

more open, substantive, and competitive,⁶⁹ while making others merely “nastier, noisier, and costlier.”⁷⁰ This result is consistent with *White*’s libertarian impulses. Whether it is good or bad for judges, litigants, and voters remains to be seen.

III. VOTER IDENTIFICATION LAWS

Of the various electoral procedure laws passed in the fifty states since the 2000 and 2004 presidential elections and those still being debated in state legislatures and local media, few arouse more potent partisan feelings than voter identification laws. Vanishing are the days of honor-system voting: in response to growing concerns about evident and potential voter fraud, states have begun to adopt stricter requirements for identification of voters. Seven states have tightened such restrictions to permit only photographic identification, and other states continue to debate similar restrictions.¹ Although the photographic identification requirement might curtail voter fraud, the cost to voters could be prohibitively high, threatening to disenfranchise racial minorities, immigrants, the poor, the elderly, and the disabled. Ultimately, as Democratic and Republican legislators battle over these antifraud provisions,² it will fall to the courts to balance the concerns regarding effective election administration against the potential burdens on disadvantaged voters. This Part argues that, absent clear empirical evidence demonstrating widespread individual voter fraud, legislatures need to fashion narrowly tailored voter identification

⁶⁹ Cf. Dimino, *supra* note 10, at 301–02.

⁷⁰ Roy A. Schotland, Comment, LAW & CONTEMP. PROBS., Summer 1998, at 149, 150.

¹ See Nat’l Conference of State Legislatures, State Requirements for Voter ID, <http://www.ncsl.org/programs/legman/elect/taskfc/VoterIDReq.htm> (last updated Oct. 11, 2005). The states requiring photographic identification at the polls are Florida, Georgia, Hawaii, Indiana, Louisiana, South Carolina, and South Dakota. *Id.*; see also [electionline.org](http://www.electionline.org), Voter ID Legislation, <http://www.electionline.org/Default.aspx?tabid=473> (last visited Jan. 15, 2006) (surveying pending legislation to enact new identification requirements).

² For a discussion of partisan divisions in attitudes toward the electoral process, see JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 16–17 (2004), which describes a 2004 Rasmussen Research poll asking individuals whether they were more concerned by voting by ineligible participants or by disenfranchisement of eligible voters. Sixty-two percent of Kerry supporters and eighteen percent of Bush supporters worried more about disenfranchisement; fifty-nine percent of Bush supporters and nineteen percent of Kerry supporters were more concerned with voter fraud. See also *Common Cause/Ga. v. Billups*, No. 4:05-CV-201-HLM, at 10 (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf> (noting that a committee report presented to the Georgia House of Representatives concerning a bill requiring photographic identification at the polls was approved by eighty-nine Republicans and two Democrats and opposed by seventy-two Democrats and three Republicans), *stay of preliminary injunction denied*, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.

provisions with an eye toward the inevitable and well-grounded constitutional challenges that will arise in the courts. Only as states grow more adept at administering elections will courts likely demonstrate greater willingness to uphold strict identification requirements.

A. *The Partisan Controversy over Voter Fraud*

The trend toward adoption of photographic identification requirements, and the controversy such provisions engender, is not likely to abate. Legislative and judicial battles will continue as long as support for stricter or looser voter identification requirements remains divided along party lines. On the one hand, some legislators likely will continue to claim widespread voter fraud, drawing upon largely anecdotal evidence to support their assertions. Examples from the 2004 presidential election abound. In Wisconsin, a voter turnout of nearly three million boosted John Kerry to an 11,000-vote victory — one of the nation's closest contests — helped in no small part by the election results in Wisconsin's major cities. Milwaukee, notably, boasted close to a 50% turnout, with over 277,000 votes cast. But a discrepancy emerged after election day, growing clearer in the days and months following: city records revealed fewer than 273,000 registered voters had actually participated in the election.³ The ensuing allegations and investigations in Milwaukee resemble others across the country, with at least sixteen states currently embroiled in disputes over possible 2004 election irregularities and voter fraud.⁴

