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“How the Sausage Gets Made”: Voter ID and Deliberative Democracy

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Joshua A. Douglas*

“How the Sausage Gets Made”: Voter ID and Deliberative Democracy

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I. INTRODUCTION

In 2020, Kentucky became the twentieth state to enact a law that requires voters to show a photo ID at the polls to vote.¹ Yet the law is one of the most mild and reasonable photo ID laws to pass in recent memory. This article tells the inside story of how that law came to be. And it presents the broader story of how the process of crafting legislation, when employing a theory of deliberative democracy, can increase legitimacy and produce better results for the functioning of our elections. The Kentucky story therefore offers important lessons for election law policy during this perilous time in our nation’s history.

It is a tale of mystique and intrigue, with shady characters and plenty of sex, drugs, and rock-n-roll. Okay, not really. The story I will tell is perhaps more mundane, but it provides an inside perspective on how a law such as this one came into force. It also offers my own insights as someone who was “in the room where it happens.”² I advised Kentucky Secretary of State Michael G. Adams on the bill, wrote several op-eds in Kentucky newspapers, and testified before the House committee that considered it. Yet, besides my role as a law professor at a public institution, I am not a governmental actor. In some ways, I have both an insider’s and an outsider’s perspective on the matter.

I have previously argued that voter ID laws are unnecessary.³ They are a solution in search of a problem, as the only kind of voter fraud that a photo ID law can prevent is in-person impersonation, and that type of fraud hardly ever occurs.⁴ I have explained why courts should strike down strict photo ID laws, particularly under state constitutions, and several courts have done just that.⁵

1. S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]; *Voter Identification Requirements: Voter ID Laws*, NAT’L CON. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/U8L3-C87P>] (last visited July 6, 2021).

2. MIRANDA, *supra* note *.

3. Joshua A. Douglas, *The False Promise of Voter ID*, GOVERNING (Mar. 29, 2017), <https://www.governing.com/gov-institute/voices/col-false-promise-photo-id-voting.html> [<https://perma.cc/39T3-H88M>].

4. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014, 6:00 AM), <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/> [<https://perma.cc/2RCV-C4GT>]; Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N.U. L. REV. 445, 460 (2009) (“Whatever the anecdotal history, it really is implausible to see voter ID laws as responding effectively to an actual problem: in-person voter impersonation seems to be rare indeed, and the major forms of election fraud, which tend to rely on the use of absentee ballots, will not be detected by limits on voting in polling places.”).

5. Joshua A. Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014); see *Weinschenk v. State*, 203 S.W.3d 201, 205 (Mo. 2006); Ap-

So, it may seem passing strange that I did not outright oppose the enactment of a photo ID law for Kentucky elections. Instead, I advocated to moderate the law so it would negatively impact as few voters as possible. This experience can offer lessons to the broader legal and policy community about the kind of moderation that is attainable—especially when one-party control assures passage of a new voting rule—and the ways to approach thorny, inherently partisan policy questions about election administration. Indeed, the passage of the photo ID law in 2020 opened the door to the broader, voter-friendly plan to administer the election during the pandemic: the Republican secretary of state could point to this legislative achievement to placate his side while working with the Democratic Governor to expand voter access.

These days, debates about election policy seem like fights to the death, with no ability to compromise. The gulf between the need to expand the right to vote and the desire to respond to allegations of voter fraud—however unfounded those claims may be—seems insurmountable. When viewed within the broader context of long-term electoral reform and best practices for the legislative process, the Kentucky story offers a way out of the morass. The Kentucky plan also offers lessons for election law legislation and suggests a way to bridge the divide between the two sides. The experience is an example, at least in part, of a legislative theory of deliberative democracy, which posits that laws are more legitimate when the legislative process is open to all stakeholders and when opponents can have a meaningful influence on the final outcome.⁶

Kentucky's new law, as enacted, is likely one of the mildest forms of a photo ID requirement for voting in the country. I still do not support photo ID laws as a general matter, and I do not think this law was necessary. But thanks to various amendments to the bill, the law will likely harm far fewer voters, at least as compared to the proposal when initially introduced. If there is going to be a photo ID law—which, to be clear, there should not—then this bill is a model for other states to follow. Ultimately, the debate on the bill offers lessons for how we, as a society, should expect the legislative process to occur—as well as a few pitfalls to avoid.

plewhite v. Commonwealth, No. 330 M.D. 2012, 2014 WL 184988, at *27 (Pa. Commw. Ct. Jan. 17, 2014); Martin v. Kohls, 444 S.W.3d 844, 852 (Ark. 2014). But see *In re Request for Advisory Op. Concerning Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 447 (Mich. 2007) (rejecting claim under state constitution); *City of Memphis v. Hargett*, 414 S.W.3d 88, 111 (Tenn. 2013) (same).

