

BRIDGING PAST AND FUTURE: JUDGE FRANK JOHNSON AND MINORITY VOTE SUPPRESSION

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It is an honor and a pleasure to be part of this celebration to mark the centennial of Judge Frank Johnson Jr. I want to thank Ron Krotoszynski and The University of Alabama School of Law for bringing us here to discuss the Judge's work and for their hospitality.

When I clerked for the Judge, he was already well established on the appellate bench. Although that year was hardly devoid of controversy—the Judge wrote important opinions in both *Hardwick v. Bowers*¹ and *McCleskey v. Kemp*²—there was a part of me that was deeply curious about the Judge in his legendary role on the district court bench (and perhaps even a little jealous of the clerks who had the opportunity to assist him in those years). I took the opportunity provided by this gathering, and this panel in particular, to investigate two of the Judge's most important district court opinions in the area of voting rights: *United States v. Alabama* (from Macon County)³ and *United States v. Penton* (from Montgomery County).⁴ My goal is to identify the distinctive attributes of Judge Johnson's approach in these cases, which concern first-generation tactics of vote suppression, and to ask what implications they might have for the second-generation tactics of vote suppression that are increasingly shaping the electoral landscape.

Alabama and *Penton* were spectacular cases, textbook illustrations of the exceptional lengths to which local registrars were willing to go to prevent African-American citizens from exercising their right to vote. The registrars utilized constitutional writing and interpretation tests and elaborate written applications for which any technical error could be disqualifying.⁵ Registrars also made administrative choices that reduced further the miniscule chance that any African-American applicant could register: they took applicants out of order of arrival; they helped white, but not black, applicants with difficult questions; and they failed to notify black applicants whether their applications for registration had

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1. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).
2. 753 F.2d 877, 907 (11th Cir. 1985) (en banc) (Johnson, J., dissenting).
3. 192 F. Supp. 677 (M.D. Ala. 1961).
4. 212 F. Supp. 193 (M.D. Ala. 1962).
5. *See Alabama*, 192 F. Supp. at 679–81.

been accepted, impeding their ability to appeal or reapply.⁶ Practices were layered on practices in a way that made the need for Section 5 of the Voting Rights Act, which would not arrive for several more years, crystal clear. The result of these varied practices was precisely what one would anticipate: in predominantly black Macon County, for example, less than 10% of the black voters and close to 100% of the white voters were registered to vote.⁷

Judge Johnson took huge strides to restore order in the face of this invidiously motivated chaos. He did it through opinions that shared a number of distinctive characteristics: some substantive, some procedural or operational. Substantively, Judge Johnson insisted on the crucial, foundational character of the right to vote. Although his immediate concern was its discriminatory denial, he also stepped outside that specific focus to emphasize its importance in animating our representative democracy. For example, Judge Johnson declared in *Penton*:

[T]he only true basis of a representative government is equality in the right to select those representatives. . . . This right to vote is a personal right that is vested in qualified individuals by virtue of their citizenship. It is not a privilege to be granted or denied at the whim or caprice of state officers or state governments.⁸

As a cornerstone of representative government that flows directly from citizenship, the right to vote is not to be treated as a privilege—available only on some showing of unusual commitment or extrinsic merit—and particularly not to be denied by state officials on the basis of ad hoc or ungrounded judgments.

Also substantively, Judge Johnson was highly contextual in his analysis of denials of the vote. He was keenly alert to the ways that challenged voting practices interacted with the inequality produced by earlier discriminatory practices, directly related to the franchise and beyond. In *United States v. Alabama*, he stated:

[T]he State of Alabama, acting through its agents . . . has deliberately engaged in acts and practices designed to discriminate against qualified Negroes in their efforts to register to vote. Such acts and practices have brought about and perpetuated the disparity between the relative percentages of Negroes and whites registered to vote.⁹

In *Alabama*, for example, he highlighted the way a registration slowdown—implemented at the end of the period he examined—interacted with discriminatory registration practices that were ongoing throughout that period.¹⁰

6. *See id.*; *Penton*, 212 F. Supp. at 198–99.

