http://articles.baltimoresun.com/2012-09-14/news/bs-md-wendy-rosen-withdraws-20120910_1_general-election-voter-fraud-vote-on-local-issues) [<http://perma.cc/4H22-XSC8>] (archived Apr. 5, 2014) (voting records show that Rosen participated in both the 2006 general election and the 2008 primary election in Florida and Maryland).

convictions to bolster their calls for reform.<sup>5</sup> One reform sweeping through the states is an effort to strengthen voter identification laws.<sup>6</sup> The strongest of these laws requires voters to show valid photo identification before voting.<sup>7</sup> The theory behind these laws is that many in-person voter fraud attempts will be thwarted if a voter is required to prove his or her identity by standing directly in front of the poll worker and showing an identification that matches the information in the voting registry.<sup>8</sup> These strict measures have attracted vocal proponents who stress that they are commonsense solutions to all types of in-person voter fraud<sup>9</sup> and vocal opponents who decry the efforts as thinly veiled attempts to disenfranchise voters.<sup>10</sup>

The issue of disenfranchisement is a double-sided coin because both sides of the debate can make a case for disenfranchisement.<sup>11</sup> On one side of the coin, turning a voter away from the polls for lack of identification directly disenfranchises that voter of his or her right to vote. But on the other side of the coin, “[e]very vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot.”<sup>12</sup> Thus, protecting the fundamental right to vote requires a balancing of both of these concerns.<sup>13</sup> Using an honor system to identify voters at the polls gives the broadest protection against direct disenfranchisement—that of erroneously turning away eligible voters—but the honor system allows individuals to commit

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5. See Thomas Patterson, *They Say Voter Fraud Doesn't Exist. They're Wrong.*, E. VALLEY TRIB. (Oct. 17, 2012), [http://www.eastvalleytribune.com/opinion/columnists/article\\_18c26d8c-17ee-11e2-b85c-0019bb2963f4.html](http://www.eastvalleytribune.com/opinion/columnists/article_18c26d8c-17ee-11e2-b85c-0019bb2963f4.html) [http://perma.cc/9DBR-CBQK] (archived Apr. 5, 2014) (noting that there have been 177 convictions to date for voter fraud in connection with Al Franken's 2008 Minnesota Senate victory over Norm Coleman, which he won by only 312 votes, and the conviction of NAACP official Lessadolla Sowers for massive voter fraud in Mississippi).

6. See *Voter ID: State Requirements*, NAT'L CONF. ST. LEGISLATURES (Sept. 2, 2012, 5:31 PM), <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> [http://perma.cc/7S2R-45KS] (archived Apr. 5, 2014).

7. See *id.*; discussion *infra* Part III.

8. H.R. REP. NO. 106-666 at 1 (2006) (“Presenting photo identification when voting provides a simple and effective method for election officials to confirm identity and eligibility.”).

9. See *supra* note 2.

10. See *supra* note 3.

11. Publius, *supra* note 4, at 278 (“Every vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot in the same way that an individual who is eligible to vote is disenfranchised when he is kept out of a poll or is somehow otherwise prevented from casting a ballot.”).

12. *Id.*

13. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); Michelle L. Robertson, *Election Fraud—Winning at All Costs: Election Fraud in the Third Circuit Marks v. Stinson*, 40 VILL. L. REV. 869, 923 n.1 (1995).

in-person voter fraud more easily.<sup>14</sup> Conversely, an absolute photo identification requirement threatens a voter's right to cast a ballot by imposing an additional registration requirement, but it is the broadest protection of the interest of an eligible voter to ensure that by catching illegally cast votes before they disappear into the ballot box, his or her vote is not diluted.<sup>15</sup> Clearly, legislatures must find a solution lying somewhere between an honor system and an absolute photo identification requirement to protect both interests.

The debate over the constitutionality of strict voter identification laws has wound its way through state legislatures and into courtrooms.<sup>16</sup> For example, in 2005, Indiana passed a strict voter identification law that requires every voter who casts a ballot on election day to prove his or her identity with photo identification.<sup>17</sup> This law was quickly challenged on federal constitutional grounds.<sup>18</sup> In *Crawford v. Marion County Election Board*, the Supreme Court upheld the law, holding it did not violate the Equal Protection Clause of the U.S. Constitution.<sup>19</sup> Having suffered defeat of their challenge, opponents of the law then refocused their attention on state constitutional limits. In *League of Women Voters of Indiana, Inc. v. Rokita*, a different organization brought suit claiming the same law violated the right to vote and equal protection under Indiana's constitution.<sup>20</sup> Indiana's voter identification law again withstood the challenge.<sup>21</sup> Because the question of federal constitutionality is settled for now, the inquiries thus turn to state constitutions, questioning which states, if any, offer equal protection rights greater than the U.S. Constitution and if that expanded protection precludes a state from mandating that voters produce valid photo identifications at the polls.

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14. Polling places are the last line of defense to keep people "from taking advantage of the 'opportunities to vote in the name of someone whom they can safely predict will not show up at the polls to challenge them.'" Samuel P. Langholz, Note, *Fashioning A Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 744 (2008).

15. Since voter identification requirements make in-person "voting frauds practically impossible," an eligible voter's vote will not be cancelled out by unauthorized voters. *Id.*

16. *Id.* at 733.

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

18. The Indiana Democratic Party initiated suit only a year after its enactment. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

19. *Crawford*, 472 F.3d at 949.

20. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 771 (Ind. 2010).

21. *Id.*

This Comment examines how Indiana's strict voter identification law strikes the appropriate balance between the constitutional protection of the right to vote and the State's valid interest in securing a fair electoral process. It then explores Louisiana's constitution and jurisprudence to show that Louisiana can sustain an appropriately balanced strict photo identification law.<sup>22</sup> Part I overviews the different types of voter identification laws in the United States. Part II investigates the scope of the problem of voter fraud and how current federal legislation may, in part, exacerbate the problem. Part III briefly outlines the U.S. Supreme Court and Indiana Supreme Court's analysis of the Indiana law. Part IV applies the Louisiana constitutional analysis of the right to vote and the right to equal protection to an Indiana-style law. Finally, Part V discusses how new legislation, if enacted to replace Louisiana's current voter identification laws, should be shaped to strike the correct balance and ultimately be sustained under Louisiana's constitution. In a growing and advancing democracy, voting remains a right that is most fundamental. The protection of this sacred right should not remain stagnant but rather should grow and advance to meet the needs of a modern democracy.

#### I. OVERVIEW OF VOTER IDENTIFICATION LAWS IN THE UNITED STATES

The National Conference of State Legislatures classifies states into four categories based on their voter identification laws.<sup>23</sup> These categories are: (1) states that require no independent form of identification to vote,<sup>24</sup> (2) states that require non-photo identification to vote,<sup>25</sup> (3) states that require photo identification but allow a person to cast a ballot without presenting one in many instances, and (4) states that strictly require photo identification in order to cast a ballot.<sup>26</sup> To fully understand the debate, one must first understand the distinctions in the law.

##### *A. Non-Strict, Non-Photo Identification*

State identification programs that fall into the first category operate exactly as they sound—a poll worker asks a voter for his or

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22. This Comment does not analyze whether a strict voter law would be upheld in Louisiana by the Justice Department as part of the 1964 Voter's Rights Act.

23. *Voter ID: State Requirements*, *supra* note 6.

24. *See, e.g.*, 10 ILL. COMP. STAT 5/17-9 (West 2010).

25. *See, e.g.*, VA. CODE ANN. § 24.2-643 (Westlaw 2014).

26. *Voter ID: State Requirements*, *supra* note 6.

her name, and if that name appears in the voting registry, the voter is given a ballot.<sup>27</sup> Illinois is one example. Under the Illinois Election Code, “[a]ny person desiring to vote shall give his name and, if required to do so, his residence to the judges of election.”<sup>28</sup> The judge then repeats this information out loud in a “distinct tone of voice, clear, and audible” and checks the register to make sure the information matches a voter in the registry.<sup>29</sup> If the information matches the registry, the person is given a ballot and allowed to vote.<sup>30</sup>

### *B. Strict Non-Photo Identification*

The second categorization encompasses state programs that require the voter to show some independent form of identification to corroborate his or her identity but not necessarily one with a photo.<sup>31</sup> Virginia is one such state.<sup>32</sup> According to the Virginia Code, an election officer must verify that the person present is “a qualified voter before admitting him to the voting booth and furnishing an official ballot to him.”<sup>33</sup> In Virginia, the election officer must ask the voter his or her name and address and repeat them out loud.<sup>34</sup> The officer then must ask the voter to provide a single form of identification, including a registration card, social security card, “valid Virginia driver’s license, . . . concealed handgun permit,” any identification issued by a Virginia state agency, a student identification from a Virginia university, an employee card with a photo, “or a copy of a current utility bill, bank statement, government check, or a paycheck that shows the name and address of the voter.”<sup>35</sup> Therefore, a photo identification is accepted but is not required to vote.

### *C. Non-Strict Photo Identification*

The law currently enforced in Louisiana is one example of the third category of voter identification laws—those that have a non-strict photo identification requirement.<sup>36</sup> When a Louisiana voter

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27. See also 10 ILL. COMP. STAT 5/17-9.

