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ESSAY

*SOFTENING VOTER ID LAWS THROUGH LITIGATION:
IS IT ENOUGH?*

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ESSAY

SOFTENING VOTER ID LAWS THROUGH LITIGATION: IS IT ENOUGH?

RICHARD L. HASEN*

INTRODUCTION

Headlines about voter identification laws often place court rulings in a simple win or loss frame. For example, the *New York Times* headline describing the result in *Crawford v. Marion County Election Board*,¹ a 2008 case involving the constitutionality of Indiana's strict voter identification law, read: *In a 6-3 Vote, Justices Uphold a Voter ID Law*.² Similarly, in reporting on the 2015 decision of the United States Court of Appeals for the Fifth Circuit involving Texas' voter identification law, the Associated Press article was headlined *Federal Court Strikes Down Tough Texas Voter ID Law*.³

In fact, the results in both cases were more nuanced. As reporter Linda Greenhouse explained in that *New York Times* article,⁴ the Supreme Court decision in *Crawford* was fractured. Although a majority of the Court rejected a full facial challenge to Indiana's law on equal protection grounds, a plurality of the Court, as well as the dissenters, left open the possibility that Indiana's law could be unconstitutional "as applied" to certain voters who faced special burdens in getting a voter identification card.⁵ Further, although the Fifth Circuit did hold in *Veasey v. Abbott*⁶ that Texas's voter identification law violated Section 2 of the Voting

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¹ 553 U.S. 181 (2008).

² Linda Greenhouse, *In a 6-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, Apr. 29, 2008, <http://www.nytimes.com/2008/04/29/washington/29scotus.html> ("The 6-to-3 ruling kept the door open to future lawsuits that provided more evidence. But this theoretical possibility was small comfort to the dissenters or to critics of voter ID laws, who predicted that a more likely outcome than successful lawsuits would be the spread of measures that would keep some legitimate would-be voters from the polls.").

³ Associated Press, *Federal Court Strikes Down Tough Texas Voter ID Law*, NBC News, Aug. 5, 2015, <http://www.nbcnews.com/news/us-news/u-s-court-strikes-down-tough-texas-voter-id-law-n404711>.

⁴ Greenhouse, *supra* note 2.

⁵ *Crawford v. Marion County Elec. Bd*, 553 U.S. 181, 199-203 (2008).

⁶ 796 F.3d 487 (5th Cir. 2015).

Rights Act,⁷ the appeals court determined that the appropriate remedy would not be a wholesale abandonment of the law; instead it directed the lower federal district court to allow Texas to use its law in most instances, but to craft a remedy which would allow those facing special burdens additional ways to prove identity and cast a ballot.⁸ (The Fifth Circuit, after rehearing the case *en banc*, ordered a similar remedy⁹, and the trial court, with the cooperation of the parties, implemented an affidavit alternative in time for the November 2016 election.¹⁰)

In theory, softening of voter identification laws through litigation is a positive development aimed at avoiding disenfranchisement of both voters who face special burdens obtaining an acceptable government-issued identification necessary to vote and of those voters who face confusion or administrative error. In practice, however, softening may do less to alleviate the actual burdens of voter identification laws than to make judges feel better about their Solomonic rulings. In fact, softening devices still leave an uncertain number voters disenfranchised. These burdens might be justified if there were evidence that state voter identification laws solve a serious problem, but there is no such evidence.

This brief Essay first describes the theoretical softening which emerged in some voter identification litigation. It then explains that, at least to this point, such softening offers less than meets the eye in helping voters facing difficulties voting in states with strict voter identification requirements. It concludes that courts should strike down strict voter identification laws, because the laws deprive at least some voters of the ability to cast a valid vote for no good reason, and the softening devices do not yet appear to do enough.

I. SOFTENING IN THEORY

The Indiana and Texas litigation show how litigation, at least in theory, can lead to softening of the harshest aspects of state voter identification laws.¹¹

Indiana is important because it was one of the first states with Republican legislative and gubernatorial control¹² to adopt strict voter identification

⁷ *Id.* at 513.

⁸ *Id.* at 519.

⁹ *Veasey v. Abbott*, ___ F.3d ___, 2016 WL 3923868, *36-39 (5th Cir. Jul. 20, 2016).

¹⁰ *Veasey v. Abbott*, Order Regarding Agreed Interim Plan for Elections, Case 2:13—cv-00193, Doc. 895, (S.D. Tex. Aug. 10, 2016), available at: <http://electionlawblog.org/wp-content/uploads/texas-id-order.pdf>.

¹¹ The next few paragraphs draws from RICHARD L. HASEN, *LEGISLATION, STATUTORY INTERPRETATION & ELECTION LAW: EXAMPLES & EXPLANATIONS* ch. 12 (2014).

¹² Georgia was another early adopter. On the history of Georgia's fight over its voter identification laws, see ARI BERMAN: *GIVE US THE BALLOT* ch. 8 (2015).

requirements following the disputed 2000 election and the rise of the voting wars.¹³ The ACLU and other organizations brought suit in federal court against Indiana's law, arguing that the law violated the Equal Protection Clause of the Fourteenth Amendment. The case was a *facial challenge*—that is, a challenge to the law as applied to everyone. This is in contrast to an *as-applied challenge*, which argues that the law is unconstitutional as applied to a person or class of people.

The case proceeded without much evidence on both sides. The state could point to no evidence that impersonation fraud (where one person goes to the polls claiming to be someone else) was a problem. Indeed, the state conceded there were no cases of such impersonation fraud in Indiana. But the trial court found plaintiffs' lawyers could not produce voters who (1) lacked identification; (2) would have a difficult time getting identification; and (3) wanted to vote. Plaintiffs claimed they did not need to produce such evidence because they were bringing a facial challenge.¹⁴

A federal district court rejected plaintiffs' challenge citing a lack of evidence on plaintiffs' side.¹⁵ The United States Court of Appeals for the Seventh Circuit affirmed in a divided opinion.¹⁶ When the case made it to the Supreme Court, the Court divided 3-3-3. Justice Stevens, writing for himself, Chief Justice Roberts and Justice Kennedy, applying an intermediate standard of scrutiny,¹⁷ rejected the facial challenge to the law but left open the possibility of new plaintiffs facing significant burdens from the identification law (such as those who could not afford the underlying documents needed to get a free voter identification card) to bring an as-applied challenge to the law.¹⁸ The plurality held that the burden most voters faced was minor and the law was justified by important enough state interests in preventing voter fraud and instilling state confidence. "For most voters who need them, 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."¹⁹

¹³ I trace the history from 2000 through 2012 in RICHARD L. HASEN, *THE VOTING WARS* (2012).

