

THINNING THE GRAY VOTE: STATE VOTER IDENTIFICATION LAWS AND THE NATION'S ELDERLY

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The elderly population in the United States is not only the largest growing demographic in the nation, but is also the most active in voting. State regulations have become increasingly strict over the past decade, including various voter identification laws. These laws burden the individual's right to vote, and often disproportionately affect certain groups, including the nation's elderly. This Note discusses the elder electorate, voter identification laws, the effect they have on the elderly, and possible alternatives and resolutions that could allow for the elderly to vote while ensuring the integrity of the electoral process. Specifically, this Note recommends two legislative solutions. First, instead of enacting identifications laws, states can accomplish the same goals by strengthening current provisions. Second, states with voter identification laws, which are unlikely to be repealed, should mitigate the adverse effects such laws have on the elderly.

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I. Introduction

With the rise of stricter state regulations over the past decade, the United States elder electorate faces impending complications to its right to partake in the most core democratic process available to citizens: voting.

Over the past several election cycles, a patchwork system of voter photo identification laws has sprouted around the nation.¹ Troublingly, such state legislative actions have created varying levels of electoral restrictions that burden one's ability to vote and have the potential to exclude sections of the populace from the electoral process.² Such laws have a disproportionate effect on several groups³ and one such sizable faction is the nation's elderly.⁴ Elderly⁵ Americans encompass both the largest growth demographic in the country in terms of age as well as the most active voting group, by percentage, in both voter registration and participation in all federal elections over the past several cycles.⁶ As such, their potential exclusion from the polls stands to have major ramifications for elderly interests.

Within this elder electorate exist classes particularly vulnerable to the ill effects of voter identification laws, including women, individuals of minority racial or ethnic backgrounds, as well as those of low socioeconomic standing. While other articles have focused on the

1. See, e.g., Claire Foster Martin, Comment, *Block the Vote: How A New Wave of State Election Laws is Rolling Unevenly Over Voters & the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 96 (2013).

2. See generally *id.*

3. Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111–16 (2009), available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf (regarding minority, low-income, and less-educated voters); Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, WASH. POST (Nov. 5, 2013, 10:35 AM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/> (regarding female voters); Marsha Mercer, *Can We Still Vote?*, AARP (Aug. 30, 2012), <http://www.aarp.org/politics-society/government-elections/info-01-2012/voter-id-laws-impact-older-americans.html> (elderly voters); Emily Schultheis, *Students Hit By Voter ID Restrictions*, POLITICO (Nov. 30, 2011, 10:11 PM), <http://www.politico.com/news/stories/1111/69465.html> (regarding college student voters).

4. See Mercer, *supra* note 3.

5. Unless stated otherwise, this Note will use the terms “elder” and “elderly” to refer to individuals that are age sixty-five and over.

6. *The Demographics of Aging...*, TRANSGENERATIONAL DESIGN MATTERS, <http://transgenerational.org/aging/demographics.htm> (last visited Oct. 20, 2014) [hereinafter *Demographics*]; U.S. Census Bureau, *The Older Population in the United States: 2011*, U.S. DEP'T OF COMMERCE, <https://www.census.gov/population/age/data/2011.html> (last visited Oct. 20, 2014).

effect of voter identification laws on a wide swath of people⁷ this Note will discuss the implications of voter identification laws on elderly voters, with a focus on particularly affected subsets when possible, as well as potential alternatives and voting methods, and what resolution, if any, should be taken to ensure both the integrity of the election process while ensuring these individuals are able to cast their ballot.

Elderly voters constitute not only the voting bloc with the highest participation among all other age groups,⁸ but the fastest growing age group in the United States with the graying of the baby boom generation.⁹ The enactment of new forms of voter identification requirements by the states, most notably photo identification requirements, angles to present major obstacles to this aging voting populace in the near future.

Consider the story of Genevieve Winslow, an elderly resident of Milwaukee, Wisconsin, who, as of 2013, had voted in every election since 1948, when she first became eligible to cast a ballot.¹⁰ With the passage of Wisconsin's voter identification law, Ms. Winslow "worrie[d] she might get turned away at the polls in the future," due in part to the incorrect spelling of her name on her birth certificate and the Anglicization of her first name during her youth which may prevent her from obtaining the identification now necessary by law to vote.¹¹

Another example is Dorothy Cooper, a Tennessee nonagenarian turned away from a state driver service center in 2011 while trying to obtain a state voter identification card because she did not have a copy of her marriage certificate.¹² There is by no means a shortage of

7. There are some exceptions. See, e.g., Sally Harrison, Comment, *May I See Your ID? How Voter Identification Laws Disenfranchise Native Americans' Fundamental Right To Vote*, 37 AM. INDIAN L. REV. 597 (2013) (concerning the impact of voter identification laws specifically on Native Americans).

8. Emily Brandon, *Why Older Citizens are More Likely to Vote*, U.S. NEWS & WORLD REPORT, Mar. 19, 2012, <http://money.usnews.com/money/retirement/articles/2012/03/19/why-older-citizens-are-more-likely-to-vote>.

9. *The Fastest-growing Age Group in America is 65 and Over (2010-2030)*, MILKEN INST., http://s3.amazonaws.com/zanran_storage/www.milkeninstitute.org/ContentPages/2516318711.pdf (last visited Feb. 23, 2015) (citing the U.S. Administration on Aging and the U.S. Census Bureau).

10. Kay Nolan, *War on 'Greatest Generation'? Critics Assail Voter ID Laws*, THE CHRISTIAN SCI. MONITOR, Nov. 18, 2013, <http://www.csmonitor.com/USA/Politics/2013/1118/War-on-Greatest-Generation-Critics-assail-voter-ID-laws.-video>.

11. *Id.*

12. Ansley Haman, *96-year-old Chattanooga Resident Denied Voting ID*, CHATTANOOGA TIMES FREE PRESS, Oct. 5, 2011, <http://www.times>

similar anecdotes and concerns emanating from across the country over the past few years.¹³

Notably, Texas' voter identification law nearly ensnared one of the state, and country's, most prominent, former politicians.¹⁴ On November 2, 2013, former Speaker of the U.S. House, gubernatorial candidate, Texas State Judge and voter in every election since 1944, Jim Wright, age ninety, was turned away by a local Texas Department of Public Safety office for failing to have the requisite photo identification needed to obtain a Texas voter identification.¹⁵ While Wright eventually did acquire the appropriate identification prior to the election, he also happened to have advantages many other elderly voters' lack, namely political prominence, an assistant, and the time and money needed to acquire a birth certificate in a prompt manner.¹⁶

freepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/.

13. See, e.g., Dan Casey, *Photo IDs May Hamper Senior Voting*, THE ROANOKE TIMES, July 21, 2014, http://www.roanoke.com/news/columns_and_blogs/columns/dan_casey/casey-photo-ids-may-hamper-senior-voting/article_fc0bd4c2-40bc-50ca-ac37-7bbd586e2a9c.html (concerning a 91-year-old habitual voter in Virginia that found the State's voter identification process "very inconvenient"); *Some Concerned What Voter ID Means for Elderly*, KARE 11, available at <http://www.kare11.com/video/1861422852001/1/Some-concerned-what-voter-ID-means-for-elderly> (last visited Feb. 23, 2015) (regarding concerns of some Minneapolitans about the State's proposed 2012 voter identification amendment and its ramifications for the elderly: Minnesota was the only state in the Union to reject a proposed voter identification during the November 2012 elections.). See Bryna Godar, *MN Only State to Vote Down Voter ID Referendum*, MINN. DAILY, Nov. 7, 2012, <http://www.mndaily.com/2012/11/07/mn-only-state-vote-down-voter-id-referendum>. *Elderly Woman Without Birth Certificate Denied Photo ID to Vote*, PIX11 (Oct. 2, 2012), <http://on.aol.com/video/elderly-woman-without-birth-certificate-denied-photo-id-to-vote-517494500> (referring to an eighty-eight-year old individual's struggle to obtain proper voter identification in Georgia due to her lack of a birth certificate); The ACLU of Florida et al., *Impact of Voter ID Laws on U.S. Voters*, <http://www.nnhrc.navajo-nsn.gov/docs/Impact%20of%20Voter%20ID-%20Work%20Group%207%20Follow%20Up%20Final.pdf> (report prepared for the U.N. Human Rights Committee's review of the United States' compliance with the International Covenant on Civil and Political Rights in March 2014, the piece documents various electoral difficulties elderly Americans have faced due to voter identification regimes); *Voter ID Law Causes Concern for Seniors*, WISN (Jan. 12, 2012), <http://www.wisn.com/Voter-ID-Law-Causes-Concern-For-Seniors/10951362> (dealing with the unease of some Wisconsinites over the possible effects of a voter identification law on the State's elderly citizens).

14. Terry Evans & Anna M. Tinsley, *Voter ID Law Snags Former House Speaker Jim Wright*, FORT WORTH STAR TELEGRAM, Nov. 2, 2013, <http://www.star-telegram.com/2013/11/02/5300503/voter-id-law-snags-former-house.html>.

15. *Id.*

16. Ari Berman, *Texas Voter ID Law Ensnarcs Former Speaker of the House, Candidate for Governor, State Judge*, THE NATION (Nov. 4, 2013), <http://www.thenation.com/blog/176977/texas-voter-id-law-ensnarcs-former-speaker-house-candidates-governor-state-judge>.

Assuredly, these are just a few examples of the impact and implications state voter identification laws can and may have on elderly voters. That being said, the time is ripe for such issues to accelerate and new problems to arise given the rapid pace to pass similar legislation among the states. This Note will take a look at the way such state voter identification laws may affect elderly voters and what can be done to ensure and enhance electoral accessibility for this group while accounting for the concerns behind voter identification laws.

First, in Section II, this Note will address general background on the growing elder electorate and legal background on the rise of stricter voter identification regulations. Then, Section III will examine implications of these laws on elderly voters, and possible viable alternatives proposed by the Brennan Center and others. Section III will also take a closer look at methods that can be used alongside voter identification in order to make the effects of such laws less trying.

Finally, Section IV of this Note will advocate for two legislative solutions. One, states without voter identification laws have little reason to adopt them and can accomplish the same, if not similar effects by simply strengthening existing, less onerous provisions. Two, states with voter identification laws that are unlikely to repeal them in the near future should implement provisions to mitigate the adverse effects these laws can have on elderly voters. Ultimately, this Note advocates for solutions that steer away from the disenfranchisement of elder Americans while preserving the integrity and accessibility of the franchise.