28. *Id.*

29. *Id.*

30. *Id.*

31. See *Voter ID: State Requirements*, *supra* note 6.

32. *Id.*

33. VA. CODE ANN. § 24.2-643 (Westlaw 2014).

34. *Id.*

35. *Id.*

36. *Voter ID: State Requirements*, *supra* note 6.

goes to the polls, he or she must identify him or herself to the poll worker and list his or her address.<sup>37</sup> The information provided by the voter must then be stated out loud by the poll worker in front of bystanders.<sup>38</sup> Next, the voter must present “a Louisiana driver’s license, a Louisiana special identification card . . . or other generally recognized picture identification card that contains the name and signature of the applicant.”<sup>39</sup> If a registered voter does not have a photo identification that meets the legal requirements, he or she is allowed to vote but first must swear by affidavit to his or her identity and lack of identification.<sup>40</sup> After completing the affidavit, the voter is allowed to vote.<sup>41</sup> The ballot is not conditioned on any further action.<sup>42</sup> It is cast and counted just like any other ballot cast in that election.

#### *D. Strict Photo Identification*

The fourth category of voter identification requirements, a strict photo identification law, is different from the third category in one clear way—a voter who does not have a photo identification on election day is required to return at a later date and provide one before his or her provisional ballot is counted. For example, to vote at the polls in accordance with Indiana’s strict voter identification law, a voter is required to produce “proof of identification”<sup>43</sup> by showing a document issued by Indiana or the United States that has not expired and contains his or her name and a photograph.<sup>44</sup> If the name on the provided identification matches the precinct register and the would-be voter matches the photo, then the person is allowed to vote.<sup>45</sup> If, however, the voter is “unable or declines to present the proof of identification,” the voter must fill out an affidavit<sup>46</sup> to receive a provisional ballot.<sup>47</sup> This is where the key

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37. LA. REV. STAT. ANN. § 18:562(A)(1) (2009).

38. *Id.*

39. *Id.* § 18:562(A)(2).

40. *Id.* The 2012 revision to Louisiana’s Election Code now requires the voter to swear to additional information contained in the voter registry such as date of birth. *Id.*

41. *Id.*

42. *Id.*

43. IND. CODE ANN. § 3-11-8-25.1 (Westlaw 2014).

44. *Id.* § 3-5-2-40.5.

45. *Id.* § 3-11-8-25.1.

46. *Id.* § 3-11-8-23. In the affidavit the affiant must swear to U.S. citizenship, date of birth, residency, name, that he or she will not be voting in another precinct for that election, occupation, address, and to the understanding that lying in an affidavit is a punishable crime. *Id.* Louisiana’s affidavit only requires the voter to

difference from the previous statutory scheme lies—the provisional ballot will only be counted if the voter returns to the registrar’s office within ten days of the election and satisfies the identification requirement.<sup>48</sup> This law ensures that, by and large, all votes cast on election day are cast by a registered voter and not an imposter. This scheme clearly provides more protection against in-person voter fraud than the other types of laws but also places the most burdens on the voter.<sup>49</sup>

## II. STATE’S INTEREST IN REFORM

This Part looks to two important factors in determining whether a state’s concern over voter fraud is warranted. First, this Part examines whether voter fraud exists at all and, if so, whether photo identification requirements would help solve this problem. Second, this Part will explore federal legislation on voter registration and how it has made voter fraud easier to accomplish.

### *A. Does Voter Fraud Exist?*

Since the time of the colonies, Americans have gone to the polls to vote.<sup>50</sup> Even in the early days of this nation, poll workers attempted to protect this right from voter fraud.<sup>51</sup> This led many colonies to follow in the British tradition of recording votes by voice, which included recognizing an elector by name in front of neighbors and friends with the belief that the voter’s identity was confirmed by the onlookers.<sup>52</sup> This tradition of declaring one’s identity out loud “in the presence and view of the bystanders” is a tradition that continues today in many states, including Louisiana.<sup>53</sup> However, while this practice was once effective in small communities, it is no longer the failsafe it once was.<sup>54</sup>

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swear to date of birth and mother’s maiden name. LA. REV. STAT. ANN. § 18:562(A)(2).

47. IND. CODE ANN. § 3-11-8-25.1.

48. *Id.* § 3-11.7-5-2.5.

49. Langholz, *supra* note 14, at 744.

50. Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG (Sept. 15, 2011, 6:26 PM), <http://www.history.org/foundation/journal/spring07/elections.cfm> [<http://perma.cc/3G22-RD8Y>] (archived Apr. 5, 2014).

51. *Id.*

52. *Id.*

53. LA. REV. STAT. ANN. § 18:562 (2009). *See infra* Part I.A.

54. COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18–19 (2005) [hereinafter BUILDING CONFIDENCE IN U.S. ELECTIONS], available at [www1.american.edu/ia/cfer/report/full\\_report.pdf](http://www1.american.edu/ia/cfer/report/full_report.pdf) [<http://perma.cc>

Many claim there is no need for voter identification laws because there is no evidence of voter fraud, pointing to the absence of criminal prosecutions as evidence of this assertion.<sup>55</sup> But one does not need to look too far to find evidence of voter fraud all around. A close look at U.S. history provides striking examples of the problem, including a successful 14-year conspiracy to commit massive, in-person voter fraud in Brooklyn, New York, in the 1970s and '80s.<sup>56</sup> A 1984 grand jury investigation in Illinois estimated that more than 100,000 fraudulent ballots were cast in one local election alone.<sup>57</sup> And a more recent grand jury report found rampant absentee ballot fraud in Miami, Florida.<sup>58</sup> While determining the exact magnitude of voter fraud is beyond the scope of this Comment, there is no doubt that voter fraud occurs.<sup>59</sup>

In-person voter fraud can take many forms, such as felons and non-U.S. citizens voting.<sup>60</sup> Another form that voter fraud can take is voter impersonation.<sup>61</sup> This occurs when a person votes in the name of someone else, most likely either someone the person knows has recently moved out of the precinct or someone known to be dead.<sup>62</sup> Impersonation can also occur when a person registers fictitious names and then votes under those names, thus allowing one person

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/GB45-2YZ3] (archived Apr. 5, 2014) (confirming the Carter–Baker Commission’s assertion that “it is less likely that poll workers will be personally acquainted with voters” because the average precinct size has increased in the past century).

55. See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007), *aff’d*, 553 U.S. 181 (2008) (noting that plaintiffs used lack of voter fraud convictions as evidence that voter fraud does not exist).

56. In the Matter of Confidential Investigation, No. R84-11 (N.Y. Sup. Ct. June 23, 2011), available at [http://electionlawblog.org/wp-content/uploads/1984\\_grand\\_jury\\_report-r84-11.pdf](http://electionlawblog.org/wp-content/uploads/1984_grand_jury_report-r84-11.pdf) [<http://perma.cc/43QP-LDER>] (archived Apr. 5, 2014) (detailing a 14-year conspiracy to “engage[] in various fraudulent and illegal practices designed to influence the outcome of elections”).

57. Publius, *supra* note 4, at 278 (discussing a 1984 federal grand jury investigation into the 1982 Illinois election estimating that “100,000 fraudulent votes had been cast” in the general election alone).

58. MIAMI-DADE COUNTY GRAND JURY, INTERIM REPORT, INQUIRY INTO ABSENTEE BALLOT VOTING (1998) [hereinafter INTERIM REPORT OF MIAMI-DADE COUNTY GRAND JURY] (detailing “evidence of outright fraud in the absentee ballot process [that] called into question the legitimacy of two major elections” and a “concerted effort to influence absentee ballot votes of the elderly”).

59. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at 18.

60. See generally HANS A. VON SPAKOVSKY, DEMOCRACY IN DANGER: CASE STUDIES OF ELECTION FRAUD 21–29 (2008), available at [www.heritage.org/Research/LegalIssues/sr24.cfm](http://www.heritage.org/Research/LegalIssues/sr24.cfm) [<http://perma.cc/5784-DFZF>] (archived Apr. 5, 2014).

61. *Id.*

62. Langholz, *supra* note 14, at 736–37.

to vote numerous times.<sup>63</sup> Another form of voter fraud occurs when a person registers in more than one precinct and votes in each.<sup>64</sup> These forms of voter fraud have been “enabled by the ‘honor system’ of voting prevalent in nearly all states until recent years”<sup>65</sup> and can be accomplished by individual voters or by concerted efforts of grassroots organizations.<sup>66</sup>

Not all of these forms of in-person voter fraud can be solved by implementation of a voter identification law, but some certainly can. For example, ineligibility to vote due to felony conviction would not be detectable by simply showing photo identification. But given the logistics of getting an identification card, virtually all types of voter impersonation would be stopped. A person wishing to impersonate someone else would simply be unable to acquire an identification that has his or her picture with the name and address of the neighbor or fictitious person that he or she fraudulently registered. Thus, requiring photo identification virtually halts this form of voter fraud.<sup>67</sup>

Without the help of photo identification, detecting and prosecuting voter fraud can be very difficult.<sup>68</sup> Imagine the following scenario. A person attempting to cast a fraudulent vote “enters the polling place, gives a name that is not his own, votes, and leaves.”<sup>69</sup> Finding this unnamed person later and linking him or her to the fraud can be next to impossible.<sup>70</sup> But once the crime is committed, the real damage to the community is already done—the ballot has already been cast and disappeared anonymously into the ballot box.<sup>71</sup> This simple fact coupled with the history of voter fraud

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63. *Id.* See also In the Matter of Confidential Investigation, No. R84-11 (N.Y. Sup. Ct. June 23, 2011), available at [http://electionlawblog.org/wp-content/uploads/1984\\_grand\\_jury\\_report-r84-11.pdf](http://electionlawblog.org/wp-content/uploads/1984_grand_jury_report-r84-11.pdf) [<http://perma.cc/43QP-LDER>] (archived Apr. 5, 2014).