6. Jon Green, Jonathon Kingzette & Michael Neblo, *Deliberative Democracy and Political Decision Making*, OXFORD RSCH. ENCYC. POLS., May 2019, at 1, <https://polisci.osu.edu/sites/default/files/OxfordEncDelibDecisionMake.pdf> [https://perma.cc/A9CP-Y9WK].

This Article has three goals, corresponding to its three main Parts. After this introduction as Part I, Part II tells the history of the passage of Kentucky’s new photo ID law for voting, explaining that Republicans initially introduced a very strict measure and showing that the final law is much more reasonable thanks to meaningful amendments during the legislative deliberation. Part III recounts the litigation over the new photo ID bill, which the state implemented in November 2020 during the COVID-19 pandemic. Importantly, the lawsuits did not challenge the law’s general features but sought only to delay its implementation. That fact suggests that even opponents did not believe the law would have a huge disenfranchising effect without the added burdens of the pandemic—or at least that they did not think they could win the argument in court. Emergency regulation ultimately eased some of the provisions for the November 2020 election, causing the plaintiffs to drop their suits. Finally, Part IV offers key takeaways from this story, discussed through the legislative theory of deliberative democracy. The Kentucky process mostly worked because even though Republicans had the votes to pass the most stringent law possible, they instead moderated in response to opposition from Democrats and advocacy organizations. That moderation made the process more legitimate and created a better substantive outcome. Part IV also suggests a way to encourage a similar legislative process on voting rights issues: courts might give slightly more deference to a state that passes an election law with indicia of deliberative democracy.

I do not support Kentucky’s new photo ID requirement for voting. I do not mean to be an apologist for a law that could make it harder to vote, especially for minorities and other marginalized communities.⁷ I do not mean to legitimize voter suppression tactics. And I recognize the scourge of racially discriminatory voting laws, both historically and in the present day. But given that the passage of a new law was inevitable, I am generally satisfied with the specific contours of the final version of Kentucky’s photo ID law—though the state went too far in trying to implement it so quickly, especially during a pandemic. If Republicans were going to push through a photo ID law for voting no matter what, then the Kentucky law is about as good as it could be. The question, then, is what made the Kentucky process better than the result in other states that have enacted stricter photo ID requirements? The broader lesson is that compromise is possible, even on the most contentious voting rights issues, through a legislative theory of deliberative democracy.

7. Unfortunately, the Supreme Court essentially gave the green light for states to enact photo ID laws when it refused to invalidate Indiana’s law in 2008. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

II. THE LEGISLATION: A TALE OF SAUSAGE MAKING

Our story begins with a campaign promise to enact a new photo ID law and the election of Kentucky's new secretary of state. It culminates with the passage of the bill during a global pandemic. In the middle, we see a lot of back-and-forth about the details of the law. As Part IV explains, the process mostly exemplifies a form of deliberative democracy, which helped to produce both a better legislative procedure and a stronger substantive outcome.

A. Campaign for Kentucky Secretary of State

Kentucky elected a new secretary of state in 2019, as the prior officeholder, Democrat Alison Lundergan Grimes, was ineligible to run again after serving two terms in office.⁸ The two major party nominees were Republican Michael G. Adams, an election lawyer and former member of the Kentucky State Board of Elections, and Democrat Heather French Henry, who ran the state's Department of Veterans Affairs and was Miss America 2000.⁹ Adams won with about fifty-two percent of the vote.¹⁰

Adams's number one campaign promise was to enact a photo ID requirement for Kentucky elections.¹¹ Kentucky's prior law was of the non-photo-ID variety: it required voters to show some documentation of their identity and allowed items without a photograph such as a credit card or Social Security card.¹² Poll workers could also verify a voter's identity based on personal recognizance.¹³ Adams wanted to change the law to require all voters to show a photo ID at the polls,

8. *The Latest: Adams Elected Kentucky Secretary of State*, AP NEWS (Nov. 5, 2019), <https://apnews.com/article/6e907a4688384a0fb40e614886b35075> [https://perma.cc/52WT-MCTJ].