II. Background and History

Voting in the United States, for the most part, has been subject to an underlying push for expansion and accessibility since the franchise first came into being with the adoption of the U.S. Constitution in 1789.¹⁷ In several parts to follow, this Section will explore both this Note's relevant subset of the electorate, elderly voters, and relevant legislative and legal action relating to voting rights and voter identification legislation.

17. See, e.g., U.S. CONST. amend. XV (removing racial restrictions on the right to vote); U.S. CONST. amend. XIX (removing restrictions on female suffrage); U.S. CONST. amend. XXVI (lowering the voting age to eighteen years old). Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001).

Over the past century, the role of elderly individuals in the electoral process has increased as life expectancies continue to rise. At the same time, the federal government has enacted an array of legislation meant to make the voting process easier and encourage registration among individuals of all ages.¹⁸ Meanwhile, many states have begun to institute stricter voter identification laws, justified by a desire to prevent voter fraud. This is a phenomenon whose magnitude, as of yet, is drawn more from political rhetoric than fact.

The 2012 election¹⁹ was the first federal general election since several of these new laws had been passed; however, many had not gone into full effect at that time²⁰ while others have faced challenges in the courts, delaying their implementation.²¹ Given their recent vintage, their true effect on the national electorate is still speculative. Furthermore, two recent major cases decided by the Supreme Court have weighed directly on voting rights and voter identification laws.²² All of these matters directly implicate the voter identification issue as it relates to elderly voters.

A. The Elder Electorate

The rise of the elder electorate in the United States has come about in large part due to medical advancement and improved public health standards.²³ In 1900, life expectancy at birth for the U.S. popu-

18. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 454 (2008) (“Key portions of the Voting Rights Act of 1965 (VRA), the National Voter Registration Act of 1993 (NVRA), and the Help America Vote Act of 2002 (HAVA) are designed to reduce registration barriers.”).

19. This Note entered the publication process prior to the November 2014 elections, however, updates, when feasible, have been incorporated into the Note.

20. For example, Rhode Island passed a voter identification law in 2011; however, the law’s photo requirement did not go into effect until 2014. Lauren Kelper, *Rhode Island Governor Signs Voter ID Bill*, REUTERS (July 6, 2011, 5:16 PM), <http://www.reuters.com/article/2011/07/06/us-rhodeisland-voterid-idUSTRE7656RS20110706>.

21. See, e.g., Aaron Blake, *Judge Delays Pennsylvania Voter ID Law Again*, WASH. POST (Aug. 16, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/16/judge-delays-pennsylvania-voter-id-law-again/>.

22. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

23. See Amanda Sonnega, *The Future of Human Life Expectancy: Have We Reached the Ceiling or is the Sky the Limit?*, RES. HIGHLIGHTS IN THE DEMOGRAPHY AND ECON. OF AGING (Population Reference Bureau, Washington, D.C.), Mar. 2006, at 2-3, available at http://www.prb.org/pdf06/nia_futureoflifeexpectancy.pdf (medical advances); Laura Helmuth, *Why Are We Not Dead Yet?*, SLATE (Sept. 5, 2013, 5:18 AM), http://www.slate.com/articles/health_

lace stood at 47.3 years; by 2010, that figure had risen to 78.7 years.²⁴ Furthermore, those reaching the ages of sixty-five and seventy-five are living significantly longer than their predecessors several decades prior.²⁵ Therefore, more individuals have the luxury of voting into the later stages of life than ever before and constructing life-long patterns of voting activity.

1. TURNOUT

In the 2012 election cycle, voters age sixty-five and over reported the highest levels of voter registration and turnout.²⁶ This trend is not new. Indeed, over the nine federal election cycles between 1996 and 2012, no fewer than 72.5 % of elderly voters have reported registering to vote and no less than 58.9 % have reported actually voting in these elections, the highest of any other age group for all cycles.²⁷

Aside from the anecdotal wisdom from age, there are likely multiple reasons behind why elderly voters turn out at greater rates than younger cohorts. Preserving entitlements that benefit the elderly, such as Social Security and Medicare, is certainly one reason.²⁸ Elderly individuals also tend to be more settled into a particular community than younger people and thus are less likely to need to change their voter registration as frequently.²⁹ Spending considerable time in one area may also make them more invested in furthering their communi-

and_science/science_of_longevity/2013/09/life_expectancy_history_public_health_and_medical_advances_that_lead_to.html (public health advances).

24. *Life Expectancy at Birth, at Age Sixty-five, and at Age Seventy-five, by Sex, Race, and Hispanic Origin: United States, Selected Years 1900-2010*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2011), available at <http://www.cdc.gov/nchs/data/hus/2011/022.pdf>.

25. *Id.* In 1950, individuals reaching the age of sixty-five had a continued life expectancy of 13.9 years; by 2010, this number was 19.1 (a 37 percent increase). *Id.* Similarly, in 1980, a seventy-five-year-old individual could expect to live 10.4 more years; by 2010 they could expect 12.1 additional years (a 16 percent increase). *Id.*

26. U.S. Census Bureau, *Voting and Registration in the Election of November 2012 - Detailed Tables*, U.S. DEP'T OF COMMERCE, <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html> (last visited Oct. 20, 2014).

27. U.S. CENSUS BUREAU, *Table 399. Voting-Age Population—Reported Registration and Voting by Selected Characteristics: 1996 to 2010*, in STATISTICAL ABSTRACT OF THE U.S.: 2012 246 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0399.pdf>. The lowest reported numbers, 72.5% registered and 58.9% voted, both arose from the 2010 mid-term elections. *Id.* In 2012, per the author's calculations based on Census figures, 76.9% reported registering and 69.5% reported voting. *Id.* See also U.S. Census Bureau, *supra* note 26.

28. Brandon, *supra* note 8.

29. *Id.*

ty through electoral means.³⁰ Finally, the retired and elderly often have the advantage of time during the day on their side not afforded to other age groups that allows them to both keep informed and vote on Election Day.³¹ Aside from their motivations, the sheer number of elderly voters positions them to be a formidable voting bloc for years to come.

2. DEMOGRAPHICS

Presently, the population of individuals ages sixty-five and over constitutes over 12.8% of the U.S. populace (a little over 39 million people in 2011), 21% of all eligible voters, and is growing at breakneck speed.³² This “pig in the python” stands to continue its growth over the coming several years with the continued aging of the baby boom.³³

Notably, individuals over eighty years of age are projected to be the fastest growing segment of the U.S. population over the next forty years.³⁴ By 2050, the elderly population in America is expected to balloon to 107 million, and by 2060, 29% of eligible voters are projected to be 65 and over.³⁵ There is no question the size of the elderly demographic will keep those issues that affect them in the spotlight for some time to come.

Individuals of minority backgrounds make up a significant portion of this burgeoning elderly voting bloc.³⁶ By 2050, the U.S. Census Bureau projects the percent of non-white and/or individuals claiming Hispanic origin will make up over forty percent of all people in the United States over sixty years old.³⁷ Per 2010 projections, they pres-

30. *Id.*

31. *Id.*

32. *Demographics*, *supra* note 6; U.S. Census Bureau, *supra* note 6. RUY TEIXEIRA ET AL., CTR. FOR AM. PROGRESS ET AL., STATES OF CHANGE: THE DEMOGRAPHIC EVOLUTION OF THE AMERICAN ELECTORATE, 1979-2060 12 (2015).

33. *Demographics*, *supra* note 6; Paul Krugman, *Reckonings; The Pig in the Python*, N.Y. TIMES, June 21, 2000, available at <http://www.nytimes.com/2000/06/21/opinion/reckonings-the-pig-in-the-python.html>.

34. *Demographic Transition Facts*, INST. FOR THE AGES, <http://www.institutefortheages.org/facts-on-aging/> (last visited Oct. 20, 2014).

35. POPULATION DIV., DEP'T OF ECON. AND SOCIAL AFFAIRS, U.N., WORLD POPULATION AGEING 1950-2050 11-13 (2001), available at <http://www.un.org/esa/population/publications/worldageing19502050/pdf/80chapterii.pdf>. TEIXEIRA ET AL., *supra* note 32.

36. ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVS., POPULATION PROJECTION BY RACE AND HISPANIC ORIGIN FOR PERSONS 85 AND OLDER: 2000 TO 2050, Table 3 (2008), available at http://www.aoa.gov/Aging_Statistics/future_growth/future_growth.aspx.

37. *Id.* Per the author's calculation using the Census Bureau's projections found in the table (47,676,817—the sum of persons projected to be other than a

ently make up over twenty percent of this group.³⁸ As a subset of the population as a whole, such individuals presently account for over three percent of all people, of all ages, in the United States.³⁹ By 2050, they will constitute over ten percent.⁴⁰

As such, elderly individuals stand to have a major impact on any U.S. election in the near future. However, the state legislative trend of implementing stringent voter identification laws have significant effects, for better or for worse, on the elder electorate and their voting activities. This seemingly flies in the face of national interests, as dictated by goals advocated by Congress in several pertinent pieces of federal electoral legislation.

B. Relevant Federal Voter Legislation

Over the past half-century, Congress has enacted four major pieces of voting legislation that relate to the elder electorate and stand for the proposition of increased access to the polls: the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002.

1. VOTING RIGHTS ACT OF 1965 (VRA)

In 1965, during the height of the Civil Rights Movement, Congress passed the Voting Rights Act of 1965.⁴¹ The Act served to

non-Hispanic white person sixty and over in 2050—divided by 112,037,396—the total number of persons projected to be sixty and over in 2050). *Id.* TEIXEIRA ET AL., *supra* note 32, at 13 (projecting that by 2060 45% of all seniors will be members of a minority group).