¹⁴ For a general history of the *Crawford* litigation, see Joshua A. Douglas, *The History of Voter ID Laws and the Story of Crawford v. Marion County Election Board* 453, in *ELECTION LAW STORIES* (Joshua A. Douglas and Eugene Mazo eds. 2016).

¹⁵ *Indiana Dem. Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

¹⁶ *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

¹⁷ The court adopted intermediate scrutiny by applying a flexible standard in which the level of scrutiny rises as voters are more heavily burdened. This flexible standard is commonly referred to as the *Anderson-Burdick* balancing test. For background see HASEN, *supra* note 11, at 260-62, 307-09.

¹⁸ *Crawford*, 553 U.S. at 200 (contrasting facial challenge to as applied challenge as described in Court's earlier case, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 1184 (2008)).

¹⁹ *Id.* at 198.

Justice Scalia, writing for himself, Justice Alito, and Justice Thomas, took a different view. Like the plurality, he believed the law imposed little burden on most voters. On this basis, however, Justice Scalia would have upheld the law against a rational basis review, not the intermediate scrutiny used by the plurality.²⁰ Unlike the plurality, the Scalia opinion seems to leave no opening for as-applied challenges for voters facing special burdens in obtaining the right form of identification.

The three dissenting Justices—Justices Breyer, Ginsburg, and Souter—agreed with the Justice Stevens plurality opinion that a higher level of scrutiny applied. The dissenters believed that the law imposed greater burdens on many voters, and that the state failed to demonstrate that its interests were strong enough to defeat the plaintiffs. The dissenters would have struck down the law facially, for all voters in Indiana.²¹

By the time Texas came to adopt a voter identification law in 2011,²² it adopted a much stricter one than Indiana, further limiting the forms of acceptable government-issued identification, and not including an exception or exemption, such as the one built into the Indiana law, for those who are indigent.²³ The effort to pass the Texas law was a fierce partisan battle, featuring a Democratic state senator being wheeled on a gurney following liver surgery in the state capitol rotunda to block the law's passage. Eventually Texas Republicans changed the Senate rules to allow the law to pass despite united Democratic opposition.²⁴

At the time Texas passed its law, it was still subject to the preclearance requirements of the Voting Rights Act.²⁵ Under Section 5 of the Act, covered jurisdictions with a history of racial discrimination in voting such as Texas had to

²⁰ *Id.* at 205 (Scalia, J., concurring in the judgment).

²¹ *Id.* at 209-37 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

²² Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

²³ The trial court considering the challenge to Texas's voter identification law found it to be the strictest in the United States. *Veasey v. Perry*, 71 F. Supp. 3d 627, 642-43 (S.D. Texas 2014). See also Erik Eckholm, *Texas ID Law Called Breach of Voting Rights Act*, N.Y. TIMES, Aug. 5, 2015, <http://www.nytimes.com/2015/08/06/us/appellate-panel-says-texas-id-law-broke-us-voting-rights-act.html> ("The Texas ID law is one of the strictest of its kind in the country. It requires voters to bring a government-issued photo ID to the polls. Accepted forms of identification include a driver's license, a United States passport, a concealed-handgun license and an election identification certificate issued by the State Department of Public Safety."); National Conference of State Legislatures, *Voter Identification Requirements/Voter ID Laws*, Jan. 4, 2016, <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (classifying Texas's law as "strict;" and noting that, among strict voter identification states, only Indiana and Tennessee have an indigency exemption) (last visited Mar. 3, 2016).

²⁴ See HASEN, *supra* note 13, at 41-43 (discussing passage of voter identification law in Texas).

²⁵ United States Department of Justice, *Jurisdictions Previously Covered by Section 5 at the Time of the Shelby County Decision*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (listing Texas) (last visited Mar. 3, 2016).

obtain approval from the United States Department of Justice or a three-judge federal court in Washington D.C. Covered jurisdictions had the burden of demonstrating that the law did not have the purpose and would not have the effect of making protected minority voters worse off in exercising their voting rights.²⁶

The Department of Justice blocked Texas's law, known as "SB 14," finding that the state did not meet its burden of proof. Texas appealed to a three-judge federal district court in Washington D.C.²⁷ After trial, the three-judge court blocked Texas's law, finding the evidence uncertain, but siding against Texas because of the burden of proof.²⁸ Texas appealed to the Supreme Court, which later remanded the case for dismissal after holding in an unrelated case out of Alabama, *Shelby County v. Holder*,²⁹ that the preclearance provisions of the law were unconstitutional.³⁰ *Shelby County* held that the formula used to decide which jurisdictions were covered was constitutionally outdated and therefore exceeded congressional power by infringing on the "equal sovereignty" of the states.³¹ Within hours of the *Shelby County* decision, Texas's then-attorney general (and now governor) Greg Abbott announced the state's intention to enforce its voter identification law immediately.³²

A diverse group of voting rights plaintiffs then challenged the law in federal court, raising a variety of theories, arguing the law violated constitutional equal protection rights, the twenty-fourth amendment's prohibition of poll taxes, and section 2 of the Voting Rights Act. In a detailed 142-page opinion, the federal district court held Texas's law illegal. The Court found it was passed with racially discriminatory intent in violation of the Fourteenth and Fifteenth Amendments, unconstitutionally burdened the right to vote, amounted to an unconstitutional poll tax, and violated Section 2 of the Voting Rights Act.³³

²⁶ On the former Section 5 requirements, see United States Department of Justice, About Section 5 of the Voting Rights Act, <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last visited Mar. 3, 2016).

²⁷ *Texas v. Holder*, 888 F. Supp. 2d 113, 118-20 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013).

²⁸ *Id.* at 144-45.

²⁹ 133 S.Ct. 2612 (2013).

³⁰ *Texas v. Holder*, 133 S. Ct. 2886 (2013).