64. See Matthew Haye Brown, *Democrat Withdraws from 1st District Congressional Race After Allegations She Voted in Two States*, BALTIMORE SUN (Sept. 14, 2012), [http://articles.baltimoresun.com/2012-09-14/news/bs-md-wendy-rosen-withdraws-20120910\\_1\\_general-election-voter-fraud-vote-on-local-issues](http://articles.baltimoresun.com/2012-09-14/news/bs-md-wendy-rosen-withdraws-20120910_1_general-election-voter-fraud-vote-on-local-issues) [<http://perma.cc/4H22-XSC8>] (archived Apr. 5, 2014).

65. Langholz, *supra* note 14, at 736–37.

66. *Id.* at 736.

67. Typical requirements for getting an identification card require proof of identity that would, in effect, prohibit any attempt at getting an identification card in the name of another. See *infra* note 249 and accompanying text.

68. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 953 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

69. *Id.*

70. *Id.*

71. The 2004 gubernatorial election in Washington state is a perfect example. Langholz, *supra* note 14, at 738. This race was decided by a 133-vote margin. *Id.* The court found over 1,600 fraudulently cast votes by felons, unregistered voters,

in the United States<sup>72</sup> shows why a proactive attempt to prevent voter fraud from happening in the first place is so important.<sup>73</sup>

*B. Effects of Voter Fraud on the Electorate*

Some of the harmful effects of voter fraud are obvious; for example, voter fraud clearly subverts the legitimacy of competitive, closely fought elections.<sup>74</sup> But there are also more insidious effects of voter fraud, such as undermining the confidence that Americans have in their electoral system as a whole.<sup>75</sup> Voters may very well be driven out of the electoral process if they “fear their votes will be outweighed by fraudulent ones.”<sup>76</sup> Further, a lack of confidence in the legitimacy of elections breeds distrust in the government and elected officials.<sup>77</sup> After tens of thousands of votes had to be recounted in the presidential election of 2000, there was a sharp decline in confidence in the electoral system.<sup>78</sup> This declining confidence in the electoral process and the almost complete failure of electoral administration in Florida was the catalyst for the formation of two national commissions on federal election reform.<sup>79</sup> The first was headed by former presidents Jimmy Carter and Gerald Ford (Carter–Ford Commission) and the second by Jimmy Carter and former Secretary of State James Baker (Carter–Baker

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deceased voters, or people who voted more than once. *Id.* But the election was upheld “since there was no way to prove for whom the illegal votes were cast.” *Id.*

72. See *supra* notes 56–58 and accompanying text.

73. See Langholz, *supra* note 14, at 738; *In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 458 (Mich. 2007).

74. INTERIM REPORT OF MIAMI-DADE COUNTY GRAND JURY, *supra* note 58 (“[E]vidence of outright fraud in the absentee balloting process called into question the legitimacy of two major elections.”).

75. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at 18 (“The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”).

76. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

77. *Id.*

78. THE NAT’L COMM’N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 17 (2001), available at [http://tcf.org/publications/pdfs/pb246/99\\_full\\_report.pdf](http://tcf.org/publications/pdfs/pb246/99_full_report.pdf) [<http://perma.cc/3W3F-ZJ3X>] (archived Apr. 5, 2014) (stating that confidence that the electoral process was “at least somewhat fair” fell from 75% after the 1996 election to 50% after the 2000 election).

79. The Jimmy Carter and Gerald Ford Commission (Carter–Ford Commission) was formed in 2001 in direct response to the 2000 election. *Id.* at 32. The Jimmy Carter and James Baker Commission (Carter–Baker Commission) was formed in 2005 to finish the job left undone by the Carter–Ford Commission. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at ii.

Commission). The Carter–Baker Commission’s express mission was to “recommend ways to raise confidence in the electoral system.”<sup>80</sup> This commission found that few things could “undermine democracy more than a widespread belief among the people that elections are neither fair nor legitimate.”<sup>81</sup>

### *C. How Federal Legislation Has Unintentionally Enabled Voter Fraud*

The first real federal foray into voter registration was the enactment of the National Voting Rights Act of 1993, commonly called the “Motor Voter Law.”<sup>82</sup> This law had a twofold effect on state voter registration rolls. First, it required state driver’s license applications to also serve as voter registration applications, thus expanding voter registration outlets and voter registration rolls.<sup>83</sup> Second, the Motor Voter Law restricted states’ “ability to remove names from the lists of registered voters” due to inactivity.<sup>84</sup> When taken together, these two provisions have inflated voter registration lists throughout the country by leaving ineligible voters on the rolls.<sup>85</sup> For example, when a registered voter moves to a new precinct and registers to vote there, the Motor Voter Law requires that the voter’s name stay on the old precinct’s registration rolls unless he or she notifies that precinct “in person or in writing”<sup>86</sup> or the State follows a lengthy procedure for removal that can take more than four years of voter inactivity and requires, among other things, notifying the voter by mail.<sup>87</sup>

Years later, the Carter–Ford Commission attempted to solve the problems demonstrated in the 2000 election with the Help America Vote Act of 2002 (HAVA).<sup>88</sup> Most of the reforms in HAVA focused on state voter-registration efforts.<sup>89</sup> Among other things, HAVA

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80. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at ii.

81. *Id.* at 1.

82. Langholz, *supra* note 14, at 745.

83. 42 U.S.C. § 1973gg-3 (2006). *See also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 192 (2008).

84. Crawford, 553 U.S. at 192. States cannot remove a voter from the registration rolls for inactivity unless they follow the complicated procedure specified in 42 U.S.C. § 1973gg-6(c) to (d).

85. A judge in Indiana estimated their rolls “were inflated by as much as 41.4%.” Crawford, 553 U.S. at 192. Whereas another study showed that in 2004 “19 of 92 Indiana counties had registration totals exceeding 100%” of their voting age population. *Id.*

86. 42 U.S.C. § 1973gg-6 (2006).

87. *Id.*

88. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at ii.

89. Langholz, *supra* note 14, at 745.

imposed an identification requirement on those who registered to vote by mail, required the registrant to declare that he or she meets citizenship and age requirements, and required the states to maintain the accuracy of their registration rolls.<sup>90</sup>

Both the Motor Voter Law and HAVA have had positive effects on voting in the United States. Motor Voter decreased the burden on voter registration by opening up new outlets, required “states to accept mail-in registration,” and eased the process for a voter to cast a ballot after moving to a new precinct.<sup>91</sup> HAVA required states to modernize their registration roll and verify the identity and citizenship of new voters.<sup>92</sup> But these positive effects were not without negative effects as well—most importantly, the laws created artificially bloated voter rolls. Since many states had to enact new legislation to comply with HAVA,<sup>93</sup> they took that opportunity to fix the problems exposed in their states by the implementation of the Motor Voter Law. Because the states could not change the procedure for purging voter registration rolls, many turned to photo identification laws as the solution.

### III. FEDERAL AND STATE CONSTITUTIONAL CHALLENGES

Non-strict and non-photo identification laws are rarely challenged on constitutional grounds. In almost every state where a strict voter identification law has been enacted, however, the law has been quickly greeted with legal challenges.<sup>94</sup> Indiana’s law was no different. The law was passed in 2005 as part of Indiana’s comprehensive election reform that overhauled the State’s election code.<sup>95</sup> A complaint was quickly filed in the Southern District of Indiana,<sup>96</sup> and another suit followed in state court a few years later.<sup>97</sup> These two cases advanced separately to the Supreme Court of the United States and the Supreme Court of Indiana to answer different

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90. *Id.* at 745.

91. *Id.* at 743–44.

92. *Id.* at 745–46.

93. “[F]orty-four states were not in compliance with the new limited voter-identification requirement.” *Id.* at 747.

94. For example, Wisconsin’s Act 23 was enacted in the 2011 legislative session and challenged that very same year. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Scott Walker, No. 11CV4669, 2012 WL 763586 (Wis. Ct. App. Mar. 12, 2012); Milwaukee Branch of NAACP v. Walker, No. 2012AP557–LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28, 2012).

95. *See* Senate Enrolled Act No. 483, 2005 Ind. Acts 2005.

96. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 186 (2008).

97. League of Women Voters of Ind., Inc. v. Rokita, No. 49D13–0806–PL-027627, 2008 WL 7005824 (Ind. Super. Dec. 17, 2008).

constitutional questions.<sup>98</sup> The federal case, *Crawford v. Marion County*, questioned whether the law was constitutional under the Equal Protection Clause of the U.S. Constitution.<sup>99</sup> The state case, *League of Women Voters of Indiana v. Rokita*, questioned whether the law was constitutional under the Indiana Constitution's Voter Qualifications Clause and Equal Protection Clause.<sup>100</sup> Thus, the Indiana law is the only law that has been tested under both the federal constitution and a state constitution.

A brief overview of these two cases will give a full picture of factors to which courts have turned to determine whether a law meets the constitutional protections provided. In addition, there are many similarities between the protections provided under Indiana's constitution and those provided under Louisiana's. Therefore, a close look at the Indiana Supreme Court case will aid in the analysis of whether an Indiana-style law can be implemented in Louisiana.

This Part focuses on the different tests employed in the two court systems for the relevant constitutional analysis. First, this Part overviews the balancing test used to evaluate a federal equal protection challenge to a voting regulation. Second, this Part explores the state constitutional concerns, including the right to vote under Indiana's constitution and the two-pronged test used to evaluate equal protection challenges in Indiana.