9. *Id.*

10. Bill Estep, *Republican Michael Adams Defeats Heather French Henry for Kentucky Secretary of State*, LEXINGTON HERALD-LEADER (Nov. 5, 2019, 8:50 PM), <https://www.kentucky.com/news/politics-government/election/article237033189.html>.

11. Michael Adams, Opinion, *Michael Adams: I Will Clean up the Mess in the Secretary of State's Office*, LOUISVILLE COURIER J. (Oct. 18, 2019, 7:18 AM), <https://www.courier-journal.com/story/opinion/2019/10/18/kentucky-secretary-state-race-adams-says-hell-clean-up-office/3981666002/> [https://perma.cc/Q4NP-WQHV]. For her part, Democratic nominee Heather French Henry also said she supported a photo ID requirement but wanted the state to send free voter IDs to all registered voters. See Morgan Watkins, *Get To Know Kentucky's Secretary of State Candidates Heather French Henry, Michael Adams*, LOUISVILLE COURIER J. (May 22, 2019, 12:02 PM), <https://www.courier-journal.com/story/news/politics/2019/05/22/kentucky-secretary-state-candidates-heather-french-henry-michael-adams/3765747002/> [https://perma.cc/K4VN-ECTA].

12. KY. REV. STAT. ANN. § 117.227 (West 2016) (amended 2020).

13. *Id.*

naming it his top priority.¹⁴ His overall platform was that he wanted to make it “easy to vote and hard to cheat,” and he believed that a photo ID law would help on the “hard to cheat” front.¹⁵

Adams and I have known each other for a few years, initially simply by following each other on Twitter. He recognizes, therefore, that I oppose photo ID laws. As I wrote in my 2019 book, *Vote for US*, “[f]ar from an abstract concern, real voters struggle to satisfy the requirements of a strict voter ID mandate.”¹⁶ Adams told me that he read my book in summer 2019, in the middle of the campaign. Later that year, I moderated a candidate discussion with Adams in which we discussed his support for a photo ID law.

So I was honored, yet also surprised, when Adams sent me a message shortly after he won the secretary of state race that fall: would I consider serving on his transition team? He explained that he wanted to create a team of Democrats, Republicans, and independents with a wealth of election expertise to help guide him as he took over the office. I pointed out that I opposed his stance on photo ID laws, which was his number one campaign promise. He responded that he purposefully wanted a group of advisors that included people who disagreed with him. That was the first indication that we might be able to accomplish meaningful, positive changes to Kentucky’s election laws. I issued this statement after Adams announced me as part of his transition team:

I’m honored to join [Secretary-elect Adams] to help in his transition. We disagree on a few things but agree on a whole lot more: the need to make Kentucky elections as strong as possible. I’m looking forward to help him improve voter turnout and Kentuckians['] confidence in our elections.¹⁷

As part of the transition team, I went to the state capitol to meet with the then-current secretary of state’s office and the state board of elections to learn about their processes. I helped interview candidates for top-level positions on the new secretary’s staff. Through this process, Adams noted his goal of hiring the best people, not necessarily those who were his complete political clones. We also discussed the photo ID law that he hoped to shepherd through the Kentucky legislature.

14. Michael G. Adams, Opinion, *Michael Adams: As Secretary of State, I Would Require Photo ID To Vote*, LOUISVILLE COURIER J. (May 5, 2019, 1:17 PM), <https://www.courier-journal.com/story/opinion/2019/05/05/kentucky-secretary-state-candidates-michael-adams/3632480002/> [https://perma.cc/ANH3-UGV7].

15. *Id.*

16. JOSHUA A. DOUGLAS, *VOTE FOR US: HOW TO TAKE BACK OUR ELECTIONS AND CHANGE THE FUTURE OF VOTING* 100 (2019).

17. Joshua A. Douglas (@JoshuaADouglas), TWITTER (Nov. 18, 2019, 6:24 PM), <https://twitter.com/JoshuaADouglas/status/1196569817496596481> [https://perma.cc/7PVL-KGP2].