7. *Alabama*, 192 F. Supp. at 678. In Montgomery County, 96% of white applicants were registered, while less than 25% of black applicants were registered. *Penton*, 212 F. Supp. at 196.

8. *Penton*, 212 F. Supp. at 202.

9. 192 F. Supp. at 679.

10. *Id.* at 680–81.

These cases also demonstrated several operational features of Judge Johnson's approach. Most notably, in these cases—as in his desegregation and institutional-reform cases—the Judge built and relied on a meticulous and exhaustive factual record in reaching his opinions. In the Macon County case, he asked John Doar from the Department of Justice to come to Alabama to document and investigate the practices of county registrars.¹¹ He then took elaborate testimony and built a veritable library of exhibits. In upholding Judge Johnson's decree, in *Alabama v. United States*, the Fifth Circuit commented on the breathtaking extent of the factual record: over 900 pages of testimony from fifty-three witnesses and “two huge boxes of . . . exhibits.”¹² *Penton* went further, with 175 witnesses and 13,000 exhibits.¹³ The Judge believed it to be crucial that his opinions were based on painstakingly established fact, rather than assumption or speculation.

This record enabled the second operational feature of Judge Johnson's adjudication in these cases: his searching scrutiny of state justifications and eagle eye for anything he thought was indicative of pretext. The Judge demanded state interests and explanations that were supported by the facts and he was not hesitant to call the state out when no evidentiary support was forthcoming. He wrote of one state justification offered in *Penton* that: “[This] impresses this Court as being nothing more than a sham and an attempt on the part of the Board [of registrars] to disguise their past discriminatory practices.”¹⁴ In *Alabama* he wrote: “The registrars tender in explanation puny excuses such as”¹⁵ Such language not only was bracing in its candor but also put parties on notice that the legitimacy and weight of state interest would be determined by comparing words with documented deeds.

Another distinctive feature of his opinions was his penchant for innovative, demanding remedial orders. These will be the specific focus of several articles in this symposium issue.¹⁶ In the vote-suppression cases, two features of the Judge's orders were particularly novel. The first was the use of mandatory decrees registering specific individuals who had been denied as a result of discriminatory practices.¹⁷ The second was the so-called “freezing” test that grounded this order: the idea that black applicants should be registered in accordance with

11. JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 151–52 (1993).

12. 304 F.2d 583, 584 (5th Cir. 1962).

13. *Penton*, 212 F. Supp. at 195.

14. *Id.* at 198.

15. *Alabama*, 192 F. Supp. at 681.

16. See James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723 (2020); Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665 (2020); Fred O. Smith, Jr., *Remediating Resistance*, 71 ALA. L. REV. 641 (2020).

17. *Alabama*, 192 F. Supp. at 682–83.

the more lenient standards that, at that time, had been applied to white applicants.¹⁸ Judge Johnson viewed this as a temporary yet urgent expedient, necessary to overcome the effects of past discrimination against prospective black voters.¹⁹ As he said of his finding that registrars had offered assistance to white voters in preparing their applications yet had denied such assistance to black applicants: “While it is true that no applicant is entitled to assistance, it is not true that the law will permit assistance to whites, whether it be solicited or unsolicited, and the denial of like assistance to members of the Negro race.”²⁰ Some view the “freezing” test, which came to be applied across the Fifth Circuit more generally,²¹ as a precursor to Section 5 review and its “retrogression” test.²²