38. ADMIN. ON AGING, *supra* note 36. Per the author's calculation using the Census Bureau's projections found in the table (11,973,860—the sum of persons projected to be other than a non-Hispanic white person sixty and over in 2010—divided by 56,986,401—the total number of persons projected to be sixty and over in 2010). *Id.*

39. *Id.* Per the author's calculation using the Census Bureau's projections found in the table (11,973,860—the sum of persons projected to be other than a non-Hispanic white person sixty and over in 2010—divided by 310,232,863—the projected U.S. population in 2010). *Id.*

40. *Id.* Per the author's calculation using the Census Bureau's projections found in the table (47,676,817—the sum of persons projected not to be a non-Hispanic white person sixty and over in 2050—divided by 439,010,253—the projected U.S. population in 2050). *Id.*

41. Pub. L. No. 89-110, 79 Stat. 437; codified at 42 U.S.C. §§ 1973–1973bb-1 (2012).

strengthen enforcement of the Fifteenth Amendment and work towards eliminating discrimination at the polls.⁴²

Major components of VRA include Section 2 and Section 5 of the Act.⁴³ Section 2 prohibits discrimination in the voting process on the basis of race, color or membership in several minority language groups identified in Section 4(f)(2) of the Act.⁴⁴ This Section has been used numerous times for enforcement litigation by the federal government.⁴⁵

Section 5 of the Act subjected certain states or portions of states with a history of discriminatory voting practices to review by either the Attorney General or United States District Court for the District of Columbia.⁴⁶ Review was appropriate whenever one of these covered jurisdictions sought to change their voting laws and/or a legal challenge was brought against their voting laws.⁴⁷

In relation to voter identification legislation, Section 5 initially placed a significant hurdle in the way of many state governments working to enact such laws. However, that situation may drastically change since the Supreme Court's 2013 ruling regarding Section 4 of the Act,⁴⁸ later discussed in further depth.⁴⁹

2. VOTING ACCESSIBILITY FOR THE ELDERLY AND HANDICAPPED ACT (VAEHA)

In 1984, Congress passed the Voting Accessibility for the Elderly and Handicapped Act.⁵⁰ Aside from requiring physically accessible polling places for federal elections, the law also requires states to make voter registration and voting aids accessible to elderly voters.⁵¹ In passing this Act, Congress explicitly stated an intent "to promote the fundamental right to vote by improving access for handicapped

42. *The Voting Rights Act of 1965*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Oct. 20, 2014).

43. *Id.*

44. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last visited Oct. 20, 2014).

45. *Id.*

46. *Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Oct. 20, 2014).

47. *Id.*

48. See *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013).

49. See *infra* Section II.E.ii.

50. Pub. L. No. 98-435, 98 Stat. 1678, codified at 42 U.S.C. §§ 1973ee-1973ee-6 (2012).

51. *A Guide to Disability Rights Laws*, U.S. DEP'T OF JUSTICE (July 2009), <http://www.ada.gov/cguide.htm#anchor64292>.

and elderly individuals to registration facilities and polling places for Federal elections.⁵² This demonstrated a clear national interest in improving of voting circumstances for elderly populations.

3. NATIONAL VOTER REGISTRATION ACT OF 1993 (NVRA)

Signed into law by President Clinton in 1993, the National Voter Registration Act of 1993⁵³ reinforced the American commitment to making voting open and accessible to all voting-age citizens.⁵⁴ Within the Act, Congress articulates its purpose as, “. . . establish[ing] procedures that will increase the number of eligible citizens who register to vote . . . ,” and making it possible to “enhance the participation of eligible citizens as voters”⁵⁵ Unlike the VRA, the NVRA “was aimed at achieving a broad-based increase in registration among all voters, not just racial and language minorities.”⁵⁶

Three major components of the Act serve to further these purposes.⁵⁷ Section 20504 requires that states make voter registration possible while obtaining or renewing a driver’s license.⁵⁸ Section 20505 enables voter registration by mail.⁵⁹ And section 20507 requires that state public assistance offices and state-funded programs geared toward individuals with disabilities provide opportunities for voter registration.⁶⁰

4. HELP AMERICA VOTE ACT OF 2002 (HAVA)

In 2002, in response to voting issues noted during the 2000 election,⁶¹ the U.S. Congress and President Bush enacted the Help America Vote Act of 2002.⁶² The chief goal of the legislation was to “promote access [to polls] while ensuring election integrity.”⁶³

52. Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (2012).

53. Pub. L. No. 103-31, 107 Stat. 77, codified at 42 U.S.C. § 1973gg (2012).

54. *About the National Voter Registration Act*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/vot/nvra/activ_nvra.php (last visited Oct. 20, 2014).

55. Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee (2012).

56. Tokaji, *supra* note 18, at 467.

57. *About the National Voter Registration Act*, *supra* note 53.

58. National Voter Registration Act of 1993, 52 U.S.C. § 20504 (2012).

59. *Id.* at § 20505.

60. *Id.* at § 20506.

61. Tokaji, *supra* note 18, at 470.

62. Pub. L. No. 107-252, 116 Stat. 1666, codified at 42 U.S.C. §§ 15301–15545 (2012).

63. Tokaji, *supra* note 18, at 470.

HAVA, among other things, required that states begin to implement voter identification procedures for first time voter registration, under certain circumstances.⁶⁴ Voter identification requirements that could satisfy HAVA included various means of valid photo and non-photo identification, such as a utility bill or government document that includes the voter's name and address.⁶⁵

In regard to elderly voters in particular, HAVA required a study be undertaken to investigate "the establishment of a free absentee ballot postage program."⁶⁶ Following the study, Congress required the submission of findings, including recommendations on how such a program could target the elderly and "identify[ing] methods to increase the number of such individuals who vote in elections."⁶⁷

C. The Evolution and Growth of State Voter Identification Legislation

The explosion of voter identification laws over the past decade has largely risen from the premise of preventing voter fraud.⁶⁸ Proponents of these laws argue that incidences of voter fraud plague the integrity of every citizen's right to vote and can be simply resolved by requiring the presentation of proper identification when voting.⁶⁹ Buttresses to this position include the ease of presenting identification and the widespread possession of photo identification by the American public.⁷⁰ However, these arguments are short on proof,⁷¹ and such laws disproportionately affect groups like the elderly, racial and eth-

64. *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/about_the_eac/help_america_vote_act.aspx (last visited Oct. 20, 2014). "HAVA requires that first-time voters present an acceptable form of identification, as discussed in the law's text, if the voter registered to vote by mail and this process did not require the submission of an acceptable form of identification." *Id.*

65. *Help America Vote Act of 2002*, 42 U.S.C. § 15481 (2012).

66. *Id.* at § 15386.

67. *Id.*

68. *How Does Requiring A Voter ID Prevent Election Fraud*, THE HERITAGE FOUNDATION, <https://www.askheritage.org/how-does-requiring-a-voter-id-prevent-election-fraud/> (last visited Oct. 20, 2014).

69. *Id.*

70. *Id.*

71. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

nic minorities and the impoverished.⁷² Despite the fact that the voter fraud premise is suspect, it is important to discuss, as it is the major rationale used to push for these measures.

1. VOTER IDENTIFICATION LAWS IN GENERAL

While there are important distinctions between the kinds of voter identification laws states have sought to implement, the most important distinctions are between strict/non-strict and photo/non-photo distinctions.⁷³ Common reference to the rise of “voter ID laws” or “voter identification laws” often connotes specifically to strict photo voter identification laws; however, this is not always the case.

Strict laws require that the requisite form of identification be provided in order for a vote to be counted as valid.⁷⁴ Generally, voters subject to strict voter identification laws who lack the requisite identification when they vote are provided with provisional ballots.⁷⁵ Such provisional ballots are kept separate from other ballots and will not be officially counted unless the proper identification is presented to election officials within a short period of time following the election.⁷⁶ As of 2014, eleven states had strict voter identification laws in effect.⁷⁷

Non-strict laws, in contrast, typically request that individuals provide photo identification but allow for the use of alternate processes to verify the voter’s identity.⁷⁸ As of 2014, twenty state laws in force were “non-strict.”⁷⁹

The other major distinction is whether there is a photo requirement tied to the need to present identification or if alternative documents will suffice.⁸⁰ As of 2014, fifteen states request photo identification while sixteen did not.⁸¹

72. BRENNANT CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3* (2006) [hereinafter *CITIZENS WITHOUT PROOF*].

73. This is the delineation used by the National Conference of State Legislatures; non-strict is a term created by the author of this Note. Wendy Underhill, *The Canvass*, NAT’L CONFERENCE OF STATE LEGS. (Mar. 11, 2014), <http://www.ncsl.org/research/elections-and-campaigns/the-canvass-march-2014.aspx>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Suevon Lee, *Everything You’ve Ever Wanted to Know About Voter ID Laws*, PROPUBLICA (Nov. 5, 2012, 5:30 PM), <http://www.propublica.org/article/everything-youve-ever-wanted-to-know-about-voter-id-laws>.

79. Underhill, *supra* note 73.

80. *Id.*

81. *Id.*

2. STATE LEGISLATIVE ACTION

The present specter of state voter identification laws sprang up in the wake of the contentious 2000 U.S. Presidential election.⁸² From 2002 - 2006, following the passage of HAVA,⁸³ twelve states adopted stricter voting standards, requiring the presentation of either some kind of identifying document or photo identification to vote.⁸⁴ In 2005, Indiana⁸⁵ and Georgia⁸⁶ became the first two states to enact, either through new legislation or the amendment of existing law, strict photo voter identification laws. State voter identification legislation experienced minimal growth in the period from 2006 - 2009 with just one state, Missouri,⁸⁷ attempting to enact a strict photo identification law.⁸⁸

The voter identification movement saw a rapid uptick in activity starting in the 2010s, particularly in the creation of new laws, or addendums to existing laws to put photo requirements in place.⁸⁹ Between 2011 and 2013, sixteen states passed new laws or amended their existing voting laws to put stricter standards in place.⁹⁰

As of the end of 2014, a majority of states, thirty-one total,⁹¹ have some kind of voter identification law in effect, while thirty-four such

82. Shelley de Alth, Short Essay, *ID At The Polls: Assessing The Impact Of Recent State Voter ID Laws On Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 185 (2009).

83. Pub. L. No. 107-252, 116 Stat. 1666, codified at 42 U.S.C. §§ 15301-15545 (2012).

84. See de Alth, *supra* note 82.

85. *Photo ID Law*, IND. SEC'Y OF STATE, <http://www.in.gov/sos/elections/2401.htm> (last visited Oct. 20, 2014).

86. Darryl Fears, *Voter ID Law is Overturned*, WASH. POST, Oct. 28, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/27/AR2005102702171.html>.