Even the potential for fraud can appear daunting: the *Chicago Tribune* reported discovering the names of over 180,000 deceased persons still on the voter rolls in six “swing” states pivotal to the 2004 election,⁵ while other reports conclude that voting lists nationwide are bloated with the names of individuals who have moved, died, or been convicted of a felony.⁶ Numerous commentators also highlight the

³ JAMES FINCH ET AL., PRELIMINARY FINDINGS OF JOINT TASK FORCE INVESTIGATING POSSIBLE ELECTION FRAUD 5 (2005), <http://www.wispolitics.com/1006/electionfraud.pdf>; Greg J. Borowski, *Inquiry Finds Evidence of Fraud in Election*, MILWAUKEE J. SENTINEL, May 11, 2005, at 1A.

⁴ See AM. CTR. FOR VOTING RIGHTS, VOTE FRAUD, INTIMIDATION & SUPPRESSION IN THE 2004 PRESIDENTIAL ELECTION (Aug. 2, 2005), <http://www.ac4vr.com/reports/072005/default.html> (detailing findings in Alabama, Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, Virginia, Washington, West Virginia, and Wisconsin).

⁵ Geoff Dougherty, *Dead Voters on Rolls, Other Glitches Found in 6 Key States*, CHI. TRIB., Dec. 4, 2004, § 1, at 13. The referenced “swing” states include Florida (with approximately 65,000 names of the deceased still on the rolls), Michigan (approximately 50,000 names), New Mexico (over 5000 names, in a state where the presidential election was decided by 6000 votes), Iowa, Minnesota, and Ohio.

⁶ FUND, *supra* note 2, at 23–24.

manipulability of voter registration rules and vote counts.⁷ And the impact of voter fraud on elections, even at a local level, suggests potentially far-reaching effects: in the state of Washington, one court found that a gubernatorial election decided by a roughly 130-vote margin was tainted by the casting of up to 1600 illegal votes.⁸

On the other hand are those who challenge claims that voter fraud is a substantial problem and who believe that, in any event, a functioning democracy should make every effort to encourage broad participation. Even the most relaxed provisions for identification at the polls — anything stricter than the honor system used in North Dakota⁹ — will impose some burden on particular voters. Individuals who do not receive utility bills and immigrant workers paid in cash find it difficult to comply with even nonphotographic documentation criteria. Many voters face significant difficulties in obtaining birth certificates or other documentation from states of prior residence.¹⁰ Homeless individuals without traditional street addresses face additional obstacles to registering and voting.¹¹

One notable example highlights the fundamental tension between claims of voter fraud and fears of disenfranchisement. When the bipartisan Carter-Baker Commission on Federal Election Reform¹² is-

⁷ See, e.g., Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 288–89 (2005) (“Anyone who has ever moved into a new house or apartment and received bank statements and other government documents (all of which would satisfy the HAVA requirement) in the mail intended for the former occupants knows how easy it is to obtain such documents. When combined with the huge rise in identity theft, it is obvious that allowing documents without photographs is not an acceptable security measure for our voter registration and voting process.”).

⁸ AM. CTR. FOR VOTING RIGHTS, *supra* note 4, at <http://www.ac4vr.com/reports/072005/washington.html> (citing *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 24, 2005)). See generally Part IV, *infra* pp. 1155–65.

⁹ See *infra* note 23.

¹⁰ See *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, at 32 (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf>, stay of preliminary injunction denied, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.

¹¹ In response to this problem, several states have enacted legislation based on the Model State Homeless Voter Registration Act. See Jennine Miller & Peter Gonzales, “*I Matter! I Vote!*”: *Overcoming the Disenfranchisement of Homeless and Formerly Homeless Voters*, 11 TEMP. POL. & CIV. RTS. L. REV. 343, 350–51 (2002). The Model Act redefines residency for homeless voters:

A person living in a residential shelter may be considered a resident of the election district where the shelter is located. A person living in a non-traditional abode other than a residential shelter has the following choices as to her voting residence: her “geographic location” or the street address of a homeless provider with which she has a relationship.