The final feature of these opinions might seem to be at odds with Judge Johnson’s stringent scrutiny of the practices of state registrars: his insistence on making state officials the remedial authorities of the first resort. In the Macon County case, for example, Judge Johnson declined the request of the United States to appoint federal voting referees to administer the registration process.²³ This refusal, he explained, reflected “the idea that the defendants can act fairly if the directions spelled out in this Court’s decree are followed in good faith.”²⁴ It was crucial, in the Judge’s view, that state officials show themselves capable of acting in a just and even-handed way, particularly after the violations the case had unearthed, because the frankly discriminatory practices of registrars damaged the state as well as those that they disenfranchised. If the defendants act fairly and can be seen to act fairly, Judge Johnson concluded, “they will have regained for Macon County and for the State of Alabama the integrity that the evidence in this case makes abundantly clear has been lost in this field of voting rights.”²⁵ Though this was the same state—and some of the same people—whose invidious schemes and pretextual rationales he upended, Judge Johnson believed that allowing state officials to direct changes under the guidance of a

18. BASS, *supra* note 11, at 153.

19. *Id.* at 155.

20. *Alabama*, 192 F. Supp. at 679–80.

21. As Judge Brown of the Fifth Circuit noted in affirming Judge Johnson’s order: “To put it another way: had there been no race discrimination as such, these persons would have been registered.” *United States v. Alabama*, 304 F.2d 583, 594 (5th Cir. 1962).

22. See BASS, *supra* note 11, at 153–55. Bass describes the “freezing” approach as being replicated in the Voting Rights Act’s suspension of literacy tests (i.e., white voters were not required to be literate in jurisdictions such as Macon or Montgomery County) and in Section 5’s “preclearance” requirement, which held existing voting-related laws in place until the Department of Justice or the District Court for the District of Columbia could confirm that the proposed changes did not have the effect of and would not produce the result of disadvantaging minority voters. *Id.*

23. *Alabama*, 192 F. Supp. at 683.

24. *Id.*

25. *Id.*

strong decree could give them a sense of ownership over the changes and restore the public trust in a system that he believed had been damaged by its great injustice.

I want to now consider the potential implications of this legacy for a new challenge: the so-called second-generation vote-denial devices that, since at least 2001, have become increasingly prominent features of the electoral landscape. A range of practices, from the purging of voter lists to felon disenfranchisement to voter-ID laws, have garnered controversy and drawn legal challenges.²⁶ Courts are now in the throes of deciding how to respond to these practices, and my question is whether and how Judge Johnson's early vote-denial jurisprudence might guide us. The application will not be direct: features of the present suppression tactics pose a distinct form of challenge and present distinct obstacles to (minority) enfranchisement. Perhaps because of these facial differences, early efforts by the Court to assess these practices took a less stringent, more deferential stance toward state actors. Nonetheless, important lessons that can be drawn from the Judge's approach are beginning to inform a new spate of challenges to these practices and might productively guide us in continuing efforts.

Second-generation vote-suppression mechanisms have conspicuous similarities to and notable differences from first-generation devices. Both are strategies mobilized in service of a specifically partisan effort to achieve electoral advantage.²⁷ While the association of strict voter-ID laws or voter purges with state Republican parties is sometimes offered to suggest that recent policies are distinct in their partisan impetus, historical analysis makes clear that the entwinement of partisan and racialized motivations for vote suppression dates back to Reconstruction.²⁸ First- and second-generation mechanisms both utilize ostensibly neutral laws to prevent the emergent enfranchisement of comparatively disadvantaged groups and perpetuate a more privileged and homogeneous electorate. Within those effects, both are alleged to bear heavily on racial

26. See, e.g., Daniel Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015); Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

27. While some political commentary may characterize the role of partisanship as a distinctive, or enhanced, feature of the present moment, many voting-rights scholars have recognized that Democrats saw a serious threat to their control in the enfranchisement of recently manumitted black citizens and in their emergent coalition with working-class whites and fought both in order to retain that control. See, e.g., Richard 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, 58–62 (2013) (discussing the historical account of J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910*, at 182–95 (1974)); Bertrall Ross & Douglas Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disenfranchisement of the Poor*, 114 NW. U. L. REV. 639, 644–52 (2019).