*A. Federal Equal Protection Analysis: Balancing the Interest of the State with the Burden on the Voters*

The right to vote is not expressly guaranteed in the U.S. Constitution.<sup>101</sup> However, the U.S. Supreme Court has declared it a fundamental right on which all other rights depend.<sup>102</sup> Typically under federal jurisprudence, if a law burdening a fundamental right is challenged, the court must evaluate the law with the highest form of scrutiny available—strict scrutiny.<sup>103</sup> In evaluating constitutional challenges to voting regulations, however, the U.S. Supreme Court has declined to impose strict scrutiny unless the burden placed on

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98. See *Crawford*, 553 U.S. 181; *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758 (Ind. 2010).

99. *Crawford*, 553 U.S. 181.

100. *League of Women Voters of Ind.*, 929 N.E.2d 758.

101. Robertson, *supra* note 13, at 923 n.1.

102. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); Robertson, *supra* note 13, at 923 n.1.

103. *Sibley v. Bd. of Sup'rs of La. State Univ.*, 477 So. 2d 1094, 1105 (La. 1985).

voting constitutes a “severe restriction.”<sup>104</sup> Because of the obvious need for government to regulate elections<sup>105</sup> and the constitutional right to do so,<sup>106</sup> the Supreme Court reasoned that “subject[ing] every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>107</sup>

Therefore, the Court developed a two-part balancing test to evaluate laws that burden the right to vote.<sup>108</sup> Under this test, a court balances “the precise interests put forward by the state as justifications for the burden imposed by its rule”<sup>109</sup> with the “character and magnitude of the asserted injury to the rights protected.”<sup>110</sup> When balancing these factors, the court must focus on the “legitimacy and strength of each of those interests” and the “extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>111</sup>

### *1. Indiana’s Interest*

Indiana set forth three distinct interests in requiring voters to present a valid photo identification at the polls.<sup>112</sup> They were: (1) a desire to modernize election procedures, (2) an interest in “detering and detecting voter fraud,” and (3) an interest in “safeguarding voter

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104. If voting is severely restricted, then the restriction “must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick v. Takushi*, 504 U.S. 428, 434–34 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

105. “Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’” *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

106. “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

107. *Burdick*, 504 U.S. at 433.

108. This test was first introduced in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). However, the Court in *Crawford* notes that this test is consistent with cases decided prior to *Anderson*, including the 1966 case, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008).

109. *Anderson*, 460 U.S. at 789.

110. *Id.*

111. *Id.*

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

confidence.”<sup>113</sup> The U.S. Supreme Court held all three interests to be valid concerns that could warrant appropriate regulation.<sup>114</sup>

In evaluating the State’s interest in modernizing election procedures, the Court pointed specifically to the effects that the Motor Voter Law and HAVA have had on voter registration across the country.<sup>115</sup> The salient point that the Court relied on included the restrictions that the Motor Voter Law has imposed on states for the removal of inactive voters from the rolls, holding the law to be at least “partly responsible for inflated lists of registered voters.”<sup>116</sup> The Court also took particular notice of the fact that HAVA itself imposed an identification requirement on newly registered voters and that HAVA and the Motor Voter Law both “indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”<sup>117</sup>

Moving on to Indiana’s declared interest in deterring and detecting voter fraud, the Court began by noting that the State did not provide any evidence of actual fraud in Indiana.<sup>118</sup> However, the Court found Indiana’s interest to be reasonable for two reasons.<sup>119</sup> First, the Court noted sufficient historical documentation of voter fraud in the United States, including not only recent examples of fraud but also recent examples of fraud in Indiana.<sup>120</sup> Based upon this evidence, the Court unequivocally stated that “the risk of voter fraud [is] real [and] that it could affect the outcome of a close election.”<sup>121</sup> Second, the Court stated that an interest in the “orderly administration [of elections] and accurate record keeping” alone “provides sufficient justification for carefully identifying all voters participating in the election process.”<sup>122</sup> When coupled with the bloated voter rolls due in part to the Motor Voter Law, the Court found that Indiana had proven a “nondiscriminatory reason for supporting the . . . decision to require photo identification.”<sup>123</sup>

The final interest put forth by Indiana, safeguarding public confidence in the electoral system, is strongly related to deterring

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113. *Id.*

114. *Id.*

115. *Id.* at 192–94.

116. *Id.* at 192 (pointing to the record that shows that “as of 2004 Indiana’s voter rolls were inflated by as much as 41.4%”).

117. *Id.* at 193.

118. *Id.* at 194.

119. *Id.* at 195–96.

120. *Id.* (noting absentee ballot fraud in the 2003 Democratic primary election in East Chicago, Indiana).

121. *Id.*

122. *Id.* at 196.

123. *Id.* at 196–97.

and detecting voter fraud.<sup>124</sup> The Court stressed, however, that it has “independent significance, because it encourages citizen participation in the democratic process.”<sup>125</sup> Overall, the Court found that Indiana had sufficient interests to burden voters with the requirement of showing a photo identification when voting in person at the polls.<sup>126</sup> This interest must be weighed against the burden placed on the voters and must be “sufficiently weighty to justify the limitation” in order to uphold the law.<sup>127</sup>

## *2. Character and Magnitude of the Injury to the Right to Equal Protection*

After having established that Indiana was justified in enacting a voter identification requirement, the Court then weighed the justification against the magnitude of the burden placed on the voters by requiring photo identification.<sup>128</sup> First and foremost, the Court noted that “the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters’ right to vote, or represent a significant increase over the usual burdens of voting.”<sup>129</sup> However, the Court recognized that a heavier burden might be placed on certain groups of voters who do not have identification, such as the elderly and the poor.<sup>130</sup> Therefore, the Court looked specifically to the burden imposed on the small portion of the population that lack identification.<sup>131</sup>

The Court was very clear that the challengers bore a heavy burden because they were seeking to fully invalidate the law.<sup>132</sup> They failed to meet this burden for a few reasons.<sup>133</sup> First, the record did not include information that allowed the Court to quantify “the number of registered voters without photo identification.”<sup>134</sup> Nor did they provide any testimony of a single citizen who “expressed a

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124. *Id.* at 197.

125. *Id.*

126. *Id.* at 202.

127. *Id.* at 190 (quoting *Norman v. Reed* 502 U.S. 279, 288–89 (1992)) (internal quotation marks omitted).

128. *Id.* at 197.

129. *Id.* at 198.

130. *Id.* at 198–99 (noting the burden might be higher on “elderly persons born out of state, who may have difficulty obtaining a birth certificate,” the poor or disadvantaged who might have difficulty obtaining their birth certificate, the homeless, and those who object to being photographed for religious reasons).

131. *Id.* at 199.

132. *Id.* at 200.

133. *Id.* at 199–202.

134. *Id.*

personal inability to vote” under the Indiana law.<sup>135</sup> Because the plaintiff could neither establish that the law had actually burdened anyone nor present a number of voters who might be burdened by the law, the Court determined the magnitude of the burden to be low at best.<sup>136</sup>

Next, the Court pointed to four provisions of the law that mitigated the burden placed on those without identification.<sup>137</sup> Most importantly, the Court recognized the ability to vote by provisional ballot.<sup>138</sup> Voters who do not have identification on election day are not summarily turned away from the polls.<sup>139</sup> Every person who claims the right to vote is, by law, allowed to cast a provisional ballot.<sup>140</sup> Second, the Court recognized the ability for most voters to cast an absentee ballot for which photo identification is not required.<sup>141</sup> Third, the Court noted that the indigent and those with religious objections to being photographed are allowed to vote by provisional ballot and then sign the appropriate affidavit at the clerk’s office within a week and a half of the election.<sup>142</sup> Finally, the Court noted that anyone without valid photo identification is able to obtain free identification from the State.<sup>143</sup> This answered the crucial question of whether the identification requirement was in fact a poll tax.<sup>144</sup> Given all of the mitigating factors, the Court simply could not “conclude that the statute impose[d] ‘excessively burdensome requirements’ on any class of voters.”<sup>145</sup>

Although this opinion was split with three justices concurring in judgment and two dissenting, the question of whether a strict photo identification requirement is valid under the federal constitution is settled for now. Because this was only a facial challenge to Indiana’s voter identification law, an individual voter who is disenfranchised by Indiana’s law can still directly challenge it,<sup>146</sup> but

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135. *Id.* at 201.

136. *Id.* at 202.

137. *Id.* at 199–202.

138. *Id.*

139. *Id.* at 199.

140. *Id.* In order to have a ballot counted, the voter would have to return to the appropriate county office and produce valid photo identification, but the time given for this allowed someone to get identification if he or she otherwise did not have one. *Id.*

141. Here, the Court specifically noted the ability of all elderly to vote by absentee without having to furnish a reason. *Id.* at 201.

142. *Id.* at 185.

143. *Id.* at 198.

144. *Id.* at 199. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]ealth or fee paying has, in our view, no relation to voting qualifications.”).

145. *Crawford*, 553 U.S. at 202.

146. *Id.* at 200.

given the mitigating factors of access to free identification, provisional balloting, absentee balloting, and accommodation of those with religious objections, it might be difficult to find a voter who truly does not fit an exception. Therefore, for now, the analysis of the constitutionality of photo identification laws turns mainly on each individual state's constitutional protections.