NAT’L COAL. FOR THE HOMELESS, MODEL STATE HOMELESS VOTER REGISTRATION ACT § 4, <http://www.nationalhomeless.org/getinvolved/projects/vote2004/model.html> (last visited Jan. 15, 2006).

¹² The twenty-one-member Carter-Baker Commission, chaired by former U.S. President Jimmy Carter and former U.S. Secretary of State James A. Baker III, was established in conjunc-

sued its recommendations for changes to the electoral process on September 19, 2005,¹³ the critical response — from election law scholars, voter advocacy groups, and dissenters within the Commission itself — focused on the proposed nationwide tightening of the Help America Vote Act of 2002¹⁴ (HAVA) requirements to resemble the photographic identification laws since passed in Georgia and Indiana. The Commission suggested a uniform system of voter identification based on the REAL ID Act of 2005,¹⁵ which would require voters to present a photographic identification, including proof of name, birthdate, address, Social Security number, and U.S. citizenship, before their votes could be counted.¹⁶ Although the Commission's suggestions have no legal force, they have nonetheless worried voting rights advocates, who are concerned that such recommendations will make federal and state lawmakers, as well as the public, more amenable to the implementation of photographic identification requirements.¹⁷

tion with American University's Center for Democracy and Election Management and a number of other organizations to prepare proposals for election reform based on research and hearings over a six-month period in 2005. See Robert A. Pastor, Welcome Message to the Am. Univ. Ctr. for Democracy and Election Mgmt., <http://www.american.edu/ia/cfer/welcome.htm> (last visited Jan. 15, 2006).

¹³ COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005), available at http://www.american.edu/ia/cfer/report/full_report.pdf.

¹⁴ Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C.).

¹⁵ Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of 8 and 49 U.S.C.). The Act mandates specific requirements, to be met by the states by 2008, for the issuance of photographic identification that individuals will be required to present, for example, to board a plane, open a bank account, or enter a federal building. § 202, 119 Stat. at 312; see also Declan McCullagh, *Senate Approves Electronic ID Card Bill*, ZDNET NEWS, May 10, 2005, http://news.zdnet.com/2100-1009_22-5702505.html.

¹⁶ COMM'N ON FED. ELECTION REFORM, *supra* note 13, at 19.

¹⁷ For example, Commissioner Spencer Overton noted in dissent that the identification proposal would adversely affect "the poor, the disabled, the elderly, students, and people of color." Spencer Overton, Dissenting Statement on the Carter-Baker Report, <http://carterbakerdissent.com/dissent.php> (last visited Jan. 15, 2006). Professor Overton further noted:

According to the Georgia chapter of AARP, 36% of Georgians over age 75 do not have a drivers' license. In the United States, more than 3 million people with disabilities do not have identification issued by the government. A June 2005 study in Wisconsin found that the rate of driver's license possession among African Americans was half that for whites, and that only 22% of black males age 18 to 24 had a driver's license. The lack of government-issued photo ID is particularly acute among Native Americans, some of whom have religious objections to photo ID.

Id. Senator Barack Obama proposed a concurrent resolution that specifically rejected the Commission's photographic identification requirement on similar grounds. See S. Con. Res. 53, 109th Cong. (2005). The resolution notes, among other things, that twelve percent of voting-age Americans, mostly minorities, new citizens, the poor, the elderly, and the disabled, do not possess drivers' licenses and that the Carter-Baker Commission's predecessor, the Carter-Ford Commission, recognized in 2001 that a photo ID requirement would "impose an additional expense . . . that would fall disproportionately on people who are poorer and urban." *Id.* at 2 (quoting JOHN