28. See Ross & Spencer, *supra* note 27, at 644–52 (demonstrating deep entwinement of efforts to thwart the emergent political agency of black voters, and their coalition with working-class whites, with Southern Democrats' struggle to maintain control in the face of Reconstruction).

minority groups, while also disabling groups of relatively disadvantaged whites.²⁹

Notwithstanding these similarities, there are also differences. Several features of first-generation voter-suppression tactics made the inference of racially discriminatory motivation more straightforward than in the present context. In the late nineteenth through mid-twentieth century, neutral measures were given starkly disproportionate effect by floridly racially differentiated administration—some of the very moves highlighted by Judge Johnson’s opinions. In the present context, racially disparate administration³⁰ exacerbates state-enacted requirements that themselves have differential effects within minority communities. Yet the differential administration is subtler in character: minority voters may be asked for ID where it is not required or asked more frequently than white counterparts where it is. And the suppressive effects are more modest than their first-generation counterparts: a 5% effect³¹ rather than a 90% effect.³² Moreover, first-generation suppression also involved organized, often state-assisted, brutality against African-American registrants, their families, and their allies, a pattern we do not see in contemporary vote-suppression efforts. These factors suggest a conspicuous thread of antiblack animus, or purposeful will to thwart the process of black enfranchisement, that is harder to identify in the present period. In the area of felon disenfranchisement, we may glimpse the operation of stereotypes about those deprived of the vote, but with respect to photo ID, restricted hours, or voter-purge laws, officials stress the importance of protecting the electoral process by preventing voter fraud.³³ The state of mind associated with second-generation suppression thus seems more indicative of deliberate indifference to, or casual devaluation of, the electoral inclusion of members of minority groups, than it does of stereotype, antipathy, or animus. This distinction might seem to make a difference in a period when courts are increasingly skeptical about evidence of disparate effects³⁴ and when discrimination is characterized either as classification per se or as the discriminatory animus underlying race-neutral state enactments.

Perhaps cognizant of these differences, courts have often been less receptive to second-generation voter-suppression claims. I will focus here on one of the most common forms of second-generation suppression: judicial treatment of strict state voter-ID requirements. *Crawford v. Marion County*,³⁵ the Supreme

29. See *id.* at 650–60.

30. See *infra* notes 33, 55.

31. See *infra* note 57.

32. See *United States v. Alabama*, 192 F. Supp. 677, 678–79 (M.D. Ala. 1961).

33. See Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Baltimore in 2008*, 7 Q.J. POL. SCI. 1, 30 (2012).

34. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

35. 553 U.S. 181 (2008); see also *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (Posner, J.).

Court's first assessment of such requirements, is an example of this more equivocal judicial treatment. Writing for the majority, Justice Stevens drew a balancing test from two earlier cases, *Anderson v. Celebrezze*³⁶ and *Burdick v. Takushi*.³⁷ These cases recognized fundamental rights in two strands of "liberty" affected by ballot-access restrictions: "[T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."³⁸ Yet they noted that the constitutional power of states to control the elections, so as to facilitate an orderly democratic process, necessitated some degree of regulation.³⁹ Thus, not all such claims should be subject to strict scrutiny or any other kind of litmus test:

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 . . ." against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."⁴⁰

Finding the state photo-ID requirement at issue in *Crawford* to be an "inconvenience" rather than a "substantial burden" on the right to vote, the majority found the state's "relevant and legitimate state interests"—principally, deterring and detecting voter fraud; modernizing elections; and maintaining voter confidence—to be "sufficiently weighty to justify the limitation."⁴¹ The Court reached this conclusion despite its acknowledgment that there had been no documented cases of voter-impersonation fraud (the kind of fraud addressed by a photo-ID requirement) in Indiana's history⁴² and despite the absence of

36. 460 U.S. 780, 789, 805–06 (1983) (sustaining a challenge to Ohio's early filing deadline for independent candidate for President to be placed on ballot).