*B. State Right to Vote Analysis: Regulations v. Qualifications*

This Part reviews the challenges to Indiana's voter identification law under Indiana's Constitution. While not expressly guaranteed in the U.S. Constitution,<sup>147</sup> the right to vote is enumerated in most states' constitutions, including Indiana's.<sup>148</sup> To qualify as a voter in Indiana, a person must meet three requirements: (1) be a citizen, (2) be at least 18 years old, and (3) have resided in the precinct where he or she wishes to vote for the 30 days immediately prior to the election.<sup>149</sup> Therefore, citizenship, age, and residency are the only characteristics required for one to vote. Indiana's Constitution also grants the Legislature the right to regulate the registration process and, thus, impose restrictions on voting.<sup>150</sup> Nevertheless, it does not allow the Legislature to add new qualifications that a voter must meet to be eligible to vote.<sup>151</sup>

In *League of Women Voters of Indiana, Inc. v. Rokita*, the League challenged the same Indiana law challenged in *Crawford* but brought the suit in state court to review state constitutional claims.<sup>152</sup> The League claimed that requiring voters to possess and provide photo identification is a new voter qualification, not a mere voting regulation.<sup>153</sup> They likened ownership of photo identification to ownership of property, which was repudiated in Indiana in 1890 as an unconstitutional qualification of voting.<sup>154</sup> The Indiana Supreme

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147. Langholz, *supra* note 14, at 767.

148. IND. CONST. art. II, § 2. *See also* LA. CONST. art. I, § 10.

149. IND. CONST. art. II, § 2.

150. *Id.* § 14(c).

151. *Id.* "The General Assembly shall provide for the registration of all persons entitled to vote." *Id.*

152. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 763 (Ind. 2010).

153. *Id.*

154. The Indiana Supreme Court struck down a law that required a voter who was absent from the state for more than six months to provide proof that he or she had been subject to taxation in the county during the absence. *Morris v. Powell*, 25 N.E. 221 (Ind. 1890). This amounted to a requirement that the voter own taxable property in the county. *Id.* In other words, a voter did not qualify as having a right to vote under Indiana's Constitution unless he or she owned property within the

Court disagreed, stating that requiring a voter to present a photo identification “is not in the nature of such a personal, individual characteristic or attribute [such as age, residency, or citizenship] but rather functions merely as an election regulation to verify the voter’s identity.”<sup>155</sup> According to the court, requiring voters to produce a valid identification will only prove that they are complying with the “valid existing constitutional qualifications” of Indiana’s Constitution, not some “*other* extra-constitutional qualification to vote.”<sup>156</sup>

Because Indiana’s Supreme Court found the law to be a voting regulation, the statute only needed to be uniform in its application and afford a reasonable opportunity to vote.<sup>157</sup> The court found Indiana’s law to be uniform even though an identification is not required of those voting by absentee ballot or certain groups of people voting in person, such as the elderly who live in certain licensed care facilities and those with religious exceptions to being photographed.<sup>158</sup> The court saw these exceptions as being no different from other accommodations that the Legislature provided, such as “absentee voting [or] early voting.”<sup>159</sup> Next, the court was not persuaded that obtaining identification is an unreasonable burden, given that the Bureau of Motor Vehicles must issue a card to anyone who meets the requirements, offer assistance in obtaining the required documents, and make temporary identification cards available if there is trouble obtaining all of the necessary documents.<sup>160</sup>

### *C. State Equal Protection Analysis: Classifications and Unequal Treatment*

Since the court found Indiana’s photo identification law to be a valid voter regulation, it then turned to the next inquiry—whether the law met Indiana’s constitutional protection of equal

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county. *Id.* This was a qualification beyond those set out in Indiana’s Constitution. *Id.*

155. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 767. The State drew the distinction that *Morris* was unconstitutional not because one had to provide documentation of his or her taxable status at the time of voting but because the voter was required to meet the additional qualification of property ownership. *Id.*

156. *Id.* at 765.

157. *Id.* at 767.

158. *Id.* at 767–68.

159. *Id.* at 768.

160. *Id.*

privileges.<sup>161</sup> The Equal Privileges Clause under Indiana's Constitution limits the State's Legislature from enacting laws that privilege any citizen or group of citizens over another if those privileges are not available to all citizens of the state.<sup>162</sup> In *Collins v. Day*, the Indiana Supreme Court set out a two-part test to determine if a law meets the Equal Privileges Clause.<sup>163</sup> Unlike the U.S. Supreme Court's differing levels of scrutiny for challenges to equal protection under the U.S. Constitution, Indiana's test applies to all challenges to Indiana's Equal Privileges Clause, regardless of the type of right infringed.<sup>164</sup> The first prong of the test requires any unequal treatment to be "reasonably related to inherent characteristics [that] distinguish the unequally treated classes."<sup>165</sup> The second prong requires the unequal treatment to "be uniformly applicable and equally available to all persons similarly situated."<sup>166</sup>

The League contended that the voter identification law violated the *Collins* test in three ways.<sup>167</sup> First, the distinction between in-person and absentee voters "is not reasonably related to the inherent characteristics" that distinguish these groups.<sup>168</sup> The group argued that this violated the first *Collins* prong.<sup>169</sup> Next, the League contended that the differences among regular in-person voters and those in licensed care facilities were not reasonably related to the groups' differences.<sup>170</sup> The League maintained that this too violated the first *Collins* requirement.<sup>171</sup> Finally, it contended that these distinctions were not equally available to all persons similarly situated, thus violating the second *Collins* prong.<sup>172</sup>

The court quickly dismissed the first argument that "the photo identification requirement for in-person voters does not reasonably relate to the inherent differences between in-person voters and mail-in absentee voters" by focusing on the practical differences between the classes.<sup>173</sup> For in-person voters, the election official has the opportunity to look at the voter and identification side-by-side to

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161. *Id.* at 769–73.

162. IND. CONST. art. I, § 23.

163. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 769.

164. *Id.*

165. *Id.* at 770. Therefore, if someone treats blind people differently, the different treatment should be related to their blindness. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

verify that the person matches the photo.<sup>174</sup> This is not the case for absentee voters.<sup>175</sup> While the court agreed with the League that absentee ballots might be more susceptible to fraud and, therefore, in need of more protection than in-person voting, the court made it clear that absentee ballots were not the issue in this case.<sup>176</sup> Whether the law's stated purpose of deterring and detecting voter fraud would be better served if applied to absentee ballots was not the question under *Collins*.<sup>177</sup> The *Collins* test only required that the actual disparate treatment created by the law be "reasonably related to the inherent characteristics" of the groups.<sup>178</sup> It does not matter if the purpose would be better served if applied to a different segment.<sup>179</sup>

The next two challenges concerned the exception for senior citizens living in licensed care facilities.<sup>180</sup> These voters are not required to provide photo identification for in-person voting if their facility is used as their polling place.<sup>181</sup> Under the first *Collins* factor, the League claimed that this creates an unequal class of voting seniors, distinguishing between those who live in a licensed care facility and those who do not.<sup>182</sup> Under the second *Collins* factor, the League claimed that this exception is not available to all senior citizens, whether or not they live in a licensed care facility, who might have difficulty obtaining photo identification.<sup>183</sup> The court dismissed the first argument due to the "extremely small number of voters excluded from the photo identification requirement," holding that this small exception was permitted under Indiana's constitutional jurisprudence.<sup>184</sup> Next, the Court answered the League's final claim that the law is not available to all seniors similarly situated.<sup>185</sup> *Collins* required that a strong deference be given to the Legislature.<sup>186</sup> Here the Court saw "the possible absence of precise congruity in application to all voters" as worthy of the court's deference "[g]iven the scope of the undertaking

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174. *Id.*

175. *Id.* at 771.

176. *Id.*

177. *Id.* at 770.

178. *Id.* at 771.

179. *Id.*

180. *Id.* See IND. CODE ANN. § 3-11-8-25.1(e) (Westlaw 2014).

181. See § 3-11-8-25.1(e).

182. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 771.

183. *Id.*

184. *Id.* at 771–72 (citing *Dvorak v. City of Bloomington*, 796 N.E.2d 236, 240 (Ind. 2003), which held that the Legislature cannot "provide for every exceptional and imaginary case").

185. *Id.* at 772.

186. *Id.* at 770.

embraced in the Voter ID Law's efforts in enhancing the integrity of the electoral process."<sup>187</sup>

The preceding discussion demonstrates how one of the strictest voter identification laws in the country<sup>188</sup> withstood challenges under two different constitutions.<sup>189</sup> Ultimately, the Indiana Supreme Court dismissed the case without prejudice, leaving the door open for challenges by individual voters who are "unlawfully prevented from exercising the right to vote" under the law.<sup>190</sup> A key component to the failure of both challenges was the lack of actual proof that the law had disenfranchised a qualified voter.<sup>191</sup> Both courts also upheld the law because the challengers did not overcome the high burden necessary for the relief sought—invalidation of the entire law.<sup>192</sup> Neither court was willing to go that far without actual evidence of disenfranchisement.

#### IV. LOUISIANA'S CONSTITUTIONAL ANALYSIS

Using Indiana's law as a model and its challenges as a guide, this Part explores Louisiana's constitutional jurisprudence to determine if Louisiana could implement a strict voter identification law like that of Indiana's. Because the law was upheld under the federal constitution, the analysis will focus on its validity under the Louisiana Constitution.<sup>193</sup> Much like Indiana, Louisiana's Constitution grants its citizens the right to vote<sup>194</sup> and establishes

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187. *Id.* at 772.

188. *Voter ID: State Requirements*, *supra* note 6.

189. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188–89 (2008); *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 760.

190. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 760. This differs from Scalia's concurrence in *Crawford*, in which he stressed that individual impacts should not determine the constitutionality of election laws in order to give stability to the electoral process. *Crawford*, 553 U.S. at 208 (Scalia, J., concurring).

191. *See Crawford*, 553 U.S. at 201 ("The record includes depositions of two case managers . . . none of whom expressed a personal inability to vote . . ."); *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 772 ("[T]his case presents only facial challenges to the constitutionality of the Voter ID Law . . .").