*B. Tightening Voter Identification Requirements in the
Wake of HAVA*

Legislators hoping to stiffen their state antifraud laws have taken their cue from identification provisions buried in HAVA. The first focused effort by Congress to regulate the actual mechanisms by which elections are administered,¹⁸ HAVA set forth comprehensive requirements designed “to assist in the administration of Federal elections and . . . to establish minimum election administration standards for States and units of local government.”¹⁹ Section 303(b), ostensibly included in the Act to minimize voter fraud,²⁰ outlines minimum requirements for identification of voters who register by mail, including presentation of photographic identification. Section 303(b) offers numerous alternatives, however, such as “a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”²¹ Nonetheless, these standards are merely a floor; HAVA makes explicit that it shall not “be construed to prevent a State from establishing election technology and administration requirements that are more strict than” HAVA itself provides.²²

The states have accepted the invitation. Twenty-two now require some form of identification of all voters at the polls rather than merely those who register by mail, and seven of those request specifically photographic identification.²³ Two of those seven — Indiana and Georgia

MARK HANSEN, TASK FORCE ON THE FED. ELECTION SYSTEM, VERIFICATION OF IDENTITY 4 (July 2001), *available at* http://www.tcf.org/Publications/ElectionReform/full_tf_report.pdf.

¹⁸ *See* Colo. Common Cause v. Davidson, No. 04CV7709, 2004 WL 2360485, at *4 (Colo. Dist. Ct. Oct. 18, 2004).

¹⁹ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1666.

²⁰ *See, e.g.,* *Hearing on H.R. 3295 Before the H. Comm. on the Judiciary*, 107th Cong. (2001), *available at* 2001 WL 1552086 (F.D.C.H.) (statement of Rep. F. James Sensenbrenner, Jr.) (identifying voter fraud as a key impetus for certain provisions of HAVA); Remarks by the President at Signing of H.R. 3295, Help America Vote Act of 2002 (Oct. 29, 2002), 2002 WL 31415995 (White House), at *2 (same).

²¹ 42 U.S.C. § 15483(b)(2)(i)(II) (Supp. II 2002).

²² *Id.* § 15484.

²³ *Compare* GA. CODE ANN. § 21-2-417 (Supp. 2005), *and* IND. CODE ANN. § 3-5-2-40.5 (West Supp. 2005), *with, e.g.,* LA. REV. STAT. ANN. § 18:562(A)(2) (2004), *and* S.D. CODIFIED LAWS § 12-18-6.1 to 6.2 (LexisNexis Supp. 2003). *See also* Nat’l Conference of State Legislatures, *supra* note 1. In rare cases, by contrast, states have actually avoided meeting HAVA’s minimum requirements. Some, such as North Dakota, have made a determination (unchallenged by the federal government) that they are exempt from the ID requirement. North Dakota waives the requirement of identification for voters known personally to a poll worker, an allowance “rooted in [the] rural character [of the state’s] small precincts, where local election boards know most of the voters.” State of N.D., What Does HAVA Mean for North Dakota?, <http://www.nd.gov/hava/about/havand.html> (last visited Jan. 15, 2006). Alaska law includes a similarly permissive provision. *See* ALASKA STAT. § 15.15.225(b) (2004). Other instances, too, demonstrate HAVA’s susceptibility to varying judicial interpretation. In a move upheld by the New Mexico Supreme Court

— accept only photographic identification at the polls²⁴ and have thereby placed themselves at the very center of the partisan controversy over the constitutionality of such requirements. What remains to be determined is how far a state may go beyond HAVA's flexible identification requirements.

*C. Preliminary Legal Challenges to
Photographic Voter Identification Requirements*

Legislators who seek to craft constitutionally sound provisions would do well to look to the test articulated in *Burdick v. Takushi*.²⁵ Decided in 1992 and applied in recent district court cases addressing voter identification provisions, *Burdick* represented a departure from a previous line of election law jurisprudence that provided for strict scrutiny of any voting restrictions potentially implicating the Equal Protection Clause.²⁶ Recognizing that “[e]lection laws will invariably impose some burden upon individual voters,”²⁷ *Burdick* replaced the strict scrutiny of earlier cases with a “more flexible standard”:²⁸

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . .

Instead, . . . [a] court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into con-

shortly before the 2004 election, New Mexico's Secretary of State interpreted HAVA's identification requirements as applying only to new voters registering by mail and not to existing voters or to anyone registering in person. See BRENNAN CTR. FOR JUSTICE, NYU SCH. OF LAW, SUMMARY OF LITIGATION CONCERNING PROVISIONAL BALLOTS IN THE 2004 ELECTIONS 7–8, <http://www.votelaw.com/blog/blogdocs/provisional%20ballot%20litigation%20list%20v6.pdf> (last visited Jan. 15, 2006) (summarizing *Vigil-Giron v. Kunko*, No. 4/28888 (N.M. Sept. 28, 2004)); Deborah Baker, *Court Sides with Madrid in Voter ID Dispute*, ABQJOURNAL.COM, Sept. 28, 2004, <http://albuquerquejournal.com/elex/apvoterido9-28-04.htm?rrc>.

²⁴ GA. CODE ANN. § 21-2-417 (2005); IND. CODE ANN. § 3-5-2-40.5 (West 2005); see also Mark K. Matthews, *States Require New Proof of Identity at Polls*, STATELINE.ORG, Apr. 27, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=27991>. Wisconsin passed a similar law that was subsequently vetoed by the Governor in May 2005. Assem. B. 63, 2005–06 Leg. (Wis. 2005); see electionline.org, *supra* note 1.

²⁵ 504 U.S. 428 (1992).

²⁶ See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625–30 (1969).

²⁷ *Burdick*, 504 U.S. at 433.

²⁸ *Id.* at 434.

sideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”²⁹

Before the suit for invalidation of Georgia’s 2005 photographic identification law, no state voter identification provision had been successfully challenged under the *Burdick* test for constitutionality. And rightly so: no other state had so ambitiously exceeded HAVA’s prescribed minimum standards for election administration. The challenges that arose to state identification provisions adhering closely to HAVA’s requirements — *League of Women Voters v. Blackwell*,³⁰ *Bay County Democratic Party v. Land*,³¹ and *Colorado Common Cause v. Davidson*³² — were never likely to succeed without challenging the constitutionality of HAVA itself. Indeed, as the *Bay County* court noted (and as could have been observed equally with respect to the other two cases), the plaintiffs tellingly avoided the monumental endeavor of challenging HAVA,³³ attempting instead to distinguish the state provisions based on differences in the forms of identification accepted at the polling place.³⁴ A pattern seemed to be emerging: so long as states offered a range of alternatives comporting approximately with HAVA’s flexible identification requirements, the constitutionality of polling-place voter identification was secure. Because Georgia offered no such alternatives and relied on a strict requirement of photographic identification, *Common Cause/Georgia v. Billups*³⁵ serves as a bellwether for assessing the constitutionality of voter identification provisions.³⁶

Regardless of its ultimate outcome, the legal dispute over the Georgia identification laws strikingly captures the fundamental tension between the purported urgency of combating voter fraud and the likely unconstitutional burden that poorly drafted and hastily implemented photographic identification requirements place upon traditionally disadvantaged voters. *Common Cause/Georgia* concerns Georgia House Bill 244 (HB 244), which required voters to present state-issued photo-

²⁹ *Id.* at 433–34 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213–14 (1986)).

³⁰ 340 F. Supp. 2d 823 (N.D. Ohio 2004).

³¹ 347 F. Supp. 2d 404 (E.D. Mich. 2004).

³² No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004).

³³ *See Bay County*, 347 F. Supp. 2d at 435.

³⁴ *See id.* at 434.

³⁵ No. 4:05-CV-0201-HLM, at 32 (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf>, *stay of preliminary injunction denied*, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.