37. 504 U.S. 428, 434, 438–39 (1992) (rejecting challenge to Hawaii's prohibition on write-in candidates).

38. *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

39. *Id.* at 788.

40. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In *Burdick*, this test is articulated slightly differently, as a kind of two-tier test. Quoting the standard described above, the Court continues:

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus . . . when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" . . . "the State's important regulatory interests are generally sufficient to justify" the restrictions.

504 U.S. at 434 (citations omitted) (first quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992); then quoting *Anderson*, 460 U.S. at 788).

41. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman*, 502 U.S. at 280).

42. It used the example of voter fraud by absentee ballot—a kind of fraud unaffected by a photo-ID requirement—to support its claim that "not only is the risk of voter fraud real but that it could affect the outcome of a close election." *Crawford*, 553 U.S. at 194–96.

any showing that the broad goals of election modernization and voter confidence necessitate this specific, stringent remedy.⁴³

Crawford has remained the dominant approach, although both a plurality in that case and majorities in subsequent court of appeals decisions have held the door open to “as applied” challenges by voters for whom the requirement poses particular barriers⁴⁴ and to remedies that would allow those facing such burdens to prove their identities by alternative means.⁴⁵ The signal features of Judge Johnson’s first-generation vote-suppression jurisprudence, however, help to demonstrate the error of the Court’s approach and point toward a more productive path forward.

The first feature of his analysis that may aid in this effort is the fundamentality of the vote. When a right is viewed as fundamental, the distinction between inconvenience and actionable burden may be less than clear-cut. In cases like *Alabama* and *Penton*, Judge Johnson acknowledged as much by citing longer waits to register, along with blunter impediments, such as the imposition of a writing test for black, but not white, applicants and non-notification of rejected black applicants.⁴⁶ Moreover, the fundamentality of the right to vote suggests the wrong-headedness of insisting on hard demonstrations of the numbers of voters denied or deterred as a result of these laws. When Judge Johnson granted an unconventional remedy enfranchising specific individuals who had been denied the opportunity to vote by Alabama registrars, as well as prohibiting specific practices going forward,⁴⁷ he signified that the damage of such suppression could be found in part in the injury to the rights and dignity of individuals, as well as the threat to an entire class of voters.

Some jurists and scholarly commentators have begun to take up this mantle in the second-generation cases. Justice Souter noted, in a trenchant dissent in *Crawford*, that the majority formally assents to the fundamentality of the right but “does not insist enough on the hard facts that our standard of review demands.”⁴⁸ This conclusion grounds a stringent look at the state’s evidence regarding voter impersonation. Richard Hasen goes further, asking, “Why is it not unconstitutional to put new roadblocks in front of voters without adequate

43. See generally *id.*

44. See *id.* at 199–200. For a thoughtful treatment of the courts’ “softening” of *Crawford*, see generally Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. 100 (2016).

45. See, e.g., *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015) (panel decision), *reh’g granted*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017). The Texas legislature subsequently passed a bill enabling some voters to prove their identities through an affidavit and alternative means; the original law, with this remedial supplement, was upheld by the court of appeals after a renewed challenge. See Manny Fernandez, *Texas’ Voter ID Law Does Not Discriminate and Can Stand, Appeals Panel Rules*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/us/texas-voter-id.html>.

46. See generally *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962); *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961).

47. *Alabama*, 192 F. Supp. at 682–83.