192. *See Crawford*, 553 U.S. at 200 ("Given the fact that petitioners . . . [are] seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion."); *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 771 ("The relief sought by the plaintiffs is that the entire Voter ID Law be declared unconstitutional, not the overturning of the special exception for voters living in state licensed care facilities that serve as precinct polling places on election day.").

193. *See Crawford*, 553 U.S. 181.

194. *See* LA. CONST. art. I, § 10, art. XI, § 1.

equal protection of the laws.<sup>195</sup> Therefore, just like in Indiana, any voter identification requirement must be held constitutional under each of these provisions.

*A. The Right to Vote in Louisiana: Article I, Section 10 and Article XI, Section 1*

The right to vote is shaped by two sections of the Louisiana Constitution. First, article I, section 10 grants all citizens the right to “register and vote” once they reach 18 years of age.<sup>196</sup> Therefore, citizenship and age are the only two qualifications to vote in Louisiana, unlike Indiana, which also has a residency requirement.<sup>197</sup> Section 10, adopted with the 1974 revision to the Louisiana Constitution, is a significant change from the previous constitutional provision.<sup>198</sup> Prior to 1974, the Louisiana Constitution had “broad limitations on suffrage,” including literacy, character, and residency requirements.<sup>199</sup> The current provision represents a

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195. *See id.* art I, § 3.

196. *Id.* art. I, § 10.

(A) Right to Vote. Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.

(B) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

(1) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government or country having such authority to pardon in the place where the person was convicted and sentenced.

(2) A person actually under an order of imprisonment for conviction of a felony.

(C) Exception. Notwithstanding the provisions of Paragraph (B) of this Section, a person who desires to qualify as a candidate for or hold an elective office, who has been convicted of a felony and who has served his sentence, but has not been pardoned for such felony, shall be permitted to qualify as a candidate for or hold such office if the date of his qualifying for such office is more than fifteen years after the date of the completion of his original sentence.

*Id.*

197. *See* IND. CONST. art. II, § 2.

198. LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 33–34 (1991).

199. *Id.* at 34. *See* LA. CONST. art. VIII (repealed 1974).

“strong statement of a right to vote,” while also recognizing “the state’s power to require registration as a prerequisite to voting.”<sup>200</sup> The power to require registration, and therefore to regulate elections, is affirmed by article XI, section 1, which instructs the Legislature to enact an election code that “provide[s] for permanent registration of voters and for the conduct of all elections.”<sup>201</sup>

As can be imagined, the strict voting limitations set out in Louisiana’s Constitution of 1921 were often challenged.<sup>202</sup> Since the 1974 revision, however, there have been a limited number of challenges, mostly centered on the rights of felons to vote and run for office, neither of which bear any relevance to the current question.<sup>203</sup> Further, since the 1974 Constitution, there has not been a single constitutional challenge to a law adding a voter qualification.<sup>204</sup> Because there is no Louisiana jurisprudence on which to base an analysis, it is helpful, although admittedly not determinative, to look to other jurisdictions that have faced the same question and have constitutional provisions similar to Louisiana. Both Georgia and Indiana have faced the question of whether a photo identification requirement was, in fact, a new voting qualification, rather than a valid voting regulation.<sup>205</sup> Also, both Georgia and Indiana have very similar constitutional provisions granting a broad right to vote.<sup>206</sup> Therefore, their courts’ analyses

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200. HARGRAVE, *supra* note 198, at 44.

201. “Section 1. The legislature shall adopt an election code which shall provide for permanent registration of voters and for the conduct of all elections.” LA. CONST. art. XI, § 1. This is similar to Indiana’s provision that requires the Legislature to “provide for the registration of all persons entitled to vote.” IND. CONST. art. II, § 14.

202. *See* Hall v. Godchaux, 90 So. 145 (La. 1921) (defining an “actual bona fide resident”); United States v. State of La., 265 F. Supp. 703 (E.D. La. 1966) *aff’d sub nom.* Louisiana v. United States, 386 U.S. 270 (1967) (declared unconstitutional a law that denied help to those registering to vote who could not read); Trudeau v. Barnes, 65 F.2d 563, 563–64 (5th Cir. 1933) *cert. denied*, 290 U.S. 659 (1933) (seeking to declare Louisiana’s Understanding Clause of the 1921 Constitution to violate the Fourteenth Amendment of the U.S. Constitution).

203. *See, e.g.*, Malone v. Tubbs, 825 So. 2d 585 (La. Ct. App. 2002) (challenge to felons’ ability to run for public office).

204. Searching the notes of decisions on Westlaw resulted in no cases.

205. *See* League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758 (Ind. 2010); Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67 (Ga. 2011).

206. The Indiana Constitution grants the right to vote to anyone who is a U.S. citizen, over the age of 18, who has been a resident of the precinct in which he or she wishes to vote for 30 days prior to the election. IND. CONST. art. II, § 2. The Georgia Constitution grants the right to vote to anyone who is a U.S. citizen, over the age of 18, who meets a residency requirement provided by the Legislature, so long as that person is not disenfranchised by later provisions of the Constitution. This article, like Louisiana’s provision, provides for the Legislature to regulate the registration of electors. GA. CONST. art. II, § 1, ¶ II.

can provide some guidance as to how this question should be answered by Louisiana courts.

The Supreme Courts of both Georgia and Indiana held that requiring a voter to produce a valid identification for in-person voting was not a qualification because it did not amount to an inherent characteristic such as age and citizenship.<sup>207</sup> An identification was merely a device to prove the person had met the qualification requirements set out in the respective constitutions.<sup>208</sup> While Indiana's court prescribed a "uniform and reasonable" test to evaluate voting regulations,<sup>209</sup> Georgia's did not.<sup>210</sup> Georgia's Supreme Court simply stated that "requiring an additional step in the voting process in order to validate identity is not unconstitutional."<sup>211</sup>

The Louisiana Constitution expressly grants the Legislature the right to regulate the registration of voters through an election code.<sup>212</sup> It further expressly grants the Legislature the power to regulate the "conduct of all elections."<sup>213</sup> Proving a person's identity by providing a valid identification falls within this power to regulate conduct. There is no direct jurisprudence to support an argument that this power is beyond the Legislature.<sup>214</sup> Indeed, the Louisiana Constitution not only allows the Legislature to regulate elections—article XI compels it to.<sup>215</sup> Moreover, as Indiana's Supreme Court noted, "[t]he fact that [people] prefer alternative procedures to the photo identification does not create a Constitutional violation in requiring" voters to provide one.<sup>216</sup> Because the photo identification law poses no additional requirement, the only concern is whether it has an unduly disparate impact under the State's equal protection analysis.

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207. See *League of Women Voters of Ind., Inc.*, 929 N.E.2d 758; *Democratic Party of Ga., Inc.*, 707 S.E.2d 67.

208. See *League of Women Voters of Ind., Inc.*, 929 N.E.2d 758; *Democratic Party of Ga., Inc.*, 707 S.E.2d 67.

209. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 764.

210. *Democratic Party of Ga., Inc.*, 707 S.E.2d at 73.

211. *Id.*

212. LA. CONST. art. XI, § 1.

213. *Id.*

214. There is no jurisprudence on this issue since the ratification of the 1974 Constitution of Louisiana.

215. "The legislature shall adopt an election code." LA. CONST. art. XI, § 1.

216. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 763 (Ind. 2010).

*B. Equal Protection in Louisiana: Article I, Section 3, The Right to Individual Dignity*

Equal protection is established in Louisiana under article I, section 3—the Right to Individual Dignity.<sup>217</sup> Louisiana’s provision begins very similarly to the guarantee provided by the U.S. Constitution,<sup>218</sup> but Louisiana’s provision goes beyond federal equal protection. First, it expressly abrogates laws that discriminate based on “race or religious ideas, beliefs, or affiliations.”<sup>219</sup> Further, it abrogates laws that discriminate based on “birth, age, sex, culture, physical condition, or political ideas or affiliations” if the law is arbitrary, capricious, or unreasonable.<sup>220</sup>

During the rehearing of *Sibley v. Board of Supervisors of Louisiana State University*, the Louisiana Supreme Court established the analysis for an equal protection challenge under the state constitution and outright rejected the federal weighing test.<sup>221</sup> The Louisiana Supreme Court held that the federal analysis made it too difficult for the Legislature to predict the outcome of similar cases because the court was too “preoccupied with the abstractions of ‘fundamental right[s],’ ‘suspect classification[s],’ [and] ‘levels of scrutiny,’ . . . instead of focusing on an open analysis of the specific merits of the individual cases.”<sup>222</sup>

Under the analysis set out in *Sibley*, the court must first look to the statute and repeal any law that discriminates on the basis of race or religion.<sup>223</sup> If a law classifies based on “birth, age, sex, culture, physical condition, or political ideas or affiliations,” then the burden is on the “state or other advocate of the classification [to] show[] that the classification has a reasonable basis.”<sup>224</sup> To do this, a

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217. LA. CONST. art. I, § 3.

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

*Id.*

218. See U.S. CONST. amend. XIV, § 1 (Equal Protection); LA. CONST. art. I, § 3. Both articles prohibit the denial of “equal protection of the laws.” *Id.*; U.S. CONST. amend. XIV, § 1.

219. LA. CONST. art. I, § 3.

220. *Id.*

221. *Sibley v. Bd. of Sup’rs of La. State Univ.*, 477 So. 2d 1094, 1106 (La. 1985).

222. *Id.* at 1106.

223. *Id.* at 1107.