87. The Associated Press, *Missouri: Court Bars Voter ID*, N.Y. TIMES, Oct. 17, 2006, available at <http://www.nytimes.com/2006/10/17/washington/17brfs-004.html>. The Missouri Supreme Court subsequently struck down the law prior to the 2006 election in a 6-1 unsigned opinion. *Id.*

88. Underhill, *supra* note 73.

89. *Id.* The states that enacted strict voter identification regimes in 2011 included Kansas and Wisconsin. *Id.* The states that adopted stricter standards on top of their existing voter identification laws included South Carolina, Tennessee, Texas, and Alabama. *Id.*

90. In 2011, new laws were passed in Kansas, Mississippi, Rhode Island, and Wisconsin; laws were strengthened in Alabama, South Carolina, Tennessee and Texas. Voter ID: 2012 and 2011 Legislation, NAT'L CONFERENCE OF STATE LEGS. (Jan. 10, 2013), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-2012-legislation.aspx>. In 2012, new laws were passed in Minnesota, New Hampshire, and Pennsylvania; the law was strengthened in Virginia. *Id.* In 2013, a new law was passed in North Carolina; laws were strengthened in Virginia, Oklahoma, North Dakota, and Arkansas. Voter ID: 2013 Legislation, NAT'L CONFERENCE OF STATE LEGS. (Aug. 22, 2013), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-2013-legislation.aspx>.

91. See Underhill, *supra* note 73.

laws have been passed.⁹² Of those in effect, eight are strict photo identification,⁹³ three are strict non-photo identification,⁹⁴ eight are non-strict photo identification,⁹⁵ and twelve are non-strict, non-photo identification.⁹⁶

D. 2012 and 2014 Elections and Looking at Impact

Notably, photo voter identification laws did not have a discernable impact on the 2012 election, which was the first national election since the voter identification rash began to spread across the country.⁹⁷

While over thirty states had passed some form of voter identification law prior to November 2012, several laws were not yet in full force on Election Day.⁹⁸ This included populous states like Pennsylvania and Texas.⁹⁹ However, given the circumstances of 2012, this does not detract from the negative impact voter identification laws could have on elders in future elections.¹⁰⁰ Nor does it necessarily justify a state's ability to make voting more difficult in the first place.¹⁰¹

Another major development has been the Supreme Court's ruling in *Shelby Cnty. v. Holder*, which has and stands to have major implications for the passage of further voter identification laws.¹⁰² While more laws were in effect for the 2014 elections, the historically low turnout¹⁰³ and regular dip in turnout for American midterm elections¹⁰⁴ does not make it an ideal case study.

92. HERE & NOW WITH ROBIN YOUNG AND JEREMY HOBSON, *Election Day Spotlights Tex. Voter ID Law, Va. Voter Purge*, WBUR (Nov. 5, 2013), <http://hereandnow.wbur.org/2013/11/05/elections-texas-virginia>.

93. Arkansas, Georgia, Indiana, Kansas, Mississippi, Tennessee, Texas, and Virginia. See Underhill, *supra* note 72.

94. Arizona, North Dakota, and Ohio. See Underhill, *supra* note 73.

95. Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, and South Dakota. See Underhill, *supra* note 73.

96. Alaska, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Utah, and Washington. See Underhill, *supra* note 73.

97. Suevon Lee, *What Effect, If Any, Did Voter ID Laws Have on the Election?*, PROPUBLICA (Nov. 15, 2012, 1:34 PM), <http://www.propublica.org/article/what-effect-if-any-did-voter-id-laws-have-on-the-election>.

98. *Id.*; Voter ID: 2012 and 2011 Legislation, *supra* note 90.

99. Lee, *supra* note 97.

100. *Id.*

101. Carl Bialik, *Impact of States' Voter Laws Can Be Difficult to Identify*, WALL ST. J., Oct. 19, 2012, <http://online.wsj.com/news/articles/SB10000872396390444868204578064890976575334>.

102. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

103. Editorial, *The Worst Voter Turnout in 72 Years*, N.Y. TIMES, Nov. 12, 2014, at A26.

E. Supreme Court Response

Two recent Supreme Court decisions have and will continue to have a major impact on the formation of state voter identification legislation: 2008's *Crawford v. Marion County Election Board*¹⁰⁵ and 2013's *Shelby County v. Holder*.¹⁰⁶

1. CRAWFORD V. MARION COUNTY ELECTION BOARD (2008)

Marion County arose from a challenge to Indiana's voter identification law enacted in 2005.¹⁰⁷ Specifically, the petitioners, local and state Democratic Party organizations, asserted that the Indiana law, which required presentation of government-issued photo identification in order to vote, was unconstitutional under the Fourteenth Amendment.¹⁰⁸

A 6-3 Court, with a majority opinion by Justice Stevens, held that Indiana's voter identification law was constitutional.¹⁰⁹ In his opinion, Justice Stevens noted that various valid interests including the modernization of elections, the prevention of voter fraud, and guarding voter confidence could sufficiently justify the state's law.¹¹⁰ In affirming the Seventh Circuit, the Court did not find that Indiana's law implicated the strict review required of a potential poll tax.¹¹¹ Furthermore, "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."¹¹²

Marion County effectively cleared the law for states to continue to pass voter identification laws, especially those of the strict variety that

104. Drew Desilver, *Voter Turnout Always Drops Off for Midterm Elections, But Why?*, PEW RESEARCH CTR. (July 24, 2014), <http://www.pewresearch.org/fact-tank/2014/07/24/voter-turnout-always-frop-off-for-midterm-elections-but-why/>; see e.g., Kennedy Elliott and Scott Clement, *Measuring the Midterm Turnout Gap*, WASH. POST (Oct. 24, 2014), <http://www.washingtonpost.com/wp-srv/special/politics/2014-midterms/turnout/> (noting "[v]oter turnout is notoriously low in midterm elections compared with presidential election years").

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

106. See *Shelby Cnty.*, 133 S. Ct. at 2612.

107. See *Marion Cnty. Election Bd.*, 553 U.S. at 186.

108. *Id.* at 187.

109. *Id.* at 204.

110. *Id.* at 191.

111. *Id.* at 188.

112. *Id.* at 198.

require the possession of government-issued photo identification in order for one's vote to be considered valid.

For what it is worth, the judges that wrote the majority opinion at both the appellate level, Richard Posner on the Seventh Circuit Court of Appeals, and court of final review, Justice Stevens, have since indicated regrets about their rulings.¹¹³ Stevens, in particular, has noted that he believes Justice Souter's dissent in *Marion County* was correct.¹¹⁴

2. *SHELBY COUNTY, ALA. V. HOLDER (2013)*

Shelby County came about after an Alabama county challenged the constitutionality of the Voting Rights Act's preclearance requirement.¹¹⁵ Section 4 of the Voting Rights Act set out a preclearance formula, established in 1965, and continually reauthorized and based on data from elections in the 1960s and 1970s, that covered jurisdictions with histories of prerequisites to voting and low records of voter turnout.¹¹⁶ Under Section 5 of the Act, states covered by the Section 4 formula were required to seek approval from federal authorities, either the Attorney General or a three judge panel, whenever they sought to change state laws involving voting matters.¹¹⁷ Under the Act, states or jurisdictions could ask to be bailed out of the preclearance requirement after ten years of preclearance if they were able to show that they had taken sufficient remedial action.¹¹⁸ Similarly, jurisdictions with histories of discriminatory activity could be bailed in to the preclearance requirement.¹¹⁹

Under the Voting Rights Act, in 2013, nine states and portions of six others were covered by Section 4 of the Act and effectively subject to preclearance review for all changes to their voting laws, including voter identification legislation.¹²⁰

113. Hans A. von Spakovsky, *Right the First Time*, NAT'L REV. (Oct. 18, 2013, 5:00 PM), <http://www.nationalreview.com/article/361645/right-first-time-hans-von-spakovsky>.

114. Jess Bravin, *Voter-ID Laws Worry Jurist*, WALL ST. J., Oct. 17, 2013, http://online.wsj.com/article_email/SB10001424052702304384104579141701228734132-lMyQjAxMTAzMDEwNzExNDcyWj.html.

115. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013).

116. *Id.* at 2619–20.

117. *Id.* at 2620.

118. Justin Levitt, *Who Draws the Lines?*, LOYOLA LAW SCHOOL L.A., <http://redistricting.lls.edu/who-preclean.php> (last visited Oct. 20, 2014).

119. *Id.*

120. *Id.* The nine covered states included Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. *Id.* States with some,

The Supreme Court, however, in a 5-4 ruling found portions of the Voting Rights Act to be unconstitutional, specifically removing the applicability of Section 4's pre-clearance formula to any jurisdiction due to it being an outdated measure.¹²¹

The Supreme Court's holding in *Shelby County* prompted several of the states previously subject to pre-clearance to move ahead with their plans for voter identification legislation (laws that prior to the ruling would have been subject to pre-clearance).¹²² For example, within hours of the Court's opinion, Texas' Attorney General announced the state's then-pending strict voter identification law would "go into immediate effect."¹²³ Similarly, on the same day as the decision in Mississippi, Secretary of State Delbert Hosemann released a press release stating, "Mississippi citizens have earned the right to determine our voting processes. . . [t]he process for implementation of Constitutional Voter Identification begins today."¹²⁴ Additionally, in the wake of *Shelby County*, one state previously subject to pre-clearance, North Carolina, enacted a new voter identification regime.¹²⁵

In general, 2013 was a rather active year for both the introduction and passage of new voter identification legislation.¹²⁶ In total, aside from the thirty-four states with voter identification laws on the books at the end of 2013, at least eleven new states fielded the notion of implementing voter identification laws.¹²⁷ While several of these

but not all, counties covered by the Act included California, Florida, Michigan, New York, North Carolina, and South Dakota. *Id.*

121. See *Shelby Cnty.*, 133 S. Ct. at 2630 ("There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago."). *Id.*

122. Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, PBS (June 26, 2013, 2:58 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/>.

123. Zachary Roth, *That was Quick: Texas Moves Ahead with Discriminatory Voting Laws*, MSNBC (June 25, 2013, 4:15 PM), <http://www.msnbc.com/msnbc/was-quick-texas-moves-ahead-discr>.