³¹ For a critique of the Supreme Court's reasoning in *Shelby County*, see Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713 (2014).

³² Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN, Jun. 25, 2013, <http://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> ("The Texas attorney general, Greg Abbott, declared that in the light of the supreme court's judgment striking down a key element of the 1965 Voting Rights Act he was implementing instantly the voter ID law that had previously blocked by the Obama administration. 'With today's decision, the state's voter ID law will take effect immediately. Photo identification will now be required when voting in elections in Texas.'").

³³ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Texas 2014).

Texas appealed to the Fifth Circuit. The Fifth Circuit held that the district court used an incorrect standard to conclude that Texas had a racially discriminatory purpose in passing the voter identification law.³⁴ After a lengthy analysis, the court concluded that Texas did violate Section 2 of the Voting Rights Act on grounds that, looking at the totality of the circumstances, the law made it harder for minority voters compared to white voters to participate in the political process and to elect representatives of their choice.³⁵ The Court declined to reach constitutional arguments made by the plaintiffs³⁶ other than the poll tax argument under the twenty-fourth amendment. The court rejected the poll tax argument on two grounds. First, the court held that the indirect costs of obtaining identification do not provide grounds for a facial poll tax attack on a voter identification law.³⁷ Further, the court held that a law Texas enacted after litigation began, which allowed voters to obtain from Texas government offices an “Election Identification Certificate” (or EIC) at no cost, meant the Texas identification requirement was not a poll tax: “Texas law no longer imposes any direct fee for any of the documentation required to obtain a qualifying voter ID.”³⁸ Texas voters seeking the EIC, however, may still face fees in obtaining the underlying documentation necessary to qualify for an EIC by proving United States citizenship and identity.³⁹ The Fifth Circuit concluded, however, that this indirect burden did not constitute a poll tax.

Despite holding that Texas’s voter identification law violated Section 2 of the Voting Rights Act, the Fifth Circuit did not enjoin enforcement of the law outright. Instead, the court remanded the case to the trial court to impose a much more limited remedy, consistent with the idea that a court fashioning a section 2 remedy should respect the legislature’s policy objectives when possible:⁴⁰

Accordingly, if on remand the district court finds that SB 14 has only violated Section 2 through its discriminatory effects, it should refer to the policies underlying SB 14 in fashioning a remedy. Clearly, the Legislature wished to reduce the risk of in-person voter fraud by strengthening the forms of identification presented for voting. Simply reverting to the system

³⁴ *Veasey v. Abbott*, 796 F.3d 487, 498-504 (5th Cir. 2015). The court remanded the case to the trial court to reconsider the discriminatory purpose question under the correct legal standard. *Id.* at 503-04.

³⁵ *Id.* at 504-13.

³⁶ *Id.* at 514.

³⁷ *Id.* at 515.

³⁸ *Id.* at 516-17.

³⁹ The Texas Administrative Code, title 37, section 15.182 lists the acceptable forms of documentation to prove citizenship and identity. [http://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=37&pt=1&ch=15&rl=182](http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=37&pt=1&ch=15&rl=182).

⁴⁰ *Veasey*, 706 F.3d. at 517-18.

in place before SB 14's passage would not fully respect these policy choices—it would allow voters to cast ballots after presenting less secure forms of identification like utility bills, bank statements, or paychecks. One possibility would be to reinstate voter registration cards as documents that qualify as acceptable identification under the Texas Election Code. The court could also decree that, upon execution of an affidavit that a person does not have an acceptable form of photo identification, that person must be allowed to vote with their voter registration card. Such a remedy would respect the Legislature's choice to do away with more problematic forms of identification, while also eliminating SB 14's invalid applications. However, we recognize that the district court must assess this potential solution in light of other solutions posited by the parties, including other forms of photo identification. We urge the parties to work cooperatively with the district court to provide a prompt resolution of this matter to avoid election eve uncertainties and emergencies.⁴¹

After a lengthy delay and prodding from the United States Supreme Court,⁴² the entire Fifth Circuit sitting en banc issued a ruling agreeing that Texas's law violated the Voting Rights Act because of its racially discriminatory effect, and it remanded to the trial court to come up with an interim remedy following the narrow guidelines of the panel decision.⁴³ The trial court on remand implemented an affidavit alternative in time for the November 2016 election.⁴⁴

The Indiana and Texas cases show that litigation has the potential to lead to the softening of voter identification laws. In the Indiana case, the Supreme Court plurality suggested “as applied” litigation to get exemptions and exceptions from

⁴¹ *Id.* at 519.

⁴² *Veasey v. Abbott*, 2016 WL 3923868, *5 (“While this case was awaiting oral argument before our full court, in light of the upcoming elections in November 2016, the parties applied to the Supreme Court to vacate the stay of the district court’s injunction that a panel of this court originally entered in October 2014. The Supreme Court denied the motion to vacate the stay but noted that if, by July 20, 2016, this court had “neither issued an opinion on the merits of the case nor issued an order vacating or modifying the current stay order, an aggrieved party [could] seek interim relief from th[e Supreme] Court by filing an appropriate application.”).

⁴³ *Id.* at *36-*39. The court also remanded to consider whether Texas engaged in intentional racial discrimination in voting, a finding which could lead the trial court to throw out Texas’s voting law entirely and even to put Texas back under federal supervision of its voting rules. Richard L. Hasen, *The Voting Rights Act Might Get Some Teeth Back*, SLATE, Jul. 21, 2016, http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/the_5th_circuit_left_an_opening_for_texas_to_lose_control_of_its_discriminatory.html?wpsrc=sh_all_mob_tw_top.

⁴⁴ *Veasey v. Abbott*, Order Regarding Agreed Interim Plan for Elections, Case 2:13—cv-00193, Doc. 895, (S.D. Tex. Aug. 10, 2016), available at: <http://electionlawblog.org/wp-content/uploads/texas-id-order.pdf>.

identification requirements for groups of voters facing special burdens. In Texas, the ongoing litigation led Texas to revise its laws to allow voters to obtain a free identification card (although there was no free access to the documentation needed to get an identification), and the Fifth Circuit followed up with an order for the district court to craft some exemptions and exceptions from the law to make it less onerous.