224. *Id.*

defender of a law that creates such a distinction must prove the classification furthers a legitimate state interest.<sup>225</sup> If a law discriminates on any other basis, the burden is shifted to the disadvantaged class to show “that [the law] does not suitably further any appropriate state interest.”<sup>226</sup> A statute can discriminate expressly in the language used or effectively if the statute creates distinct groups of protected classes.<sup>227</sup> Louisiana’s recognition of these two types of discrimination is explored in the following subparts.

*1. Threshold Question: Is There Discrimination Expressly on the Face of the Statute?*

Given *Sibley*’s single standard of scrutiny for equal protection analysis, the fact that voting is a fundamental right does not afford any additional analysis or heightened burden on either party.<sup>228</sup> Therefore, the threshold step of *Sibley* turns on the express language in the statute.<sup>229</sup> On its face, a voter identification law like Indiana’s does not expressly create a distinction based on race or religion. Instead, this type of law expressly classifies people into two groups—those with photo identification and those without. Because these classes are not based on race or religion, a strict photo identification law would not be invalidated under the first hurdle of Louisiana’s Equal Protection Clause. Neither does this classification implicate the second standard enumerated in *Sibley*—classification based on “birth, age, sex, culture, physical condition, or political ideas or affiliations.”<sup>230</sup> Again, the law only classifies voters based on whether they possess photo identification. Therefore, an Indiana-style voter identification law falls to the third level of protection under Louisiana’s equal protection analysis for discrimination on another basis—namely whether someone has photo identification. Therefore, any challenge to the law requires a member of the

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225. *Id.* at 1104.

226. *Id.* at 1107.

227. *See* Johnson v. State, 965 So. 2d 866, 872 (La. Ct. App. 2007) (discussing the different burden a plaintiff has if the statute they complain of is facially neutral but discriminates in effect).

228. When discussing the problems with the U.S. Supreme Court’s three-tiered analysis, the Louisiana Supreme Court noted that “the Court’s opinions are preoccupied with the abstractions of ‘fundamental right,’ ‘suspect classification,’ ‘levels of scrutiny,’ and the like, instead of focusing on an open analysis of the specific merits of the individual cases which would necessarily entail a balancing or comparative evaluation of government and individual interests.” *Sibley*, 477 So. 2d at 1106.

229. *See id.* at 1107.

230. LA. CONST. art. I, § 3.

disadvantaged class to prove there is no valid state interest in requiring in-person voters to present photo identification.

The language of *Sibley* sets up two requirements for any legal challenge to be successful in Louisiana. First, a member of the disadvantaged class, a voter without photo identification, must bring the suit challenging implementation of a strict photo identification law in Louisiana. This could be a citizen who was unable to track down the required paperwork needed to obtain identification or someone too poor to afford the fees for acquiring a birth certificate needed to obtain identification. As seen in *Crawford* and in *League of Women Voters*, it is difficult to win a purely facial challenge to a strict photo identification law.<sup>231</sup>

Second, the challenger must prove that there is no valid state interest in requiring in-person voters to present identification.<sup>232</sup> This inquiry mirrors the U.S. Supreme Court's analysis more than the Indiana Supreme Court's.<sup>233</sup> Proving no valid state interest is an extremely tough bar to overcome given the fact that the U.S. Supreme Court has already declared three valid state interests that could apply to every state in the union—modernizing the election system, deterring and detecting voter fraud, and boosting public confidence in the electoral system.<sup>234</sup> All of these concerns can be shown in Louisiana. HAVA and the Motor Voter Law were national laws, and therefore the same problems that Indiana had in managing its registration rolls are present in Louisiana.<sup>235</sup> Deterring and detecting voter fraud before it dilutes the weight of lawful votes is a valid interest of any state,<sup>236</sup> and boosting public confidence in the

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231. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 182 (2008); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 772 (Ind. 2010).

232. *Sibley*, 477 So. 2d at 1107.

233. Indiana's equal protection analysis differs from the analysis under the U.S. Constitution and Louisiana's. See *supra* Parts III.C, III.A.1–A.2.

234. See *Crawford*, 553 U.S. at 181–82.

235. Louisiana Department of Motor Vehicle offices must act as registration outlets, and Louisiana's Registrar of Voters must meet the same requirements as Indiana in removing inactive voters from their registration rolls. See 42 U.S.C. § 15511 (2006) (providing U.S. Attorney General with right to bring a civil action against "any State or jurisdiction" for declaratory and injunctive relief for violations of HAVA); see also *id.* § 1973gg(b)(2) (providing Congressional purpose of increased voter participation).

236. Louisiana has a "zero tolerance policy toward voter fraud." *Protect Your Vote: Elections Compliance Unit*, LA. SECRETARY ST., available at <http://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ProtectYourVote.pdf> [<http://perma.cc/WH46-MY98>] (archived Apr. 5, 2014). The State's interest in deterring and detecting voter fraud is also evidenced by the Secretary of State's Election Compliance Unit and the Voter Fraud Hotline. See also *Election Fraud and Compliance*, LA. SECRETARY ST., available at <http://www.sos.la.gov/Elections>

electoral process is crucial throughout the United States because “[l]ittle can undermine democracy more than a widespread belief among the people that elections are neither fair nor legitimate.”<sup>237</sup>

*2. Secondary Question: Is There a Discriminatory Effect, and Is It Recognized by Louisiana’s Jurisprudence?*

Because an Indiana-style law does not expressly discriminate on any of the enumerated bases in article XI, section 3 of the Louisiana Constitution, potential plaintiffs would have difficulty convincing a court that the State has no valid interest in requiring in-person voters to present photo identification. Therefore, the plaintiff might attempt to argue that while an Indiana-style law does not expressly discriminate on one of the bases set out in the Louisiana Constitution, it does so in effect.

This argument would be difficult for a challenger to mount. Under *Sibley*, the basis for classification is determined by looking at the “primary cause of [a person] being assigned to one of the two classes.”<sup>238</sup> The primary cause in this case is whether the voter has photo identification.<sup>239</sup> Louisiana courts have held that to recognize a discriminatory effect that was not the primary cause for classification as recognized in *Sibley*, it must be shown that the Legislature in some way desired that effect.<sup>240</sup> Therefore, a challenger would have to show that, while the law does not expressly discriminate against these protected classes, it does so in reality and the Legislature “selected or reaffirmed a particular course of conduct at least in part because of, and not merely in spite of, its adverse effects upon an identifiable group.”<sup>241</sup> It is not enough that a statute has a discriminatory effect once put into practice; the discriminatory effect “must be traced to a discriminatory purpose to support a claim that a statute is unconstitutional under the [E]qual [P]rotection [C]ause.”<sup>242</sup>

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AndVoting/GetInvolved/ReportElectionFraud/Pages/default.aspx [http://perma.cc/VCB-9WAW] (archived Apr. 5, 2014).

237. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at 1. The Carter–Baker Commission was “formed to recommend ways to raise confidence in the electoral system.” *Id.* at ii.

238. *Sibley v. Bd. of Sup’rs of La. State Univ.*, 477 So. 2d 1094, 1108–09 (La. 1985).

239. *See Id.*

240. *Johnson v. State*, 965 So. 2d 866, 872 (La. Ct. App. 2007).

241. *Id.*

242. *Id.*

Therefore, to prove the statute has a discriminatory effect would require showing that eligible voters who do not have valid photo identification are, in fact, members of a protected class and that the law was enacted purposefully to discriminate against the class.<sup>243</sup> The purposefulness component requires the Legislature to know that a certain class of people would be discriminated against and to have enacted the legislation with that intent.<sup>244</sup> Once intentional discrimination is established in fact, the court would follow the same analysis as above: If the law is found to discriminate purposefully in its effect based on race or religion, then the law would be unconstitutional.<sup>245</sup> Further, if the law is found to purposefully discriminate based on “birth, age, sex, culture, physical condition, or political ideas or affiliations,” the State would have the burden of proving a valid state interest for the discrimination.<sup>246</sup> In this case, it would likely be struck down as well because there is no valid state interest in discriminating against a voter for any of the listed reasons. The bar for overturning a law based on a discriminatory effect is high. But this avenue seems likely to be the most fruitful approach in having a voter identification law declared unconstitutional. However, given the difficulty in showing that the Legislature intended to disadvantage a distinct class of voters, this attack on a strict photo identification law would likely fail.

#### V. GOING FORWARD: SHAPING LEGISLATION

Replacing Louisiana’s current non-strict photo identification law with an Indiana-style strict photo identification law would likely survive a challenge under the Louisiana Constitution.<sup>247</sup> However, a poorly constructed law that ignores principles of *Crawford* and *League of Women Voters* would almost certainly fail to pass constitutional muster. Both courts took note of factors that help create a balanced law and mitigate the burden on voters and risk of disenfranchisement. In light of recent cases in other states, the Legislature should pay particular attention to the implementation

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243. *Id.*

244. *Id.*

245. *See* LA. CONST. art. I, § 3; *Sibley v. Bd. of Sup’rs of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985). “When the law classifies individuals by race or religious beliefs, it shall be repudiated completely.” *Id.*

246. LA. CONST. art. I, § 3; *Sibley*, 477 So. 2d at 1107. “When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis.” *Id.*

247. *See supra* Part IV.

timeline and how it coincides with major elections.<sup>248</sup> Factors that mitigate the burden on voters and a thoughtful implementation timeline are the two most important concerns to incorporate in any law passed in Louisiana.<sup>249</sup>

Because the Supreme Court noted that “gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting,” the most obvious mitigating factor in Indiana’s law is therefore the availability of a free photo identification.<sup>250</sup> Currently, a Louisiana identification can cost anywhere from \$3 to \$10 depending on one’s age.<sup>251</sup> However, in Louisiana, a person can get an identification card for free if they are a registered voter.<sup>252</sup> Therefore, any concern that obtaining identification would amount to a poll tax is already mitigated under current Louisiana law. To get photo identification in Louisiana, one must follow the same procedures as for a driver’s license.<sup>253</sup> This means that one must prove his or her identity by bringing in two primary forms of identification, or one primary and two secondary forms.<sup>254</sup> These are the same requirements to obtain photo identification in Indiana.<sup>255</sup> As the U.S. Supreme Court noted in *Crawford*, obtaining certain forms of primary identification, such as a certified copy of a birth certificate, costs money.<sup>256</sup> In upholding the Indiana law, the Court allowed a fee range of \$3 to \$12.<sup>257</sup> An appropriate form of identification can be purchased within this range in Louisiana as well.<sup>258</sup> Therefore, the mitigating factor of a free identification is already in place in Louisiana.