124. Delbert Hosemann, *Statement on Supreme Court Voting Rights Act Opinion*, MISS. SEC'Y OF STATE (June 25, 2013), <http://www.sos.ms.gov/About/Pages/Press-Release.aspx?pr=422>. "It will be conducted in accordance with the Constitutional Amendment adopted by the electorate, funded by the Legislature, and regulations as proposed by the Secretary of State." *Id.*

125. Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST (Aug. 12, 2013, 2:35 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/>.

126. *Voting Laws Roundup 2013*, BRENNAN CTR. FOR JUSTICE (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>.

127. *Voter ID: 2013 Legislation*, *supra* note 90.

bills ultimately failed to secure passage in their respective state legislature some carried over into the 2014 legislative session.¹²⁸

Whether such laws are presently in effect, will soon be in effect, or remain in the incubation stage in some state legislators' minds, there is no denying the effects of voter identification legislation stands to create major issues for the elder electorate.

III. Analysis of the Problems Posed By Voter Identification Laws and Potential Alternatives

Voter identification legislation poses several problems to elderly voters that largely serve to make the voting process less attainable than it ideally should be. Furthermore, many of the major pieces of federal legislation that advocate for electoral accessibility fall short of achieving their goals.

On a more positive note, there are many viable alternatives, many of which are already in place that reach effectively the same result as voter identification laws without placing the same kind of burden on the elder electorate. And for states already with voter identification laws in place, there are several means to alleviate the dismal effects they can have on the elderly demographic.

A. Shortcomings of Federal Legislation

Several major pieces of federal legislation mentioned in Part II.B have worked to make the voting booth more accessible to elderly voters, but they are not without their shortfalls. Importantly, due to federalism, some of these federal actions only apply to federal elections, and state law is largely left to govern the voting requirements for individuals in a given state.

1. VRA

In most respects, the VRA and its amendments have had marked success in encouraging minority voters, particularly minorities in the South and language minorities, to both register and participate in elections.¹²⁹ However, these successes have their limits. For example, while language assistance components of the VRA have encouraged greater electoral participation by Latino, Asian-American and Native

128. *Id.*

129. Tokaji, *supra* note 18, at 466.

American citizens, such provisions are often insufficient.¹³⁰ Furthermore, there is still a large registration gap between these groups and their white cohorts.¹³¹ Finally, the Act is primarily concerned with voting and race, and not the elderly population in general.

2. VAEHA

Despite the strong message of this legislation, this Act has some very clear limits grounded in federalism. Notably, the requirement that polling places be accessible only applies to federal elections, and determining what constitutes “accessible” is left to each respective state’s discretion.¹³²

3. NVRA

The efficacy of NVRA is debatable.¹³³ While the number of voters that have registered to vote, including those belonging to groups less likely to vote, has increased since NVRA,¹³⁴ turnout has been variable, though this result likely does not rest solely on NVRA’s shoulders.¹³⁵

4. HAVA

HAVA contains a significant imperfection: The agency created to implement the Act, the U.S. Election Assistance Commission (“EAC”), lacks significant regulatory authority and is instead relegated to issuing voluntary guidance.¹³⁶ Additionally, certain provisions within the Act place substantial hurdles in the way of enacting regulations.¹³⁷

130. *Id.*

131. *Id.* (“In 2002, for example, only 53% of Latino voting-age citizens and 31% of Asian voting-age citizens were registered, compared to 69% of white voting-age citizens.”).

132. Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 828 (2005).

133. Tokaji, *supra* note 18, at 469.

134. *Id.* at 469–70; MARIE LEARY & ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., THE HELP AMERICA VOTE ACT 2-3 (2012) (citing HAVA, “HAVA does not give the EAC authority to ‘issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government.’”).

135. Tokaji, *supra* note 18, at 469 (stating that several variables likely play into voter turnout and that NVRA may have actually mitigated some declines).

136. *Id.* at 474.

137. *Id.* (noting that the equal bipartisan structure of the Act makes it difficult for the EAC to act).

5. OTHER MAJOR FEDERAL LAWS

Moreover, other major federal laws not discussed in Part II.B but often implicated as a means of ensuring accessible voting for elderly individuals, such as the Rehabilitation Act of 1973¹³⁸ and the Americans with Disabilities Act of 1990¹³⁹ are inherently limited if the individual voter is elderly but does not have a cognizable disability.¹⁴⁰

B. Issues Posed to Elderly Voters Enhanced By Voter Identification Laws

Voter identification laws primarily affect elderly individuals because they either lack the proper identification needed to cast a ballot; live with mobility, disability or accessibility challenges; face significant socioeconomic constraints; and/or fall within the cross section of other groups disproportionately affected by such laws.

1. LACK OF PROPER IDENTIFICATION

A significant fraction of the elderly population in the United States lacks the kind of identification often required under voter identification regimes and/or the means necessary to obtain needed documentation.¹⁴¹ For example, drivers licenses are generally considered one of the most common forms of government-issued photo identification.¹⁴² While a large segment of the population is licensed,¹⁴³ many elderly individuals no longer possess valid identification for a couple of reasons. One, some elderly individuals simply stop driving due to concerns that may be health, safety, or family related,¹⁴⁴ and after a

138. Pub. L. No. 93-112, 87 Stat. 355, codified at 29 U.S.C. § 701 (2012).

139. Pub. L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. § 12101 (2012).

140. Waterstone, *supra* note 132, at 829 (Rehabilitation Act of 1973); Brian K. LaFratta & Jamie Lake, *Inside the Voting Booth: Ensuring the Intent of the Elderly Voter*, 9 ELDER L.J. 141, 156 (2001) (Americans with Disabilities Act).

141. Keesha Gaskins & Sundeep Iyer, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION (2012), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf; CITIZENS WITHOUT PROOF, *supra* note 72, at 3.

142. Corey Dade, *Why New Photo ID Laws Mean Some Won't Vote*, NPR (Jan. 28, 2012 6:24 AM ET), <http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote>.

143. OFFICE OF HIGHWAY POLICY INFO., U.S. DEP'T OF TRANSP., OUR NATION'S HIGHWAYS: 2011 28 (2011), available at <http://www.fhwa.dot.gov/policy/information/pubs/hf/pl11028/onh2011.pdf> (stating that in 2009 there were 210 million licensed drivers).

144. Diane Persson, *The Elderly Driver: Deciding When to Stop*, 33 GERONTOLOGIST 88, 89 (1993).

certain period of time, their licenses lapse.¹⁴⁵ Two, many states impose more restrictive renewal requirements on elderly drivers that can make retaining a valid license more difficult than for other age groups.¹⁴⁶

Some elders face rather unique burdens to the franchise in voter identification states simply because of practices at the time they were born. Place of birth, for example, has rapidly changed in just the past seventy years. In 1940, half of all births in the United States occurred at home,¹⁴⁷ often meaning no official birth certificate was produced at the time of birth.¹⁴⁸ Furthermore, many elder Americans possess birth certificates that do not correspond to their current name, often due to name changes—such as married individuals that have chosen to take on their spouse's surname—or recording errors.¹⁴⁹ While new and corrected birth certificates can be obtained at a later time, doing either costs money.

2. MOBILITY/DISABILITY

Many elderly voters face disease, live with disabilities, or are otherwise limited in their mobility. Such physical hindrances can impede even the most ardent elderly voters from accessing state voter identification facilities or the resources need to obtain such identification.

Of individuals ages sixty-five or over, at least thirty-six percent¹⁵⁰ live with some form of disability, and the number of people living with disabilities in this age group is expected to increase dramatical-

145. See, e.g., *No ID, No Vote: What's Happening in Texas*, BRENNAN CTR. FOR JUSTICE (Oct. 30, 2014), <http://www.brennancenter.org/blog/no-id-no-vote-whats-happening-texas> ("Her mother is elderly-she will be 95 soon . . . Her driver's license had expired because she can no longer drive.").

146. *Older Drivers: State Laws*, HIGHWAY LOSS DATA INST. (Feb. 2015), <http://www.iihs.org/iihs/topics/laws/olderdrivers>.

147. Neal Devitt, *The Transition from Home to Hospital Birth in the United States, 1930-1960* 4(2) BIRTH & FAM. J. 47-58 (1977), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1523-536X.1977.tb01207.x/pdf>.

148. See, e.g. John Ostapovich, *Voter ID Bill Would Disenfranchise Elderly*, *Advocate Says*, KYW-TV (July 18, 2011, 4:50 AM), <http://philadelphia.cbslocal.com/2011/07/18/voter-id-bill-would-disenfranchise-elderly-advocate-says/>; Jon Sherman, *Out in the Cold at Age 84: Wisconsin's Ruthelle Frank Fights for Her Right to Vote*, ACLU (Dec. 13, 2011, 11:39 AM), <https://www.aclu.org/blog/voting-rights/out-cold-age-84-wisconsin-ruthelle-frank-fights-her-right-vote>.

149. *Id.*

150. Emily Nohr & Alissa Skelton, *Disabled and Elderly Voters Face a New Voter ID Hurdle at Polls*, NBC NEWS (Aug. 20, 2012, 4:57 AM), http://investigations.nbcnews.com/_news/2012/08/20/13374311-disabled-and-elderly-voters-face-a-new-voter-id-hurdle-at-polls.

ly.¹⁵¹ Many elderly individuals use mobility devices to get around,¹⁵² with significant gaps in use between the white, non-Hispanic elderly and the non-white or Hispanic elderly populations.¹⁵³ Additionally, many elderly are unable to perform certain physical functions, such as walking two to three blocks, which place severe limits on their ability to get around unaided.¹⁵⁴

Mobility and disability issues also tie in to issues of whether voter identification is accessible.

3. ACCESSIBILITY CHALLENGES TO OBTAINING IDENTIFICATION

The location and transportation options (or lack thereof) available to many of the nation's elderly population combined with the requirements of many voter identification laws places a significant burden on these individuals ability to vote. Many states with voter identification laws generally require that citizens possess specific kinds of state-issued photo identification.

In many rural areas within the United States, certain amenities, especially governmental offices, can be few and far between.¹⁵⁵ Americans age sixty-five and over constitute 17.2% of the population living outside metropolitan or micropolitan areas in the United States, a figure disproportionate to their overall share of the national population.¹⁵⁶ Given this rural placement, many likely live in locations quite removed from the nearest state facility capable of providing appropriate identification. Per overall estimates by the Brennan Center of ten states with restrictive voter identification laws in place with photo requirements, at least 17.5% of voting age citizens (10.3 million) in these

151. ADMIN. ON AGING, AGING INTO THE 21ST CENTURY, DEP'T OF HEALTH AND HUMAN SERVS. (1996), available at http://www.aoa.gov/Aging_Statistics/future_growth/aging21/health.aspx#Disability ("However, all sets of data suggest that the number of persons who will be disabled will increase sharply.").