This softening of the potentially harsh effects of voter identification laws through litigation is not unique to Indiana or Texas. In South Carolina, election administrators enacted administrative rules to allow those voters with a “reasonable impediment” to obtaining the right voter identification to be allowed to vote without showing the identification. South Carolina adopted these rules while a three-judge court in Washington D.C. was considering whether to give federal approval under the now moribund preclearance rules of Section 5 of the Voting Rights Act. There is little doubt South Carolina adopted this softening solely to obtain preclearance from the court. After the South Carolina softening, the court approved South Carolina’s voter identification law.⁴⁵

⁴⁵ *South Carolina v. U.S.*, 898 F. Supp. 2d 30 (D.D.C. 2012). As concurring judge Bates wrote:

First, to state the obvious, Act R54 as now pre-cleared is not the R54 enacted in May 2011. It is understandable that the Attorney General of the United States, and then the intervenor-defendants in this case, would raise serious concerns about South Carolina’s voter photo ID law as it then stood. But now, to the credit of South Carolina state officials, Act R54 as authoritatively interpreted does warrant pre-clearance. An evolutionary process has produced a law that accomplishes South Carolina’s important objectives while protecting every individual’s right to vote and a law that addresses the significant concerns raised about Act R54’s potential impact on a group that all agree is disproportionately African-American. As the Court’s opinion convincingly describes, South Carolina’s voter photo ID law, as interpreted, now compares very favorably with the laws of Indiana, Georgia and New Hampshire, each of which has passed legal muster through either federal court constitutional review or pre-clearance by the Attorney General. The path to a sound South Carolina voter photo ID law has been different, given the essential role of the State’s interpretation of key provisions.

Which brings me to my second observation—one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive. Several legislators have commented that they were seeking to structure a law that could be pre-cleared.... The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of Act R54, particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials’ efforts to satisfy the requirements of the Voting Rights Act.

Id. at 53-54 (Bates, J., concurring).

North Carolina followed suit a few years later. Thanks to the Supreme Court's 2013 decision in *Shelby County*,⁴⁶ North Carolina did not need to submit its new voter identification law or other voting changes for Section 5 preclearance. But after voting rights plaintiffs challenged North Carolina's laws in court under the Constitution and the Voting Rights Act's section 2, North Carolina passed another statute implementing a "reasonable impediment" exemption similar to South Carolina's. The change came on the eve of the federal court trial, and the court put off the part of the trial related to voter identification for a later date.⁴⁷ Although the district court wrote that the North Carolina "reasonable impediment" exemption is "identical" to South Carolina's requirement, it is not. The North Carolina statute lists specific reasons a voter may claim an impediment, along with a catch-all "other" provision.⁴⁸

The trial court in the North Carolina case held that North Carolina's voter identification law, with its reasonable impediment exemption, did not violate the Voting Rights Act or the Constitution.⁴⁹ The Fourth Circuit reversed the trial court, holding that North Carolina passed its law for a racially discriminatory purpose,⁵⁰ a holding the state of North Carolina has promised to appeal to the United States Supreme Court.⁵¹ Rather than allow the law to function with the reasonable impediment exemption, the Fourth Circuit rejected the entire law.⁵²

⁴⁶ 133 S. Ct. 2612 (2013).

⁴⁷ North Carolina State Conference of the NAACP v. McCrory, __ F. Supp. 3d __, 2016 WL 204481, *1 (M.D.N.C. 2016) (noting that the state opposed motion to enjoin North Carolina voter identification law, "pointing out that North Carolina's current law permits those without a qualifying photo ID to vote under a broad "reasonable impediment" exception identical to that approved by a three-judge court in South Carolina v. United States, 898 F.Supp.2d 30 (D.D.C.2012)."); *id.* at *2 ("Trial was set for July 13, 2015. On June 18, 2015, the North Carolina General Assembly passed House Bill 836, and on June 22, 2015, the Governor signed it into law as North Carolina Session Law 2015-103 ('SL 2015-103'). The law relaxed the photo-ID requirement created by SL 2013-381 by providing an additional exception that permits individuals to vote without a photo ID so long as they sign a reasonable impediment affidavit.").

⁴⁸ NC Code § 163-166.15(e)(1).

⁴⁹ North Carolina State Conference of the NAACP v. McCrory, __ F. Supp. 3d __, 2016 WL 1650774, *170 (M.D.N.C. 2016), *rev'd*, 2016 WL 4053033 (4th Cir. 2016).

⁵⁰ North Carolina State Conference of the NAACP v. McCrory, 2016 WL 4053033 *2.

⁵¹ [Citation coming when emergency motion filed.]

⁵² North Carolina State Conference of the NAACP v. McCrory, 2016 WL 4053033 *22 ("But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case. That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters. We cannot discern any basis upon which this record reflects that the reasonable impediment exception amendment fully cures the harm from the photo ID provision.").

In Wisconsin, voting rights plaintiffs challenged Wisconsin's tough voter identification law in both state and federal court. A federal court held the law violated Section 2 of the Voting Rights Act and the United States Constitution's Equal Protection Clause.⁵³ Meanwhile, the Wisconsin Supreme Court in a state challenge to the voter identification requirements construed its laws and related regulations to require the Wisconsin Department of Motor Vehicles to exercise discretion in providing documentation without a fee to voters when the voters lacked the documentation necessary to secure a state-issued voter identification card.⁵⁴ After this construction of Wisconsin law by the state's highest court, the United States Court of Appeals for the Seventh Circuit rejected both the constitutional and Voting Rights Act challenges to the law.⁵⁵

However, in further proceedings in the case, the Seventh Circuit held its initial order did not bar plaintiffs' attempt to bring an as-applied claim against the Wisconsin law based on how the law was implemented in practice, and the court remanded the case to the district court to consider such a challenge.⁵⁶ It explained: "The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily. Plaintiffs now accept the propriety of requiring photo ID from persons who already have or can get it with reasonable effort, while endeavoring to protect the voting rights of those who encounter high hurdles. This is compatible with our opinion and mandate, just as it is compatible with *Crawford*."⁵⁷

On remand the trial court issued an order allowing Wisconsin voters to sign a reasonable impediment affidavit to be allowed to vote.⁵⁸ The state of Wisconsin appealed and a Seventh Circuit panel put the affidavit requirement on hold, ruling that it was likely too broad a remedy for those facing special burdens to vote.⁵⁹ Separately, another federal district court required the state of Wisconsin to take additional steps to help those voters facing special burdens obtain identification to be used for voting.⁶⁰ Both rulings are currently on further appeal.