The importance of making a provisional ballot available on election day and a procedure to have that ballot counted if the

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248. See *Applewhite v. Com.*, No. 330 M.D. 2012, 2012 WL 4497211, at \*3 (Pa. Commw. Ct. Oct. 2, 2012) (analyzing implementation in upcoming election); *South Carolina v. United States*, 898 F. Supp. 2d 30, 50 (D.D.C. 2012) (deciding whether to “pre-clear” the South Carolina voting law under the Voting Rights Act).

249. An example would be the challenge to the exception in Indiana for those living in licensed care facilities. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 771 (Ind. 2010).

250. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008).

251. LA. REV. STAT. ANN. § 40:1321(D) (Supp. 2014).

252. *Id.* § 40:1321(C)(1).

253. *Id.* § 40:1321(A).

254. *Id.* § 32:409.1(A)(2)(d)(x). A primary form of identification is a document such as a certified copy of a birth certificate, a certificate of citizenship, a military identification, etc. *Id.*

255. See *Crawford*, 553 U.S. at 198 n.17.

256. *Id.*

257. *Id.*

258. See LA. REV. STAT. ANN. § 40:40 (2002).

voter's identity is later proven to the registrar cannot be underscored enough and should be included in a law enacted in Louisiana. Although the availability of provisional ballots was seen by Justice Scalia as merely "an indulgence—not a constitutional imperative,"<sup>259</sup> it does prevent a substantial number of everyday circumstances from disenfranchising a lawful voter, such as forgetting identification, having a wallet stolen days before an election, or forgetting to renew one's driver's license.<sup>260</sup> None of these factors should preclude a voter from casting a ballot, and Louisiana should make certain that there is a provision in place to account for "life's vagaries."<sup>261</sup> Because one can obtain an identification card in Louisiana in one day, a ten-day grace period to return to the registrar's office with a valid identification after election day is sufficient and recommended.

Another mitigating factor briefly discussed in *Crawford* is the ability to cast an absentee ballot instead of voting in person.<sup>262</sup> Some states, such as Georgia, allow anyone to vote by absentee ballot.<sup>263</sup> The voter does not need to give a specific reason for requesting an absentee ballot, such as being out of town on election day.<sup>264</sup> Indiana, however, requires a voter to give a reason to vote by absentee, but the State allows the elderly and disabled to vote by absentee ballot without a reason.<sup>265</sup> In Louisiana, one must provide sufficient reason to cast an absentee ballot.<sup>266</sup> Reasons such as expecting to be temporarily out of the parish on election day for vacation or work, attending or teaching school outside of the parish on election day, or being a member of the armed services serving outside of the parish are all valid reasons to cast an absentee ballot.<sup>267</sup> Like Indiana, Louisiana also allows the elderly and disabled to cast absentee ballots without stating a reason.<sup>268</sup> Therefore, Louisiana already sufficiently reduces the burden on voters by allowing absentee balloting and, further, allowing certain vulnerable groups to vote by absentee ballot without meeting one of the criteria for ordinary citizens.

There are a few other mitigating factors of which the Supreme Court of Indiana took notice that might be worth implementing in

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259. *Crawford*, 553 U.S. at 209 (Scalia, J., concurring).

260. *Id.* at 197.

261. *Id.*

262. *Id.* at 201.

263. GA. CODE ANN. § 21-2-381 (Westlaw 2014).

264. *Id.*

265. *Crawford*, 553 U.S. at 240.

266. LA. REV. STAT. ANN. § 18:1303 (2012).

267. *Id.*

268. *Id.*

Louisiana. First, the Indiana Bureau of Motor Vehicles lists the documents necessary to obtain identification online.<sup>269</sup> This practice reduces the number of return trips to and from the Bureau and thus reduces the burden on the voter.<sup>270</sup> Louisiana also has a list of necessary documents available online; however, it is difficult to find and should be made more readily accessible.<sup>271</sup> Indiana's Bureau also has a "hotline" available to assist people in gathering the necessary documents.<sup>272</sup> Further, the Bureau has the ability to grant exceptions or "use other verifiable documentation if an applicant is reasonably unable to gather the necessary documents," and it has the ability to "issue an interim identification card to allow an individual to vote while the Bureau conducts its verification of the application for a permanent identification card."<sup>273</sup> All of these mitigating factors should be seriously considered by Louisiana's Legislature when considering a strict voter identification law.

One final factor that the Louisiana Legislature should strongly consider is the timing of the implementation. In recent years, at least two states' courts have issued injunctions to halt implementation of a strict photo identification law.<sup>274</sup> Neither injunction declared that the laws unconstitutionally burdened voters.<sup>275</sup> Rather, the injunctions were handed down because there was simply not enough time to ensure implementation of the law before an upcoming federal election.<sup>276</sup> A phase-in period was suggested in Justice Souter's dissent in *Crawford*<sup>277</sup> and recommended in the Carter-Baker Report.<sup>278</sup> While a timeline that attempted to rush implementation of a strict photo identification law will not keep a valid law from being implemented at some point, it could delay implementation of the law and cause unnecessary court challenges that a well-drafted piece of legislation could easily avoid.

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269. *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 768 (Ind. 2010).

270. *Id.*

271. *See Identification Cards*, LA. OFF. MOTOR VEHICLES, <http://dpsweb.dps.louisiana.gov/omv1.nsf/47c22a6b4cac67ec862570c90053bd7f/2be27793a2c96e83862564ae0054290f?OpenDocument&Highlight=2,identification,card> (last visited Oct. 8, 2012) [<http://perma.cc/M88E-46NL>] (archived Apr. 5, 2014).

272. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 768.

273. *Id.*

274. *Applewhite v. Com.*, No. 330 M.D. 2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012).

275. *See Applewhite*, 2012 WL 4497211; *South Carolina*, 898 F. Supp. 2d 30.

276. *See Applewhite*, 2012 WL 4497211; *South Carolina*, 898 F. Supp. 2d 30.

277. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 231 (2008) (Souter, J., dissenting).

278. BUILDING CONFIDENCE IN U.S. ELECTIONS, *supra* note 54, at 19.

In crafting legislation to replace Louisiana's current non-strict photo identification law, the Legislature should take direct note of the factors included in Indiana's law that helped mitigate the burden that the identification requirement posed on the voters. It should pay particular attention to the availability of provisional ballots and a thoughtful implementation timeline that allows for a full and fair implementation in advance of an upcoming election. By combining these provisions with current Louisiana laws that allow the elderly and other groups to vote by absentee ballot without stating a reason and the availability of a free voter identification card,<sup>279</sup> Louisiana can sustain a strict photo identification law. And doing so would help ensure confidence in the State's electoral process.

#### CONCLUSION

A movement to strengthen voter regulations has swept the country.<sup>280</sup> As with most political issues, there are strong proponents and opponents. The Supreme Court of the United States found that requiring a photo identification to prove one's identity before voting is a valid electoral regulation under the U.S. Constitution, given the strong interests of state governments and the small burden on voters. States have a valid interest in modernizing the electoral system, ensuring confidence in the electoral process, and deterring and detecting voter fraud. These interests are only made more urgent by the harm to the electoral process that can result once an illegal ballot disappears into those legally cast. The inability to later retract a fraudulent ballot is wholly different from making a lawful voter take the additional steps of casting a provisional ballot because the provisional ballot will in fact be counted and given the same weight as all other ballots once the voter takes the steps necessary to properly comply with the law. The laws that are sweeping through the states are withstanding state constitutional challenges because they provide the balance necessary to address this dual problem of disenfranchisement.<sup>281</sup>

Given Louisiana's constitutional protections and jurisprudence, a strong voter identification law enacted for the proper purpose of ensuring a fair and free election should withstand all constitutional challenges. Louisiana's Constitution directs the Legislature to enact

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279. See LA. REV. STAT. ANN. § 18:1303 (West 2012); LA. REV. STAT. ANN. § 40:1321(C)(1) (Supp. 2014).

280. *Voter ID: State Requirements*, *supra* note 6.

281. See *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758, 770 (Ind. 2010); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). *But see Applewhite v. Com.*, 54 A.3d 1 (Pa. 2012).

an election code regulating voter registration and conduct and holds that if a voter meets the qualifications to vote set out in article I, that they have the right to *register* and vote.<sup>282</sup> This registration requirement presupposes that there will be additional requirements that must be met before voting. So long as the Legislature includes commonsense and fair mitigating factors to avoid voter disenfranchisement, the State's strong interest in protecting and ensuring a fair and free election will win out. Ultimately, a strong photo identification law ensures that voters will not lose one of their most fundamental rights—their right to participate in the greatest experiment of all, that of self-governing.

*Julia d'Hemecourt\**

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282. LA. CONST. art. XI, § 1.

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