³⁶ Similar litigation is now pending in Indiana. *See* Complaint for Declaratory and Injunctive Relief, *Crawford v. Marion County Election Bd.*, No. 1:05-CV-00804-SEB-VSS (Ind. Super. Ct. Apr. 28, 2005), available at <http://www.aclu.org/FilesPDFs/ACF6FA3.pdf>.

graphic identification at the polls and narrowed the forms of acceptable identification from seventeen to six.³⁷ Georgia's Secretary of State wrote the Governor asking for a veto of HB 244,³⁸ arguing that the state had ample existing stopgaps to prevent fraud, that the bill would create substantial obstacles to poor and elderly voters,³⁹ and that the amendment likely violated both the federal and Georgia Constitutions.⁴⁰ The state nonetheless enacted HB 244, and after a brief review, the Department of Justice approved the new law⁴¹ on August 26, 2005.⁴² A coalition of civil rights advocacy organizations filed a complaint against state and local election officials in federal court, seeking a declaration that the statute is unconstitutional and an injunction against its enforcement.⁴³ While acknowledging the contrary holdings in predecessor cases,⁴⁴ the *Common Cause/Georgia* court granted the injunction, finding a substantial likelihood that the plaintiffs would prevail on the merits.⁴⁵

Like its predecessors,⁴⁶ *Common Cause/Georgia* applied the *Burdick* test in weighing the interests of the state in preventing fraud against the potential burden placed on disadvantaged voters. But while the laws at issue in *Blackwell* and its ilk imposed additional regulations in the form of voter identification at the polls, the allowance of additional forms of identification helped ensure that courts would find those provisions sufficiently nondiscriminatory — if a dis-

³⁷ *Common Cause/Ga.*, No. 4:05-CV-0201-HLM, at 32.

³⁸ See Letter from Cathy Cox, Ga. Sec'y of State, to Sonny Perdue, Governor of Ga. (Apr. 8, 2005), available at <http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168>.

³⁹ In particular, the Secretary noted that the law would affect over 150,000 individuals over age sixty, that the poorest citizens might be unable to bear the cost of an identification card, thereby constituting an illegal poll tax, and that with DMV offices in only 56 of its 159 counties, Georgia would be placing a general burden on citizens who needed to travel outside their home counties to obtain state-issued IDs. *Id.* at 2–3.

⁴⁰ *Id.* at 4–5.

⁴¹ 42 U.S.C. § 1973c prevents legal enforcement of any changes to voting rules in specific jurisdictions pending review by either the U.S. District Court for the District of Columbia or the U.S. Attorney General.

⁴² Tyler Lewis, *Despite Strong Opposition, DOJ Approves Georgia Voter I.D. Bill*, CIVILRIGHTS.ORG, Aug. 31, 2005, <http://www.civilrights.org/issues/voting/details.cfm?id=35131>.

⁴³ Complaint for Declaratory and Injunctive Relief at 2, *Common Cause/Ga. v. Billups*, No. 4:05-CV-201-HLM (N.D. Ga. Oct. 18, 2005), available at <http://www.acluga.org/briefs/voterID/complaint.pdf>.

⁴⁴ See *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, at 121–22 n.10 (N.D. Ga. Oct. 18, 2005) (order granting preliminary injunction), available at <http://www.acluga.org/briefs/voterID/condensed.pdf>, *stay of preliminary injunction denied*, No. 05-15784-G (11th Cir. Oct. 27, 2005), available at <http://www.votingrights.org/news/downloads/Order%20Denying%20Stay.pdf>.

⁴⁵ *Id.* at 120–21.

⁴⁶ See *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 828–29 (N.D. Ohio 2004); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 435 (E.D. Mich. 2004); *Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *3 (Colo. Dist. Ct. Oct. 18, 2004).

advantaged voter could not produce photographic identification, a utility bill, paycheck, or naturalization document would suffice.⁴⁷ What distinguishes the provision at issue in *Common Cause/Georgia* is the refusal to accept these alternatives, thereby placing an undue burden on those voters who do not have photographic identification and for whom procuring such identification would involve an unreasonable expense and burdensome travel requirements.