⁵³ Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wisc. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), cert. denied 135 S. Ct. 1551 (2014).

⁵⁴ Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 278-79 (Wisc. 2014).

⁵⁵ Frank v. Walker, 768 F.3d 744 (7th Cir. 2014). The entire Seventh Circuit denied rehearing en banc by an equally divided 5-5 vote, over a strong dissent, 773 F.3d 783 (7th Cir. 2014). The Supreme Court denied a petition for writ of certiorari. 135 S. Ct. 1551 (2014).

⁵⁶ Frank v. Walker, ___ F.3d ___, 2016 WL 1426486 (7th Cir. 2016).

⁵⁷ *Id.* at *2.

⁵⁸ Frank v. Walker, ___ F. Supp. 3d ___, 2016 WL 3948068, *2 (E.D. Wis. 2016).

⁵⁹ [WL cite not yet available: order posted here: <http://electionlawblog.org/wp-content/uploads/7th-frank.pdf>]

⁶⁰ One Wisconsin Institute v. Thomsen, ___ F. Supp. 3d ___, 2016 WL 4059222, *2 (W.D. Wis. 2016).

II. SOFTENING IN PRACTICE

For those who believe voter identification laws impose unnecessary hurdles to voting, softening through litigation is certainly preferable to no softening. For example, the South Carolina “reasonable impediment” exemption makes the law far more palatable than the law without it. And the Wisconsin as-applied litigation may serve to allow more opportunity for unfairly disenfranchised voters to vote.

But it is easy to exaggerate the extent to which these softening devices actually alleviate the problems caused by voter identification laws. By “problems,” I mean not only the disenfranchisement of otherwise eligible voters who lack and cannot get the right government-issued identification to vote, but also administrative issues, pollworker errors, and confusion or forgetfulness by voters which leads to practical disenfranchisement. Further, voter identification laws, even softened ones, impose burdens on voters, voting rights groups, states, state agencies, and local governments.

Beginning with *Crawford*, softening has been underwhelming. Justice Stevens’ opening to channel voter identification challenges into as-applied challenges has been completely unsuccessful. Indeed, it is hard to find successful reported as-applied challenge in the federal or state courts. William Groth, the lawyer who brought *Crawford*, reported a single successful as-applied challenge for a single voter which took two years and considerable effort to bring.⁶¹ There have been some unsuccessful challenges, such as *Stewart v. Marion County*, in which a federal district court rejected an as-applied challenge to Indiana’s voter identification law, finding the burdens on the plaintiff no more than the burdens

⁶¹ Groth explained in an email:

In connection with your new article, you might want to look at a post-Crawford case I litigated on behalf of an individual who was denied a photo ID because the names on his birth certificate and Social Security records did not match. The case is *Worley v. Waddell*, 819 F. Supp. 2d 826 (S.D. Ind. 2011), and 2012 U.S. Dist. LEXIS 145049 (S.D. Ind. 2012). We ended up bringing Worley’s mother up from Georgia to testify before an ALJ that he was indeed her son and the same person known [] as both Joseph A. Ivey and Joseph A. Worley. At the end of about two years of litigation the State finally relented, issued my client his ID, and paid all of Mr. Worley’s attorney fees.

The presiding judge was Sarah Barker, the jurist who decided *Crawford* in the district court.

Email from Bill Groth to author dated April 18, 2016 (on file with the author).

that other voters faced which the Supreme Court found to be acceptable in *Crawford*.⁶²

The general failure of as-applied challenges is no surprise. As early as 2009, Julien Kern wrote of the administrative and logistical difficulties of gathering the most vulnerable potential voters for class action purposes.⁶³ As Kern put it:

After *Crawford*, even the most stringent voter identification laws must be challenged using the blunt tool of an as-applied challenge. Practical limitations on resources and remedies in an individual as-applied challenge are strong deterrents to effective representation. Furthermore, it is unclear whether a plaintiff class would be able to be certified in an as-applied class action against a voter identification law. Some precedent indicates that a putative voter identification class may fail on commonality grounds due to the necessity of a case-by-case examination of the burdens imposed by the voter identification law.

Thus, the reference in *Crawford* to a future as-applied solution is illusory. The invocation of an as-applied challenge as an adequate safeguard to protecting the right to vote in unconstitutional applications is an attractive idea on its face. But upon closer examination, it is a hollow promise, a legal chimera.⁶⁴

Nor have other softening devices proven to be greatly successful. Consider the “Election Identification Certificate,” which Texas created apparently to blunt the argument that its identification law constituted a poll tax. The certificate is

⁶² *Stewart v. Marion County*, 2008 WL 4690984:

[T]he Court concludes that even though Plaintiff asserts an “as applied” challenge to the Voter ID Law, the reasoning in *Crawford* still applies to Plaintiff's claim. Plaintiff has not designated any evidence to demonstrate a burden that, on balance, outweighs the State's interest in protecting against voter fraud. In his briefs, Plaintiff tries to demonstrate that he, and many other voters, have traveled great distances and paid fees they could not afford in order to get a free, valid Indiana photographic identification. However, as previously discussed, Plaintiff represents himself only, and not the rights of other voters. Additionally, Plaintiff succeeded in obtaining valid identification because he currently possesses a valid Indiana photographic identification. Ultimately, the burden on Plaintiff evidenced here is not significantly distinguishable from that of the plaintiffs in *Crawford*. As a result, the State's interest in protecting against voter fraud is “sufficiently weighty” to justify its requirement that Plaintiff present photographic identification in order to vote.

⁶³ Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board*, 42 LOY. L.A. L. REV. 629 (2009).

⁶⁴ *Id.* at 668-69.

available without a fee to those voters who do not have a state identity card. The voter still must pay whatever fees are necessary for documentation to prove citizenship and identity to obtain the EIC card.