48. *Crawford*, 553 U.S. at 211 (Souter, J., dissenting).

justification?”⁴⁹ Hasen’s recognition of the importance of the right leads him to propose replacing the Court’s approach with the standard articulated by Judge Evans in his Seventh Circuit *Crawford* dissent:⁵⁰

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 Instead, evidence of [a desire to prevent fraud, save money, or instill voter confidence] should *prompt courts to look skeptically upon asserted state interests unsupported by actual evidence*.⁵¹

Even if courts decline to see the fundamentality of the vote as rendering a range of burdens constitutionally suspect, they may be guided by a second feature of Judge Johnson’s vote-suppression jurisprudence: his insistence on developing and relying on a detailed factual record. In *Alabama* and *Penton*, the Judge invited investigation by the Department of Justice and compiled a range of documentation to demonstrate the disparate practices applied by registrars to black and white registrants. While some of this evidence was used to expose the pretextual character of defendants’ justifications, much of it went to establish a “pattern and practice” that was intended to and had the effect of preventing black citizens from registering to vote.⁵² The circumstances in second-generation cases are in some respects different: the impediment created to the right to vote is more evident on the face of state statutes⁵³ and less dependent on the racially disparate practices of state officials. Yet if courts or commentators fail to take a more encompassing view of the right to vote and its restriction, careful development of the factual record may be necessary to connect strict ID requirements to group-based disparate effects.⁵⁴

Here the evidentiary landscape is still being populated, as social scientists and voting-rights advocates study the effect of voter-ID laws on state and local turnout. But existing studies point in several directions that might bolster the

49. Hasen, *supra* note 44, at 119.

50. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

51. Hasen, *supra* note 44, at 120 (emphasis added); *see also id.* at 62.

52. *Alabama*, 192 F. Supp. at 681.

53. Although the broad impediment to voting created, say, by the imposition of a picture-ID requirement may be clear on its face, the disparate effect of this requirement on minorities or other groups of voters, while intuitively plausible, would seem to require more empirical demonstration.

54. In cases such as *Alabama* and *Penton*, Judge Johnson’s development of the factual record concerned the treatment of and effects on voters in the particular counties at issue. In the context of second-generation challenges, data about the effects of practices such as ID requirements—which are subtler and may require sustained empirical investigation to document—may not be available at the local level in all of the contexts in which they are challenged. Data of the type I describe above may be gathered nationally or in multiple jurisdictions (sometimes outside the jurisdiction where the law is being challenged) and may be referenced to demonstrate the observed consequences of such laws on a broader scale.

claims of plaintiffs in these cases. A first kind of evidence supports a more direct analogy between cases like *Alabama* or *Penton* and contemporary voter-ID requirements: this is evidence that state officials engage in racially disparate application of state law requirements.⁵⁵ Early empirical studies suggest that black and Latino voters (as well as, in some jurisdictions, young voters) tend to be asked more frequently for ID—even where the state law gives officials no discretion over whether to ask for ID—and may be asked for picture ID where the state law does not require it.⁵⁶ More central to these cases—particularly if courts require more than a generalized burden on the right to vote—is evidence that strict ID requirements bear more heavily on voters of color (or other marginalized voters, such as the poor or the elderly) or that strict requirements disparately affect the turnout of these groups. Here, the evidence is, at present, more contested. While some emerging studies document disparate effects for a number of racial groups,⁵⁷ other investigators have challenged these findings on methodological grounds.⁵⁸ Yet another line of inquiry suggests that voter-ID requirements in many states exacerbate preexisting inequalities that bear on the exercise of the franchise⁵⁹—a problem Judge Johnson found in the practice of

55. See, e.g., Cobb et al., *supra* note 33 (reporting evidence that black and Latino voters were asked for ID at higher rates than white voters in jurisdictions where poll workers were given no discretion over whether to request IDs); Stephen Ansolabehere, *Ballot Bonanza*, SLATE (Mar. 16, 2007), <https://slate.com/news-and-politics/2007/03/the-first-big-survey-of-voter-id-requirements.html> (stating that the first major study of effects of ID requirements demonstrated that close to 50% of those surveyed had been asked for photo ID when only two states in the survey required photo ID and that young voters, blacks, and Latinos were more likely to be asked for ID).