152. H. Stephen Kaye, Taewoon Kang, & Mitchell P. LaPlante, *Mobility Device Use in the United States*, DISABILITY STATISTICS CTR. (June 2000), available at http://dsc.ucsf.edu/publication.php?pub_id=2.

153. Jennifer C. Cornman & Vicki A. Freedman, *Racial and Ethnic Disparities in Mobility Device Use in Late Life*, 63 J. GERONTOLOGY S34, S39 (2008).

154. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS. THE STATE OF AGING & HEALTH IN AMERICA 2013, 36 (2013), available at http://www.cdc.gov/features/agingandhealth/state_of_aging_and_health_in_america_2013.pdf.

155. GASKINS & IYER, *supra* note 141, at 7–10.

156. CARRIE A. WERNER, U.S. CENSUS BUREAU, THE OLDER POPULATION: 2010 (Nov. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br09.pdf>.

states live more than ten miles from the nearest state identification-issuing office.¹⁵⁷

Also of note, elderly individuals with minority backgrounds living in rural locations are more likely to be impoverished than other groups in their geographic setting and thus, particularly disadvantaged by voter identification requirements. In 2009, the household poverty rates for rural elderly African-Americans (23%), Native Americans (23%) and Hispanics (17%) all well exceeded the overall 9% poverty rate for the “nonmetro elderly.”¹⁵⁸ As such, not just physical distance but also socioeconomic limits on travel may hinder elderly, minority voters ability to obtain the requisite identification.

However, even individuals in urban and suburban areas can experience difficulties. Many eligible voters in states with voter identification laws lack access to a vehicle or experience the effects of limited government funding for public transportation.¹⁵⁹ Countless elderly individuals, particularly the many who no longer drive, live in areas without the adequate, affordable transportation options necessary to carry out daily activities.¹⁶⁰ Additionally, many individuals with minority backgrounds live in areas not adequately prepared to meet the voter identification needs due to a lack of sufficient identification-issuing facilities.¹⁶¹

4. HIDDEN COSTS/COMPLEXITIES OF FREE VOTER IDENTIFICATION

Many states that have enacted voter identification laws have provided means for individuals without the proper identification needed to vote to obtain free photo identification.¹⁶² Arguably, the Twenty-Fourth Amendment¹⁶³ prevents states from imposing fees on obtaining whatever form of voter identification they devise, as doing

157. GASKINS & IYER, *supra* note 141.

158. THE HOUSING ASSISTANCE COUNCIL, RURAL SENIORS AND THEIR HOMES (2011), available at <http://www.ruralhome.org/storage/documents/elderly.pdf>. In 2009, about 23% of all American homes were located in non-metropolitan areas. *Id.* Of these households, 23%, or six million, were elderly-headed (as such, they constituted over 5% of overall American households). *Id.*

159. GASKINS & IYER, *supra* note 141, at 5–10.

160. KEVIN DEGOOD, TRANSP. FOR AM., AGING IN PLACE, STUCK WITHOUT OPTIONS: FIXING THE MOBILITY CRISIS THREATENING THE BABY BOOM GENERATION (2011), available at <http://t4america.org/docs/SeniorsMobilityCrisis.pdf>.

161. GASKINS & IYER, *supra* note 141, at 10–13.

162. See, e.g., *Georgia Voter Identification Requirements*, GA. SEC'Y OF STATE, <http://sos.georgia.gov/gaphotoid/> (last visited Oct. 20, 2014).

163. U.S. CONST. amend. XXIV, § 1.

so might qualify as a poll tax.¹⁶⁴ However, even the “free” state programs generally require the presentation of various means of alternate identification, many of which can have costs of their own.¹⁶⁵ In Georgia, for example, voters interested in obtaining a state voter identification card must provide (1) a photo identity document or approved non-photo identity document that includes their full legal name, (2) documentation of date of birth, (3) evidence of voter registration, and (4) documentation of the voter’s name and address.¹⁶⁶

For many elderly individuals, the assemblage of all of these required documents would be by no means a small task. Furthermore the costs of acquiring the needed documentation could also serve to deter registration by elderly voters, especially those living below the poverty line. In 2011, using its supplemental measure, the U.S. Census Bureau placed the nation’s elderly poverty rate at 15.1%.¹⁶⁷ Even for elders falling above the poverty mark, many already have to deal with a myriad of costs, including skyrocketing healthcare costs, which serve to put expenses related to post-materialist matters, such as obtaining voter identification, on the back burner.¹⁶⁸

5. MINORITY & SOCIOECONOMIC STATUS CONSIDERATIONS

The cross-section of elderly and minority voters highlights a subset of the population particularly sensitive to the effects of voter

164. Compare Lyle Denniston, *Constitution Check: Is it Unconstitutional to Require Voters to Have a Photo ID?*, NAT’L CONSTITUTION CTR. (Jan. 5, 2012), <http://blog.constitutioncenter.org/2012/01/constitution-check-is-it-unconstitutional-to-require-voters-to-have-a-photo-id/> (opining that the anti-poll tax Twenty-Fourth amendment is likely inapplicable to voter identification laws), with Laura Leslie, *Fee for voter ID might be unconstitutional*, WRAL (Apr. 6, 2013), <http://www.wral.com/fee-for-voter-id-might-be-unconstitutional/12310806/> (providing the conviction of some individuals that requiring individuals to purchase identification in order to vote is a poll tax).

165. See, e.g., *Georgia Voter Identification Requirements*, *supra* note 162; see generally GASKINS & IYER, *supra* note 141 (pointing out, among other things, the costs of obtaining birth certificates and marriage licenses, prerequisites to obtaining a free voter identification in several states with strict voter identification laws).

166. See, e.g., *Georgia Voter Identification Requirements*, *supra* note 162.

167. Dylan Matthews, *The New Poverty Measure is Out, and It’s Grim*, WASH. POST (Nov. 14, 2012, 12:40 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/14/the-new-poverty-measure-is-out-and-its-grim/>. The Census Bureau’s traditional formula for assessing poverty is based on thresholds based on mid-1960s data and has only been updated to account for inflation. *Id.* Arguably, the supplemental standard provides a more accurate picture of actual poverty. *Id.*

168. Alexander Brown, *Health-care Costs Hit the Elderly Hard, Diminish Financial Wellbeing*, EUREKAALERT! (Sept. 4, 2012), http://www.eurekaalert.org/pub_releases/2012-09/ssm-hch090412.php.

identification legislation. Several studies have shown that a disproportionate amount of non-white, voting-age citizens lack the government-issued photo identification required by strict voter identification laws.¹⁶⁹

For example, in Texas, the Justice Department estimated that of the 600,000 to 800,000 registered voters that lacked the requisite form of identification in the state, a substantial portion were minority voters.¹⁷⁰ “Even using the data most favorable to the state, Hispanics disproportionately lack either a driver’s license or a personal identification card issued by [the Department of Public Safety], and that disparity is statistically significant,” the Department noted in its review of the state’s voter identification law.¹⁷¹

However, aside from lacking the necessary identification in the first place, many also lack the financial means to obtain acceptable forms of identification. In particular, many elderly individuals of minority heritage currently face socioeconomic difficulties unlike those of the other voting-eligible groups in American society.¹⁷²

C. Alternatives to Photo Voter Identification

There are a variety of alternatives to photo voter identification laws that would potentially have similar efficacy and less of an impact on the elderly population. There are, unfortunately, no silver bullets, but several promising options nonetheless. Possibilities include statewide voter databases, proper registration administration, unique

169. Citizens Without Proof, *supra* note 72; Eric Holder Says Recent Studies Show Twenty-five Percent of African Americans, Eight Percent of Whites Lack Government-issued Photo IDs, POLITIFACT, <http://www.politifact.com/texas/statements/2012/jul/11/eric-holder/eric-holder-says-recent-studies-show-25-percent-af/> (last visited Oct. 20, 2014).

170. Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, THE ATLANTIC (Mar. 12, 2012, 12:10 PM), <http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/>.

171. *Id.*

172. See ELLEN O'BRIEN, KE BIN WU, & DAVID BAER, AARP PUB. POL'Y INST., OLDER AMERICANS IN POVERTY, (2010), available at <http://assets.aarp.org/rgcenter/ppi/econ-sec/2010-03-poverty.pdf>; Pedro da Costa, *The Plight of Minority Elderly Americans*, REUTERS (Feb. 24, 2012), <http://blogs.reuters.com/macroscope/2012/02/24/the-plight-of-minority-elderly-americans/> (quoting a study by the University of California, Berkeley's Labor Center, “Elder poverty rates are twice as high among Blacks and Latinos compared to the U.S. population as a whole . . .”); *Majority of Elderly Blacks and Hispanics are on the Cusp of Poverty, A New EPI Report Finds*, ECON. POL'Y INST. (June 6, 2013), <http://www.epi.org/press/majority-elderly-blacks-hispanics-cusp-poverty/>.

identifier numbers, affirmations, signature comparison, identification picture database and prosecution.¹⁷³ Many of these alternatives could potentially be combined, as necessary. As alternatives, these ideas are premised on the notion that voter identification laws are unnecessary and should be repealed out of a lack of necessity.

1. THE PREMISE: REPEALING VOTER IDENTIFICATION LAWS OUT OF LACK OF NECESSITY

Many advocates for voter identification laws base their argument on the prevention of voter fraud and restoring the integrity of elections. However, according to one study, between 2000 and 2012, there were ten total cases of voter impersonation across the nation out of 146 million registered voters during this same period.¹⁷⁴ Another found thirty-one total incidences of possible voter fraud that could have potentially been prevented by a voter identification requirement out of one billion ballots cast between 2000 and May 2014.¹⁷⁵ Similarly, 2006 reports put out by the EAC found that while voter fraud does indeed occur, it generally takes place at voter registration or during absentee voting, not when at the physical polling places—the kind of voter fraud the photo identification laws would theoretically be able to prevent.¹⁷⁶ The EAC also found that the impact of voter identification laws tend to fall disproportionately on minority groups.¹⁷⁷ Arguably, the number of people most at risk for not being able to satisfy voter identification requirements, such as the elderly, vastly outweighs the instances of harm such laws seek to prevent.