According to an investigation by the *Texas Observer*, the Texas Department of Public Safety “has issued only 653 EICs across the state—only one ID for every 930 Texans who lack voter ID. In a survey of 46 counties that issue their own EICs, the *Observer* found that many elections administrators had little to no familiarity with the ID, and some expressed surprise that anyone would inquire about it.”⁶⁵

Next consider the “reasonable impediment” exemptions involved in the North Carolina and South Carolina voting laws. A federal district court recently denied a preliminary injunction to stop North Carolina from using its new voter identification law until a ruling on the merits on the challenge to the law. The district court relied heavily on the “reasonable impediment” rules in denying the preliminary injunction:

When the State did not have a reasonable impediment exception, NAACP Plaintiffs claimed the burden imposed on the socioeconomically disadvantaged was too severe. Now that the State has sought to accommodate these voters with the reasonable impediment exception, Plaintiffs claim that the exception swallows the rule and that the State need not have a photo-ID requirement. This court finds any alleged diminution in achieving the State’s purported interest to be more than offset by the reduction of burden achieved by the reasonable impediment exception.⁶⁶

While confusion reigns in North Carolina over how the state will actually implement its voter identification program in the first few elections,⁶⁷ in South Carolina elected officials do little to publicize the reasonable impediment exemption from the law. A report by *Think Progress* noted that South Carolina’s voter information program barely mentions the reasonable impediment exemption in fine print in voter information, and the governor of the state has incorrectly stated that voters must have photographic identification in order to be allowed to vote.⁶⁸

⁶⁵Hannah McBride, *Years After Voter ID Law, Alternative IDs Confuse Texas County Officials*, TEXAS OBSERVER, Mar. 1, 2016, <http://www.texasobserver.org/election-identification-certificates-voter-id/>.

⁶⁶ North Carolina State Conference of the NAACP v. McCrory, ___ F. Supp. 3d ___, 2016 WL 204481, *11 (M.D.N.C. 2016).

⁶⁷ Pam Fessler, *Election Officials Tackle Confusing Voter ID Laws in North Carolina*, NPR Mar. 4 2016, <http://www.npr.org/2016/03/03/469083115/election-officials-help-north-carolina-voters-tackle-confusing-voter-id-laws>.

⁶⁸ Kira Lerner, *South Carolina Voters are Getting Misleading Instructions About Voter ID*, THINK PROGRESS, Feb. 19, 2016, <http://thinkprogress.org/politics/2016/02/19/3750017/south-carolina-voters-are-getting-misleading-instructions-about-voter-id/>; see also Ari Berman, *67,536 Reasons*

Some voters are confused, with confusion beginning with the fact that some voters do not know what the word “impediment” means and therefore have difficult time taking advantage of the exception.⁶⁹

In response to the *Think Progress* article, the South Carolina Election Commission wrote on Twitter incorrect information, stating that if a voter does not bring the right photographic identification to the polls, “you’ll have to show it later for your vote to count.”⁷⁰ This is not true for voters who take advantage of the reasonable impediment exemption. The state then corrected this misinformation in a follow-up tweet.⁷¹

This raises a related problem: election administrator and poll worker error. A poll worker in South Carolina expressed concern that given the poor information campaign of South Carolina officials, many poll workers will not know that voters may cast ballots without a photographic identification upon signing an affidavit of a reasonable impediment to voting.⁷²

Consider this case from Texas, where state law requires poll workers to accept identification from voters whose names on the rolls are “substantially similar”⁷³ to those on a photographic identification card:

A strict interpretation of the law ended up disenfranchising Taylor Thompson, a student at Texas State University in San Marcos. Thompson’s name on the voter registration card she received in the mail was incorrectly spelled “Tayllor Megan Rose Thompson.” Because it didn’t match her name on her photo ID, which is “Taylor Megon-Rose Thompson,” she was barred from voting. Nor was she offered a provisional ballot, which would

Racism is Still Alive in South Carolina, THE NATION, Feb. 25, 2016, <http://www.thenation.com/article/63756-reasons-why-racism-is-still-alive-in-south-carolina/>;

⁶⁹ Author interview with Kathleen Unger of VoteRiders, March 5, 2016.

⁷⁰ https://twitter.com/scvotes/status/701065823968956416?ref_src=twsrc%5Etfw. The exchange over Twitter with the author of the *Think Progress* article is instructive.

⁷¹ https://twitter.com/scvotes/status/701067445788917761?ref_src=twsrc%5Etfw.

⁷² Zachary Roth, *Confusion over South Carolina Voter ID Law Could Keep Voters Away*, MSNBC, Feb. 12, 2016, <http://www.msnbc.com/msnbc/confusion-over-south-carolina-id-law-could-keep-voters-away> (“There’s concern, too, that some poll workers might not enforce the law correctly. People without ID are supposed to be allowed to vote simply by signing an affidavit saying they had a ‘reasonable impediment’ that stopped them from getting one and explaining what the impediment was. They can give essentially any reason. But Leonard, a trained poll worker herself, said she’s not at all confident that all poll workers will know the rules. ‘It’s not clear to poll workers that they should accept any reason,’ she said, ‘It’s not emphasized in the poll worker training.’”).

⁷³ TEXAS ELEC. CODE § 63.001(c), <http://www.statutes.legis.state.tx.us/Docs/EL/htm/EL.63.htm>.

have allowed her to return in the next six days to straighten out the problem and have her vote counted.⁷⁴

The law required Texas election officials to offer Ms. Thompson that provisional ballot;⁷⁵ it was not incumbent upon her to ask for it.

Finally, this problem with administrative discretion appears no better in Wisconsin, where the state Supreme Court engaged in creative statutory interpretation to require its Department of Motor Vehicles to exercise discretion to assist voters in obtaining full documentation required to obtain a state-issued voter-identification cards.