56. Ansolabehere, *supra* note 55.

57. Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 368 (2017). Using data from the Cooperative Congressional Election Study, investigators found strict ID states have disparately low turnout (4.6 to 7.1% lower) for black, Asian, and Latino voters. *Id.*

58. Justin Grimmer et al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045, 1045–46 (2018) (critiquing of Hajnal et al. based on arguments that the study neglects other factors that both contribute to depressed turnout and correlate with adoption of voter-ID laws; that Cooperative Congressional Election Study data are not meant to be reliable at the level of state-level subsamples; and that “custom-sampled surveys” might better capture these effects).

59. Joshua Clark, *Widening the Lens on Voter Suppression: From Calculating Lost Votes to Fighting for Effective Voting Rights*, HAAS INST. RES. BRIEF, July 2018, at 7 (identifying factors such as lack of voter education, activation, and outreach infrastructure, which are complicated by voter-ID requirements and may be addressed by official action and citizen advocacy). Daniel Tokaji has argued that the interaction of what he calls “vote denial” mechanisms with historical conditions tending to disadvantage minority voters can give rise to a challenge under Section 2 of the Voting Rights Act. See Tokaji, *supra* note 26, at 441–42 (advocating for a test for finding a violation under Section 2 of the Voting Rights Act that considers the disparate impact of the challenged practice; its interaction with social and historical conditions, including but not limited to intentional discrimination, that have tended to disadvantage minority voters; and the state’s proffered interests). Arguing along slightly different lines but sharing Clark’s conclusion that voter education and outreach matter, Ross and Spencer have argued for mobilization of poor voters by campaigns and political parties. See Ross & Spencer, *supra* note 27, at 693–702 (arguing for mobilization of poor voters by campaigns and political parties through accessing information about voter-registration status, history, and partisan affiliation, which is available to and is currently collected by some states).

registration slowdowns or the failure to provide adequate facilities for the registering of large numbers of unregistered minority voters.⁶⁰ Advocacy and adjudication carefully focused on the evidence as it is emerging may enable plaintiffs to make, and courts to recognize, stronger cases than plaintiffs offered, for example, in the *Crawford* litigation.

A detailed focus on the factual record underlying litigants' claims could, with perhaps greater authority, reshape the courts' approach to state justifications for voter restrictions. In *Crawford*, the State failed to identify a single instance of voter-impersonation fraud in Indiana's electoral history, and while it gestured toward the problem of voter fraud in other jurisdictions—again, without offering detailed evidence—the most salient examples it referenced involved fraud in absentee voting, which is not a problem remediable by strict ID requirements.⁶¹ Moreover, scholarly inquiry into the existence of voter fraud, including voter impersonation fraud, has found such fraud to be exceptionally rare.⁶² When such evidence, or the lack thereof, is made the focus of judicial attention—whether under the robust *Crawford* analysis described by Justice Souter or the revised focus on burdening the vote proposed by Professor Hasen—the stark absence of evidentiary support for the defendants' rationale becomes clear. This lack of support, as well as the gap between the asserted justification and the voter-ID requirements enacted to implement it, should trigger the skepticism—or alertness to the possibility of pretext—that animates many of Judge Johnson's first-generation vote-suppression opinions.

Beyond the way that courts adjudicate second-generation vote-suppression claims, there is a final thread in Judge Johnson's first-generation opinions that may prove vital to mitigating vote suppression. This thread concerns the potentially ameliorative role of state officials responsible for administering any voting scheme. Despite the violations he observed, Judge Johnson insistently held to the view that state and local officials were the institutional actors who enjoyed the closest face-to-face relationship with citizens. He believed that their buy-in was crucial to the enforcement of constitutional commands and that the way citizens were acknowledged and treated by those officials was integral to their sense of dignity and equality.⁶³ For this reason, Judge Johnson often placed substantial responsibility in the hands of those who had committed violations: directing their institutional choices through his decrees rather than displacing them with federal actors or resolving all choices through judicial command. In

60. *United States v. Alabama*, 192 F. Supp. 677, 680 (M.D. Ala. 1961).

61. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195–96 (2008).

62. See, e.g., LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* 3 (2007), http://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf (finding only twenty-four people to have committed voter fraud between 2002 and 2005, that “available state-level evidence . . . culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible,” and that most voter-fraud allegations turn out to be something other than fraud). See generally LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

63. See *Alabama*, 192 F. Supp. at 682–83.

the vote-suppression cases, for example, he rejected the appointment of federal registrars, holding that the even-handed conduct of state and local officials—structured by a strong judicial decree—could “regain[] for Macon County and for the State of Alabama the integrity that the evidence in this case makes abundantly clear has been lost”⁶⁴ in the voting field. There are many ways in which fair-minded, and even proactive, conduct by state election officials can mitigate the suppressive effects of voter-ID laws.

A first step is publicizing any applicable voter-ID standards, so that citizens understand the requirements and have maximum opportunity to obtain the forms of identification required. Research demonstrates that many of those who have failed to vote in the face of changes in standards actually possessed acceptable identification,⁶⁵ suggesting that incomplete or poorly disseminated information may be a problem. State responsibility should encompass not only publicizing changes but also targeting those populations who are most likely to be burdened by new requirements, in ways that are linguistically and culturally appropriate.⁶⁶ A second vital step is scrupulously even-handed administration of any applicable ID requirement. State and local officials must be vigilant about addressing the demonstrated dangers that standards will be applied disparately across racial groups or that officials will demand ID that is not required by state law. As this imperative suggests, careful training of all polling officials—including training so that the officials understand the various ways that voters can meet the applicable standards and can advise voters who have questions or inadequate forms of identification—is vital to the fair administration of any voter-ID regime. Officials must be able to explain alternatives, such as provisional voting, and what these alternatives may require of voters after election day in order to ensure that their votes count.

I observed the efficacy of such measures firsthand when I volunteered as an election observer for the Arizona Democratic Party in the November 2018 election. In 2004, Arizona passed what is considered to be a strict, non-picture-ID law. Voters must present an Arizona driver’s license; a federal, state, or local government-issued ID; an Arizona ID card; or a tribal enrollment card.⁶⁷ If voters do not possess any of these forms of identification, they may present two alternative forms of ID, which include a recent bank statement, a utility bill, a property-tax statement, or an Arizona vehicle registration.⁶⁸ Part of my job, as a poll observer, was to watch the way that ID requirements were being enforced and explained. After spending most of an uneventful day at a suburban precinct where most of the voters appeared to be white, I was reassigned

64. *Id.* at 683.

65. Clark, *supra* note 59, at 12.

66. *Id.* at 16.

67. *What ID Do I Need to Vote Quiz*, CITIZENS CLEAN ELECTIONS COMM’N, <https://www.azcleanelections.gov/how-to-vote/what-id-do-i-need-at-the-polls> (last visited Jan. 20, 2020).

68. *Id.*

to a majority-minority precinct on the outskirts of Phoenix. Supervisors explained that they were concerned about this precinct because of the risk that voter-ID requirements would present disproportionate obstacles to minority residents or that confusion about how to meet such requirements would create delays and extend late-day lines, discouraging precinct residents from voting. When I arrived at the precinct, however, I saw precisely the opposite pattern. The precinct captain—a white man who, I learned, was a longtime resident of the neighborhood—was working assiduously to make sure both polling staff and prospective voters understood the operation of the ID requirements. He walked up and down the line of waiting voters, making sure people possessed the preferred forms of ID or explaining to them the accepted range of alternatives if they did not. I watched him, and other poll workers, help voters find their most recent bank statement on their phones or advise them to return home in search of a utility bill. I saw the relief on the faces of voters as they located items electronically or returned with the required documents in hand. Actively expedited by the polling staff, the lines moved swiftly, and I saw almost no voters turned away. I suspect Judge Johnson would have been pleased.