Proponents of voter identification laws, however, are often non-plussed by such arguments. Some posit low reports of voter fraud are a reflection of partisan politics and are, therefore, not to be trusted.¹⁷⁸ Other arguments point to the need to preserve the importance and in-

173. *Policy Brief on Alternatives to Voter Identification*, BRENNAN CTR. FOR JUSTICE (Sept. 12, 2006), <http://www.brennancenter.org/analysis/policy-brief-alternatives-voter-identification> [hereinafter *Alternatives to Voter Identification*].

174. Corbin Carson, *Exhaustive Database of Voter Fraud Cases Turns Up Scant Evidence That It Happens*, NEWS21 (Aug. 12, 2012, 10:41 AM), <http://votingrights.news21.com/article/election-fraud-explainer/>.

175. Levitt, *supra* note 71.

176. AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 209 (Benjamin E. Griffith, ed., 2008).

177. *Id.*

178. See John Fund, *Winning the Fight for Voter-ID*, THE NAT'L REV. (Jan. 19, 2014, 6:30 PM), <http://www.nationalreview.com/article/368864/winning-fight-voter-id-john-fund>.

tegrity of elections.¹⁷⁹ These arguments parallel the already-existent necessity and acceptability of presenting photo identification for a variety of everyday tasks, like purchasing alcohol or riding on a plane.¹⁸⁰ That said, those lobbying for these laws have yet to present convincing, empirical evidence of their necessity, and seem to be driven more by their own partisan interests of their own over actual concerns for electoral integrity.¹⁸¹ Arguably, the impetuses of proponents' concerns are awash in the irritations of fear rather than a sober sense of reality.¹⁸²

2. STATEWIDE VOTER DATABASES

Under HAVA, states are already required to maintain a single, dedicated voter database.¹⁸³ Such a system makes it easier for states to maintain accurate rolls instead of having to deal with issues arising from sourcing this information from databases kept for separate matters.

However, such databases are by no means ideal. While requiring centralized voter databases, HAVA left each state with a fair amount of local control to interpret and create their respective rolls.¹⁸⁴ Upon implementation, this decentralization resulted in differing approaches to the creation, administration and capabilities of their databases which yielded varying levels of interactivity and currentness.¹⁸⁵

179. Jonathan Tobin, Wendy Weiser & Richard Hasen, *One Minute Debate: 3 Views on Whether US States Should Require Voter ID*, THE CHRISTIAN SCI. MONITOR (Oct. 1, 2012), <http://www.csmonitor.com/Commentary/One-Minute-Debate-3-Views/2012/1002/3-views-on-whether-US-states-should-require-voter-ID/Yes-States-must-preserve-the-integrity-of-each-vote-especially-in-an-era-of-close-elections>.

180. *Id.*

181. See Keith G. Bentele and Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL., 1088, 1088 (2013).

182. See generally Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear Of Fraud, And The Fundamental Right To Vote*, 62 VAND. L. REV. 1871 (2009) (discussing the fear-based rationales in laws requiring photo identification to vote).

183. *Alternatives to Voter Identification*, *supra* note 173.

184. U.S. ELECTION ASSISTANCE COMM'N, VOLUNTARY GUIDANCE ON IMPLEMENTATION OF STATEWIDE VOTER REGISTRATION LISTS (2005), available at http://www.eac.gov/assets/1/workflow_staging/Page/330.PDF [hereinafter VOLUNTARY GUIDANCE]; see generally ELECTIONLINE.ORG, ASSORTED ROLLS: STATEWIDE VOTER REGISTRATION DATABASES UNDER HAVA (2005).

185. See VOLUNTARY GUIDANCE, *supra* note 184.

3. PROPER REGISTRATION ADMINISTRATION

Both HAVA and the NVRA impose requirements on the states that, when used properly, could prevent voter fraud manipulation.¹⁸⁶ These include regular cleansing of voter rolls in order to remove ineligible individuals and the removal of inactive voters.¹⁸⁷ Such efforts potentially offer the benefit of accurate voter rolls so that only eligible voters are casting ballots.¹⁸⁸

Conversely, the downside is that scrubbing voter rolls is no easy task. State election officials “face the tightrope of making sure their voter rolls are accurate while avoiding erasing a valid record.”¹⁸⁹ Additionally, some argue that the process used to purge voter rolls involves a flawed methodology that has a greater impact on eligible rather than ineligible voters.¹⁹⁰ Furthermore, there is no universal sharing of this information between the states.¹⁹¹ Instead, groups of states have resorted to forming interstate consortiums based on the voter roll system they use.¹⁹²

4. UNIQUE IDENTIFIER NUMBERS

Several forms of government-issued identification assign particular, exclusive numbers to individuals.¹⁹³ Examples include Social Security numbers, driver’s license numbers and passport numbers. Particular to elderly individuals, verification via Social Security number would not necessitate the acquisition of any form of government-issued identification. That said, the use of an identifier such as a Social Security number could present privacy and security concerns to some voters.

5. AFFIRMATIONS

Many localities already require potential voters to affirm, via statement, their identity and eligibility to vote.¹⁹⁴ In Vermont, for ex-

186. *Alternatives to Voter Identification*, *supra* note 173.

187. *Id.*

188. *Id.*

189. Reid Wilson, *Here’s How to Clean Up Messy Voter Rolls*, WASH. POST (Nov. 3, 2013, 8:00 AM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/03/heres-how-to-clean-up-messy-voter-rolls/>.

190. Marissa Liebling, *Voter Protection: Preserving A Thriving Democracy*, 26 CBA REC. 34, 36 (Oct. 2012).

191. Wilson, *supra* note 189.

192. *Id.*

193. *Alternatives to Voter Identification*, *supra* note 173.

194. *Id.*

ample, voters may not cast their ballots without having previously taken the state's Voter's Oath and attesting that they have done so.¹⁹⁵

The benefit of affirmation requirements is that they are simple to administer and require little to no expense of public funds. That said, while not meaningless, affirmations alone do not expressly prevent an individual from deception in the voting booth, or even from lying while giving the affirmation itself.

6. SIGNATURE COMPARISONS

Like affirmations, obtaining signatures is already a common part of the voting verification process in many jurisdictions.¹⁹⁶ These signatures, generally obtained during voter registration, are commonly used as a way to verify the identity of an individual voter. For example, the official website of the Oregon Secretary of State affirmatively states that "[t]he county elections office looks at every ballot that they receive and compares the signature to the voter registration record."¹⁹⁷

Nevertheless, signature comparisons often rely on the individual abilities of election officials and could fall by the wayside during particularly busy polling times.

7. IDENTIFICATION PICTURE DATABASE

One solution that would allow for picture identification without requiring elderly voters to physically possess photo identification would make use of existing government photo databases.¹⁹⁸ More than 120 million people's photos already exist in searchable state databases used primarily to counter driver's license and identity theft fraud.¹⁹⁹ States could conceivably expand the use of these databases to include voter verification as well.

Particular to elders, use of such systems would still require that some kind of identification photo does exist, whether it is state identi-

195. *Register to Vote: Your Vote is Your Voice!*, VT. SEC'Y OF STATE, <http://www.sec.state.vt.us/elections/voters/registration.aspx> (last visited Oct. 20, 2014).

196. *Alternatives to Voter Identification*, *supra* note 173.

197. *Frequently Asked Questions*, OR. SEC'Y OF STATE, <http://www.oregonvotes.gov/pages/faq/index.html> (last visited Oct. 20, 2014) (archived version available at <http://library.state.or.us/repository/2012/201201191054054/index.pdf>).

198. *Alternatives to Voter Identification*, *supra* note 173.

199. Craig Timberg & Ellen Nakashima, *State Photo-ID Databases Become Troves for Police*, WASH. POST, June 16, 2013, http://articles.washingtonpost.com/2013-06-16/business/40012903_1_databases-facial-recognition-systems-searches.

fication, a driver's license, or passport. That being the case, relying solely on pictures in such a database might not be the most reliable way to ensure election official would be able to verify every voter they encounter. Furthermore, use of such a system could cause privacy concerns that might discourage some from partaking in the voting process or deter registration.²⁰⁰

8. PROSECUTION

Most states already have laws against voter fraud with penalties including fines and imprisonment.²⁰¹ In addition to existing state laws, federal election law already penalizes instances of voter fraud, with five years in prison and fines that can reach ten thousand dollars.²⁰²

The plus of relying on existing laws is that they do not require additional legislative action and arguably serve a deterrent purpose. The consequence, however, is that such legal avenues require states and/or the federal government to expend time and money for litigation and by no means offer an immediate or certain resolution to issues of voter fraud.

D. Methods to Make Existing Voter Identification Laws Less Onerous

While the alternatives discussed rest on the notion of replacing voter identification requirement with means less likely to harm elderly voters, the discussion cannot stop there. As many states have already established voter identification laws likely to remain in place for the near future, it is also essential to look at means of mitigating the effects of voter identification laws, should they remain in place. Some options include providing free means of identification or exemptions, educating voters, provisional ballots and offering early voting opportunities.

200. *Voter Photo ID and Privacy*, ELEC. PRIVACY INFO CTR., <http://epic.org/privacy/voting/photo-identification.html> (last visited Feb. 23, 2015).

201. *Alternatives to Voter Identification*, *supra* note 173.

202. Wendy Underhill, *Proof at the Polls: July/August 2011*, NAT'L CONFERENCE OF STATE LEGS. (2011), <http://www.ncsl.org/research/elections-and-campaigns/proof-at-the-polls.aspx>.

1. FREE VOTER IDENTIFICATION/EXEMPTIONS

Many states with strict voter identification laws provide a free means to obtain the appropriate identification needed to vote or otherwise exempt particular classes of voters.²⁰³ However, the requirements of obtaining free identification and the exemptions vary by state.