The trial court in one of the two cases raising problems with the Wisconsin process began its opinion with this vignette:

Mrs. Smith has lived in Milwaukee since 2003. She was born at home, in Missouri, in 1916. In her long life she has survived two husbands, and she has left many of the typical traces of her life in public records. But, like many older African Americans born in the South, she does not have a birth certificate or other documents that would definitively prove her date and place of birth. After Wisconsin's voter ID law took effect, she needed a photo ID to vote. So she entered the ID Petition Process (IDPP) at the Wisconsin Department of Motor Vehicles (DMV) to get a Wisconsin ID. DMV employees were able to find Mrs. Smith's record in the 1930 census, but despite their sustained efforts, they could not link Mrs. Smith to a Missouri birth record, so they did not issue her a Wisconsin ID. She is unquestionably a qualified Wisconsin elector, and yet she could not vote in 2016. Because she was born in the South, barely 50 years after slavery, her story is particularly compelling. But it is not unique: Mrs. Smith is one of about 100 qualified electors who tried to but could not obtain a Wisconsin ID for the April 2016 primary.⁷⁶

As to the scope of the problem in Wisconsin, the trial court found a few hundred voters who had trouble navigating the process to obtain an identification from the Wisconsin DMV.⁷⁷ The judge described the type of voters facing problems as follows:

⁷⁴ Zachary Roth, *Scattered Problems for Voting at Polling Sites, Especially in the South*, MSNBC, Mar. 1, 2016, <http://www.msnbc.com/msnbc/scattered-problems-voters-polling-sites-especially-the-south>.

⁷⁵ TEXAS ELEC. CODE § 63.001(g)(1), <http://www.statutes.legis.state.tx.us/Docs/EL/htm/EL.63.htm>.

⁷⁶ One Wisconsin Institute, 2016 WL 4059222, *2.

⁷⁷

The petitioners in suspended or denied status were the ones who faced serious roadblocks in the IDPP: their birth records did not exist, or those records did not perfectly match their names or other aspects of their identities, such as Social Security records. The problems arose because the DMV evaluated IDPP petitions for voting IDs by using the same identification standards that it applied to applications for Wisconsin driver licenses and standard IDs. To acquire any one of these products from the DMV, a person must prove both their identity and their legal presence in the United States. Thus, the DMV refused to issue IDs to IDPP petitioners until CAFU could confirm their identities with a match to a valid birth record, or to some equivalently secure alternative. Some petitioners simply could not meet the DMV's standard of proof, and so they could not obtain free IDs.

*The lack of a valid birth record correlated strikingly, yet predictably, with minority status. The evidence at trial demonstrated that Puerto Rico, Cook County, Illinois, and states with a history of *de jure* segregation have systematic deficiencies in their vital records systems. Voters born in those places were commonly unable to confirm their identities under the DMV's standards. For example, many African American residents in Wisconsin were born in Cook County or in southern states. And many of the state's Latino residents were born in Puerto Rico. *Id.* As of April 2016, more than half of the petitioners who had entered the IDPP were born in Illinois, Mississippi, or a southern state that had a history of *de jure* segregation.⁷⁸

The problems each disenfranchised voter faces is fact specific, making class action lawsuits to solve identification problems difficult. Administrative discretion, lack of understanding by voters, and lack of publicity leave many administrative softening devices underutilized and unfairly implemented.

Many people successfully navigated the IDPP. Out of 1,389 petitions for free IDs, the DVM issued IDs to 1,132 petitioners. Of the petitioners who applied, 487 had to go through "adjudication," which included a full investigation by CAFU and a final decision from Jim Miller, the head of the DMV's Bureau of Field Services (a different unit from CAFU). 230 of the petitioners who went through adjudication received IDs; 257 petitioners did not. DMV records indicate that 98 of the petitioners who did not receive IDs after adjudication cancelled their petitions.

Id. at *12 (citations omitted)

⁷⁸ *Id.* at *12-13 (citations omitted).

In sum, softening in practice so far has not fixed problems for voters facing special burdens to produce identification to vote, and it will take considerable effort to make these devices viable means for avoiding disenfranchisement.⁷⁹

It will take detailed empirical study of how jurisdictions handle softening devices before we can have confidence that particular means of avoiding disenfranchisement are successful. At this point, the evidence does not inspire confidence.

III.

INSTEAD OF SOFTENING, A NEW BALANCE

The last Part demonstrated that softening of voter identification laws in theory does not necessarily lead to softening of voter identification laws in practice. Difficulties of proof, administrative problems, and poll worker error all make voter identification softening devices less than ideal to ameliorate the harshness of voter identification laws for those facing difficulty producing the right document to vote.

Further, these laws impose other social costs. They suck up resources of voting rights groups and others, sometimes quite significant, to fight for individual rights to vote.⁸⁰ They are also expensive for states and local governments to administer. A proposed Missouri voter identification law has been estimated to cost \$17 in its first three years.⁸¹ And each fight threatens to disenfranchise a voter who cannot put up with the administrative hassle.

As historian Allan Lichtman noted in a recent court filing in the Wisconsin case, the Wisconsin DMV's improper decisions to deny voter identification cards to 19 applicants who sought to obtain the cards worked an unprecedented disenfranchisement:

Although 19 outright denials may seem like a small number, as far as I know it represents the first time since the era of the literacy test that state officials have told eligible voters that they cannot exercise their fundamental right to vote – not in the next election, probably not ever — ... I am unaware in the post-voting rights era of other examples of state officials telling eligible

⁷⁹ One of the judges on the Fifth Circuit panel who believed that softening the law as a good enough remedy, cited an earlier draft of this article, remarking: "I also disagree with the opposite criticism that this interbranch engagement ameliorates too little, though that argument is contributory." *Veasey v. Abbott*, 2016 WL 3923868, *44 (Higgonson, J., concurring).

⁸⁰ Consider, for example, the work of VoteRiders, <http://www.voteriders.org/>, whose sole mission is to get voters the identification materials they need in states which have adopted strict, tough voter identification laws.

⁸¹ Jon Swedien, *Bill Requiring Photo ID at Polls Advances in Legislature*, SPRINGFIELD NEWS-LEADER, Feb. 6, 2016, <http://www.news-leader.com/story/news/politics/elections/2016/02/06/bill-requiring-photo-id-polls-advances-legislature/79896192/>.

citizens of their state that they cannot vote because they fail to meet an external criteri[on] established by the state — unrelated to age, residency or other objective qualification for voting.⁸²

It is hard to quantify just how many people are deterred from voting because of strict voter identification laws, as well as how many people who would otherwise deterred would have been able to take advantage of one of these softening devices. (This does not even count voters who cannot vote because they have been deterred by registration requirements, such as those in Kansas, requiring documentary proof of U.S. citizenship before voting.⁸³) But a focus on aggregate numbers puts the emphasis in the wrong place, away from individual voters' rights and dignity and on naked partisan effects.