Yet the ruling in *Common Cause/Georgia* should not be framed, as some commentators have done,⁴⁸ as merely a dispute over a modern-day poll tax. As the court noted, Georgia made efforts to alleviate the burdens of its identification law, both by waiving the fee to obtain a voter identification card for those voters attesting to their indigence⁴⁹ and by providing a mobile facility for those unable to travel to distant Department of Motor Vehicles stations.⁵⁰ These remedial measures were lacking, however, for a number of reasons. Georgia failed to publicize adequately both the fee waiver option and the schedule of the mobile facility.⁵¹ The facility itself — a single bus to serve 159 counties — neither provided sufficient availability for the large number of voters in need of its services nor was equipped to service an additional disadvantaged demographic, disabled voters.⁵² In sum, the state's mitigating measures had the air of a slapdash remedy, put in place in the short time between the passage of HB 244 and the local elections in November 2005. If this result offers any cautionary note to lawmakers, it is that a holistic election system must be carefully planned and that concerns over voter fraud are not sufficient justification for hasty remedies. The identification requirement was not per se unconstitutional — but for such a requirement not to create an undue burden on particular voters, the prescription for lawmakers is patience and attention to such a provision's careful and equitable administration.

D. The Legal Future of Photographic Voter Identification Laws

The actual extent of voter fraud will always be in dispute. Not only can investigative findings be misleading as to the extent of fraud,

⁴⁷ See *Blackwell*, 340 F. Supp. 2d at 830; *Colo. Common Cause*, 2004 WL 2360485, at *6, *13.

⁴⁸ See, e.g., NewsHour with Jim Lehrer: Conversation: Carter and Baker (PBS television broadcast Sept. 19, 2005), available at http://www.pbs.org/newshour/bb/politics/july-deco5/reform_9-19.html; Editorial, *Abolishing the Poll Tax Again*, N.Y. TIMES, Oct. 19, 2005, at A22; Editorial, *No Poll Tax / Making Voters Pay Is Not a Route to Reform*, PITTSBURGH POST-GAZETTE, Sept. 21, 2005, <http://www.post-gazette.com/pg/05264/574922.stm>.

⁴⁹ *Common Cause/Ga.*, No. 4:05-CV-201-HLM, at 88–89.

⁵⁰ *Id.* at 87.

⁵¹ *Id.* at 87–89.

⁵² *Id.* at 87–88.

but they can also dramatically overstate the actual impact on elections.⁵³ Often where the battle over voter identification is most heated, real evidence of voter fraud proves scarce: in Georgia, for example, the Secretary of State averred that she had never encountered a single instance of voter impersonation at the polls.⁵⁴ State laws might sometimes impose tighter restrictions on in-person voting than on absentee ballots, which yield the greatest incidence of, and provide the easiest avenue for, voter fraud⁵⁵ — such was the case in *Common Cause/Georgia*.⁵⁶ Furthermore, the appearance of deceased persons and felons on the voter rolls is suggestive far more of administrative mismanagement than of any widespread electoral wrongdoing.⁵⁷ Nonetheless, the constitutional viability of photographic identification provisions might well increase in the future, both as states improve election administration and as voters and election officials grow more aware of their respective responsibilities, thus further diminishing the burden of photographic identification requirements.⁵⁸

⁵³ For example, the Carter-Baker Commission refers as evidence of significant voter fraud to 180 investigations by the Department of Justice since October 2002, which yielded eighty-nine individuals charged and fifty-two convictions for offenses ranging “from vote buying to submitting false voter registration information and voting-related offenses by non-citizens.” COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 45 (citing Press Release, U.S. Dep’t of Justice, Department of Justice To Hold Ballot Access and Voting Integrity Symposium (Aug. 2, 2005), http://www.usdoj.gov/opa/pr/2005/August/05_ag_404.htm). But the Brennan Center’s response to the Commission’s report points to statistics to demonstrate that even in a close election the incidence of fraud is so low as to have little practical significance. BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW & SPENCER OVERTON, RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 8–10 (2005), available at http://carterbakerdissent.com/final_white_paper.pdf (noting, as examples, the extremely low incidences of voter fraud in recent elections in Ohio and Washington).

⁵⁴ Letter from Cathy Cox, Ga. Sec’y of State, to Sonny Perdue, Governor of Ga. 1 (Apr. 8, 2005), available at <http://www.aclu.org/VotingRights/VotingRights.cfm?ID=18652&c=168>. But see *Common Cause/Ga.*, No. 4:05-CV-0201-HLM, at 47–49 (detailing the testimony of a county election board member who claimed to have encountered thousands of incidences of attempted or successful registration fraud during his tenure).