While these voter identification cards themselves are free, the materials needed to obtain them often cost money. For example, Indiana allows individuals to acquire free photo identification, but requires them to provide the same documentation requested of applicants for driver licenses or state identification.²⁰⁴ Generally the most common means of satisfying these documentations requirements cost money or favor individuals that are employed.²⁰⁵ Furthermore, actually acquiring identification generally requires visiting a physical location to present documentation,²⁰⁶ a trip not all elderly voter may have a means to make.²⁰⁷

Some states have opted to make their voter identification laws less burdensome on the elderly via certain exemptions. For example, Kansas permits voters age sixty-five and older to use expired drivers licenses to satisfy the state's voter identification requirements.²⁰⁸

2. VOTER EDUCATION

One means of mitigating potentially harmful effects of voter identification laws on elderly voters could be a concerted effort to educate this group on the requirements of a voter identification law in a particular state. For example, North Dakota recently started a public

203. *Voter Identification Requirements*, TENN. SEC'Y OF STATE, <https://www.tn.gov/sos/election/photoID.htm> (last visited Oct. 20, 2014). For example, the Tennessee Secretary of State's site indicates both that free photo identification is available and that certain classes, such as "[v]oters who are residents of a licensed nursing home or assisted living center and who vote at the facility." *Id.*

204. *Obtaining a Photo ID*, IND. ELECTION DIV., IND. SEC'Y OF STATE, <http://www.in.gov/sos/elections/2625.htm> (last visited on Oct. 20, 2014).

205. *Documents Required for A SecureID Drivers License or ID Card*, IND. BUREAU OF MOTOR VEHICLES, http://www.in.gov/bmv/files/SecureID_Documents_List.pdf (last visited Oct. 20, 2014) (listing of documents sufficient to prove identity includes current valid photo identification, passports and original birth certificates, ways of verifying one's social security number include providing a W2 or pay stub).

206. *See Obtaining a Photo ID*, *supra* note 204 (stating that Indiana voters need to go to a BMV branch in order to request free photo identification).

207. *See supra* Part III.B.iv.

208. *See Martin*, *supra* note 1, at 96 (citing KAN. STAT. ANN. § 25-2908(h)(1) (2014)).

education campaign to remind voters to bring proper identification to the polls.²⁰⁹ While by no means a free endeavor, the state is paying for the campaign with grant funds provided under HAVA.²¹⁰

3. PROVISIONAL BALLOTS

States with voter identification laws generally allow individuals that arrive at a polling location without the requisite identification to cast a provisional ballot, to be counted once proper identification has been provided, usually within a few days.²¹¹ Under HAVA, all states are already required to provide provisional ballots when a voter does not appear on their rolls, however, many administrative issues can arise with the use of provisional ballot measures.²¹² As such, they are ideally a last resort option.²¹³

4. EARLY VOTING

Early voting opportunities potentially give voters a bigger window than a single election day affords to realize and rectify issues with the identification they possess. Prominent methods of early voting include opening physical polling places prior to Election Day and absentee voting.

Early voting periods can be advantageous because they give voters greater schedule flexibility, better enabling them to make it to the polls. With a voter identification regime in place, an early voting period could serve as a means for voters to figure out whether or not they have the proper identification and afford them some time to obtain the proper identification. Particular to elderly voters, especially those with mobility or accessibility issues, this could provide them enough time to get their identification situation sorted out without missing out on an election.

209. Nick Smith, *State Plans Voter ID Campaign*, THE BISMARCK TRIB., Mar. 17, 2014, http://bismarcktribune.com/news/local/govt-and-politics/state-plans-voter-id-campaign/article_fa0b34e2-ae54-11e3-a694-001a4bcf887a.html.

210. *Id.*; The Associated Press, *ND Kicks Off Campaign Aimed Voter ID Education*, WASH. TIMES, Mar. 18, 2014, <http://www.washingtontimes.com/news/2014/mar/18/nd-kicks-off-campaign-aimed-voter-id-education/>.

211. Underhill, *supra* note 73.

212. Provisional Voting, PROJECTVOTE, <http://projectvote.org/provisional-voting.html> (last visited on Oct. 20, 2014).

213. *Id.*

On the downside, early voting arguably does not necessarily encourage more people to vote²¹⁴ and may actually be a factor in decreasing overall turnout.²¹⁵ In relation to voter identification concerns, in order for early voting to serve as a proper warning a voter would need to actually partake in the process. While nearly a third of all voters reported voting early in the most recent general election, there still are a lot of people that simply do not or cannot—if their state does not allow it—cast their ballot early.²¹⁶ Presently, thirty-two states allow eligible voters to cast their ballot during a particular period prior to the jurisdiction's official Election Day.²¹⁷

All states permit some form of absentee voting for electors unable to make it to the polls.²¹⁸ Absentee voting in particular can be an attractive option for elderly voters in a variety of circumstances, such as those living in rural areas, or those residing in an assisted-living facility²¹⁹ by affording them greater convenience and flexibility when voting.²²⁰

However, despite the positives, there are a variety of potential downsides to absentee balloting especially pertinent to elderly voters. These include increased opportunities for inappropriate influence from individuals the elderly voter resides with, as well as campaign workers.²²¹ Some individuals may also hold a personal preference for voting in-person.²²²

214. William G. Jacoby, *Barry Burden: Early Voting Is Convenient But Decreases Overall Turnout*, AM. J. POL. SCI. (Jan. 18, 2014), <http://ajps.org/2014/01/18/barry-burden-early-voting-is-convenient-but-decreases-overall-turnout/>.

215. BARRY C. BURDEN ET AL., ELECTION ADMIN. PROJECT AT THE UNIV. OF WIS.-MADISON, THE EFFECTS AND COSTS OF EARLY VOTING, ELECTION DAY REGISTRATION, AND SAME DAY REGISTRATION IN THE 2008 ELECTIONS (2009), *available at* https://apw.polisci.wisc.edu/archives/Burden_et_al.pdf.

216. Michael P. McDonald, *A Modest Early Voting Rise in 2012*, HUFFINGTON POST (June 12, 2013, 4:29 PM), http://www.huffingtonpost.com/michael-p-mcdonald/a-modest-early-voting-ris_b_3430379.html (stating that 31.6% of voters in a Census Bureau survey reported casting their ballot prior to Election Day 2012).

217. *Absentee and Early Voting*, NAT'L CONFERENCE OF STATE LEGS., <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited Oct. 20, 2014).

218. *Id.*

219. James Nord, *Most States Have Both Early and No-excuse Absentee Balloting, but not Minnesota*, MINNPOST (June 17, 2013), <http://www.minnpost.com/effective-democracy/2013/06/most-states-have-both-early-and-no-excuse-absentee-balloting-not-minneso>.

220. Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 471 (2005).

221. *Id.*

222. See, e.g., Casey, *supra* note 13.

There are several viable ways to ensure voting integrity when casting an absentee ballot. Some provisions states have enacted include witness requirements and notary requirements.²²³ Some states with voter identification laws have also sought to require that a copy of an acceptable form of photo identification be provided with absentee ballot requests.²²⁴

IV. Resolution and Recommendation

The resolution to this issue comes in two parts. One, as strict voter identification laws are worth more trouble than good in terms of keeping the polls accessible for all factions of the body politic, such as elderly voters, they should be avoided and emphasis should instead be put on improving existing, less arduous verification methods. But, two, as many states have already adopted strict forms of voter identification laws that they are unlikely to willingly repeal in the near future, such states must take the steps necessary to ensure they mitigate the harmful effects that such laws can have in order to ensure fair participation by the whole electorate.

A. States Without Voter Identification Laws

Given the blockade voter identification laws put in place of many elderly voters;²²⁵ the phenomenally low, verifiable occurrence of the kind of harm voter identification laws are meant to prevent;²²⁶ and the existence of verification alternatives that place less of a burden on voters,²²⁷ an optimal solution would be to do away with new voter identification legislation altogether. Instead, the focus should be placed on strengthening the existing, numerous, valid, and less burdensome verification mechanisms.²²⁸ In place of voter identification laws, states truly concerned with integrity of their elections should

223. Fay, *supra* note 220, at 475–76.

224. WIS. GOV'T ACCOUNTABILITY BD., ABSENTEE VOTING: WISCONSIN'S NEW PHOTO-ID LAW 1, available at http://epic.org/privacy/voting/Wisconsin-voting_by_absentee_ballot_pdf_46357.pdf (last visited Oct. 20, 2014). However, multiple injunctions on Wisconsin's voter identification law, enacted in 2011, resulted in this provision not affecting the 2012 elections. *Impact of Voter ID Legislation with Respect to Absentee Voters*, WIS. GOV'T ACCOUNTABILITY BD. (Oct. 7, 2011), <http://gab.wi.gov/node/2070>.

225. See *supra* Parts III.B.i–v.

226. See *supra* Part III.C.i.

227. See *supra* Parts III.C.ii–viii.

228. *Id.*

turn to and perfect many of the safeguards already at their disposal instead of resorting to flavor-of-the-week legislation. Most states already have the tools in place to do so; they just need to figure out how to properly use them.

B. States With Voter Identification Laws

States that have already adopted stricter forms of voter identification laws should seek to mitigate the harms such laws can bring to elderly and minority voters via the use of all means previously discussed,²²⁹ including free means of identification or exemptions, educating voters, provisional ballots and offering early voting opportunities.

While effecting all of these provisions may seem like overkill, the importance of ensuring eligible voters are able to assert their right to vote is too important for leaving stones unturned. Importantly, implementation of most of these would require minimal costs on the part of the states as they build off practices already carried out by the state, or, in the case of educational outreach, federal funding is available.²³⁰

All that really stands in the way is the slovenly political will to make them happen, and the need for spirited legislators, perhaps motivated by romantic visions of our nation's democratic principles, to ensure the right to vote is not unduly infringed.

229. See *supra* Parts III.D.i–iv.

230. See, e.g., Smith, *supra* note 209.

V. Conclusion

Free, fair, and open elections are essential to preserving our country's democratic essence. In order to maintain this principle, elections need be made open and accessible to all eligible citizens, regardless of age or any other factor, so their voices may be heard at the ballot box.

While the impetus for voter identification legislation is largely grounded in ensuring the integrity of the American electoral process, without great care they stand to disproportionately hinder more than help many sections of the electorate, such as elderly voters who seek to see their vote counted. Free and fair elections are about giving every voice an opportunity to be heard. While there certainly is a balance to be drawn in ensuring that elections are both fair and respectable, "Is it wise," Judge Evans questioned in his *Crawford* dissent "to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table?"²³¹

"I think not."²³²

231. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 955 (7th Cir. 2007) (Evans, J., dissenting).

232. *Id.*