This debate over numbers parallels the focus of some opponents of voter identification laws on whether voter identification laws will depress turnout, and if so, whether the turnout can skew the election in favor of Republicans and away from Democrats.⁸⁴ Such laws certainly appear to be intended by many Republicans to make it harder to vote,⁸⁵ even if they do not necessarily have that effect. But this misses the point: there is no good reason why *any* voters, regardless of party, should face significant hurdles to voting for no good reason.

⁸² See *One Wisconsin Now v. Nichol*, Case 15-CV-324, is Plaintiffs' Brief in Support of Motion for Miscellaneous Relief, Motion for Partial Reinstatement of Voter ID Claims filed Feb. 24, 2016, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PlaintiffsBriefinSupportofMotionforMiscellaneousReliefMotionforPartialReinstatementofVoterID.pdf>, quoting Feb. 16, 2016 Expert Rebuttal Report of Allan J. Lichtman, at 15-16 (footnotes and emphasis omitted).

⁸³ Sari Horowitz, *Want to Vote in this State? You Have to Have a Passport or Dig Up a Birth Certificate*, WASH. POST, Feb. 19, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/>.

⁸⁴ On the difficulty of determining how voter identification laws affect turnout, see Robert S. Erickson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION LAW JOURNAL 85 (2009) (“We should be wary of claims – from all sides of the controversy – regarding turnout effects from voter ID laws.... [T]he data are not up to the task of making a compelling statistical argument.”). For a recent draft study provisionally accepted at the *Journal of Politics* finding a turnout effect which skews against Democratic and minority voters, see Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, draft available <http://pages.ucsd.edu/~zhajnal/page5/documents/VoterIDLawsandtheSuppressionofMinorityVotes.pdf>. See also Janie Valencia & Alissa Scheller, *Fewer Democrats are Voting This Year in (Surprise!) States with New Strict Voter Laws*, HUFFINGTON POST, Mar. 3, 2016, http://www.huffingtonpost.com/entry/voter-id-laws-democratic-turnout_us_56d8c5bae4b0000de403f238. A study like this one does not account for other reasons turnout may be down aside from restrictive voting laws. For example, Democratic turnout may have been down in the Democratic primary in Texas because neither Hillary Clinton nor Bernie Sanders expended great resources in the large and expensive state, but Republicans saw a contested presidential primary race including a great push for votes by U.S. Senator from Texas Ted Cruz.

⁸⁵ See HASEN, *supra* note 13, ch 2.

Consider those 19 disenfranchised voters in Wisconsin. Are they being disenfranchised for a good reason? And what of eligible voters who are the victim of administrative incompetence, like Ms. Thompson in Texas, or voters who simply forget their correct identification at home, and cannot afford the few hours to wait in line and return to vote or show up at a government agency in the requisite time period at the voter's own expense to prove identity? Why is it not unconstitutional to put new roadblocks in front of voters without adequate justification? The evidence that such laws prevent impersonation fraud or instill voter confidence is essentially non-existent.⁸⁶

As I have argued elsewhere,⁸⁷ we need a new approach to potentially burdensome voting laws which makes the state come forward with actual evidence that they are necessary:

In reviewing laws which impose burdens on voters, courts should adopt something along the lines of the "strict scrutiny light" standard which Judge [Terence] Evans advanced in his Seventh Circuit *Crawford* dissent. When a legislature passes an election-administration law discriminating against a party's voters or otherwise burdening voters, courts should read the Fourteenth Amendment's Equal Protection Clause to require the legislature to produce real and substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. This approach would not require delving into the motives of legislators to determine if they were merely self-interested and had passed laws to hurt the other party, as opposed to being motivated by a desire to prevent fraud, save money, or instill voter confidence. Instead, evidence of such intent should prompt courts to look skeptically upon asserted state interests unsupported by actual evidence.⁸⁸

⁸⁶ On the lack of evidence of impersonation fraud, see HASEN, *supra* note 1313, ch 2.; Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WONKBLOG, WASH. POST, Aug. 6, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>;

Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008); Charles Stewart III, Stephen Ansolabehere, and Nathaniel Persily, *Revisiting Public Opinion on Voter Identification in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455 (2016)..

⁸⁷ Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014) (citations omitted), <http://harvardlawreview.org/2014/01/race-or-party-how-courts-should-think-about-republican-efforts-to-make-it-harder-to-vote-in-north-carolina-and-elsewhere/>.

⁸⁸ *Id.*

Sam Issacharoff, building an analogy from antitrust law, has developed a similar “rule of reason” framework for evaluating when courts should intervene to block cutbacks to voting rights to politically vulnerable populations:

Two sets of cases provide the backdrop for the rule of reason analysis in voting rights law, one a statutory claim under Section 2 of the Voting Rights Act, the other a constitutional claim. Each involves a challenge to altered rules for the ability to cast a vote, with one dealing with voter identification requirements and the other with the availability of early in-person voting. What unifies them for purposes here is that both apply doctrines not generally directed at voting practices to craft a nuanced test for the relationship between the stated state objective and the burdens.

Each line of cases begins by identifying a threshold burden on the franchise and then shifts the bulk of the judicial inquiry to the state’s justification for the burden. Each eschews any rigid ruling that the claim to a particular form of identification or a particular form of early voting is an entitlement. At the same time, each carefully sidesteps any finding of improper purpose or animus on the part of state officials. Rather, each concludes by finding that the state fails to meet a burden of justification for proving that the claimed state objectives are best addressed at the cost of the associated burdens upon prospective voters.⁸⁹

These new kinds of approaches, focusing on each voter’s right to vote free of unnecessary burdensome restrictions, is better than a deferential approach to voting cutbacks coupled with softeners.

In the end, the courts are misguided in relying upon softening devices to justify otherwise upholding unnecessary voting restrictions. The softening devices do not appear to be helping as much as the judges and justices may have envisioned, and in the meantime, an uncertain number of voters are being disenfranchised, inconvenienced, and discouraged from voting for no good reason. It would be better to throw these laws out completely than to pretend softening devices have significantly eased their ill effects.

⁸⁹ Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law* IND. L.J. (forthcoming 2016), draft available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2788808 (manuscript at 14-15).