⁵⁵ The Carter-Baker Commission acknowledges that photographic identification requirements for in-person voting do little to address the problem of fraudulent registration by mail, especially in states that do not require third-party organizations that register voters to verify identification. COMM’N ON FED. ELECTION REFORM, *supra* note 13, at 46–47.

⁵⁶ *Common Cause/Ga.*, No. 4:05-CV-0201-HLM, at 90. The court found, however, that this loophole was not itself sufficient to relieve disadvantaged voters; even those few who were aware of this option faced additional administrative obstacles, particularly the lack of assurance that a mailed-in vote would reach the proper destination and be counted. *Id.* at 90–91 & n.6.

⁵⁷ For example, HAVA mandates computerization and cleaning of voter rolls, Help America Vote Act of 2002, 42 U.S.C. § 15483(a) (Supp. II 2002), a requirement that has met with delays in certain states, see, e.g., Greg J. Borowski, *What’s the Holdup on Voter List? Depends Whom You Ask*, MILWAUKEE J. SENTINEL, Oct. 7, 2005, available at <http://www.jsonline.com/news/metro/oct05/361674.asp>.

⁵⁸ There do remain potential alternatives to a photographic identification requirement, and they are likely to emerge as technology advances. See, e.g., Richard L. Hasen, *Carter-Baker Elec-*

A nationwide photographic identification requirement, properly implemented, could both provide an effective solution to voter fraud concerns, real or imagined, and help eliminate confusion among voters and election officials alike.⁵⁹ Many of the alleged difficulties of implementation that affected the outcome of *Common Cause/Georgia* — limited access by citizens to facilities for obtaining voter identification, limited awareness on the part of voters of their right to waive the fee by declaring indigence, and the stigma attached to such declarations — need only be temporary situations. The hurdles that photographic identification proposals face today could diminish in as few as two election cycles if the states take on more of the responsibility of educating voters, ensuring greater access to voter identification facilities, and adhering to HAVA requirements such as cleansing of the voter rolls. These efforts would minimize at once both the severity of the proposal's disenfranchising effects and any potential for voter fraud. While partisan disputes will likely never fully abate, a more equitable system of election administration could tip the balance for courts, making photographic identification requirements more constitutional — and more sensible — under the *Burdick* balancing test.

tion Reforms Imperiled by Its Partisan Voter ID Mandate, CHRISTIAN SCI. MONITOR, Sept. 22, 2005, at 9, available at <http://www.csmonitor.com/2005/0922/p09s01-coop.htm>. Professor Hasen offers a counterproposal:

When someone registers to vote, the state should collect a thumb print that can then go in voter rolls and on every absentee ballot (in such a way to assure secrecy of voting). The voter IDs should be free to everyone, and any voters who show up without their ID should be able to vote by giving a thumbprint.

Id.

⁵⁹ For instance, numerous reports suggest that some minority voters in the 2004 general and primary elections felt intimidated at the polls because election officials demanded photographic identification even when state law set forth no such requirement. See Tova Andrea Wang, 2004: *A Report Card*, AM. PROSPECT, Jan. 4, 2005, at A4, A5 (“In South Dakota, . . . primary voters at heavily Native American polling sites were turned away because they lacked photo identification. And during Ohio’s primary, the NAACP and other voting-rights groups received numerous complaints from African American voters in Cleveland who said that they were wrongfully asked for ID. . . . In New York City, . . . some Asian American voters were ‘subjected to racial profiling at the polls, since they were routinely asked for identification in order to establish their eligibility to vote, even when it was not required,’ reported Margaret Fung, head of the Asian American Legal Defense and Education Fund. As a *New York Times* editorial put it on November 4, ‘Voter identification requirements were arbitrarily, and often incorrectly, enforced.’”). These allegations underscore the need for uniformity and transparency in the enforcement of any future photographic identification provisions.