B. Evolution of the Bill Requiring a Photo ID To Vote

1. Kentucky's Prior Rule

Before 2020, Kentucky had a non-strict, non-photo ID requirement for voting: voters were required to show a driver's license, Social Security card, another county-issued card, or even a credit card to prove their identity.¹⁸ Poll workers could also check off a voter based on personal acquaintance without the voter showing anything.¹⁹ Thus, unless the poll worker knew the voter, the voter had to present some form of identification, but a photo ID was not required.

Kentucky first enacted an identification law for voting in 1988. The impetus for the law seems to be a *Louisville Courier Journal* eight-day investigative report in October 1987 about corruption in Kentucky elections and a subsequent special commission on election reform.²⁰ The newspaper's investigation focused on vote buying and campaign finance corruption. The series also mentioned fraud in the use of absentee ballots as a tool of vote-buyers, who can "easily verify for whom the ballot is cast."²¹ Notably, the investigative series did not mention in-person voter fraud—the only kind of fraud a voter ID law can prevent.

Based on this series, the Kentucky Legislative Research Commission created a Special Commission on Election Reform to study vote buying and selling as well as campaign finance issues.²² On December 19, 1987, the *Lexington Herald-Leader* reported on the commission's preliminary recommendations, which included "[a]llow[ing] local election officers to require prospective voters to produce identification as a condition for voting if the election officials do not know the voters."²³ This recommendation—which went beyond the *Louisville Courier*

18. KY. REV. STAT. ANN. § 117.227 (West 2016) (amended 2020, 2021) ("Election officers shall confirm the identity of each voter by personal acquaintance or by a document, such as a motor vehicle operator's license, Social Security card, any identification card that has been issued by the county and which has been approved in writing by the State Board of Elections, any identification card with picture and signature, any United States government-issued identification card, any Kentucky state government-issued identification card with picture, or credit card. The election officer confirming the identity shall sign the precinct voter roster and list the method of identification.")

19. *Id.*

20. Richard Whitt & R.G. Dunlop, *Winning at Any Cost: How Money Poisons Kentucky's Elections*, LOUISVILLE COURIER J., Oct. 11, 1987, at A15; *Task Force Formed on Election Fraud*, LEXINGTON HERALD-LEADER, Nov. 5, 1987, at B2.

21. Whitt & Dunlop, *supra* note 20, at A16.

22. LEGIS. RSCH. COMM'N., FINAL REP. OF THE SPECIAL COMM'N. ON ELECTION REFORM, No. 240 (Ky. 1988).

23. *Vote-Fraud Panel Recommends Changes*, LEXINGTON HERALD-LEADER, Dec. 19, 1987, at B2.

Journal's ideas for reform at the end of its series²⁴—appears to be the first mention of an ID requirement for Kentucky voters.

The Kentucky legislature then passed a bill to enact the special commission's recommendations.²⁵ The bill focused on rooting out vote buying and campaign finance corruption, but House Floor Amendment 3 to Senate Bill 268 added “language to a newly created section of KRS Chapter 116 to specify that a voter who is not known by an election officer and who lacks identification may vote after completing the affidavit which is required to be completed by a voter whose right to vote is challenged.”²⁶ After legislative negotiations, the overarching election reform bill—which included the amendment to add the voter ID language—passed both houses by significant margins.²⁷ Governor Wallace Wilkinson signed the bill into law on April 10, 1988.²⁸ The new voter ID law read:

Election officers shall confirm the identity of each voter by personal acquaintance or by a document, such as a motor vehicle operator's license, Social Security card, or credit card. If the voter has no identification in his possession, the election officer shall require the voter to complete the affidavit which is required to be completed by a voter whose right to vote is challenged. The election officer confirming the identity shall sign the precinct voter roster and list the method of identification.²⁹

A 2002 amendment to the law removed the middle sentence that allowed someone to vote if they did not have any identification but filled out a voter identity affidavit.³⁰ In 2016, the legislature expanded the kinds of identifications that were permissible to vote to include any ID card with a picture and signature, any U.S. government identification, and any Kentucky ID with a picture.³¹

24. Whitt & Dunlop, *supra* note 20, at A16.

25. S.B. 268, 1988 Gen. Assemb., Reg. Sess. (Ky. 1988).

26. *Id.*

27. *Id.*; Jacqueline Duke, *House Saves Part of Election Reform Bill Measure Narrowly Ok'd as Amendment to 2nd Bill*, LEXINGTON HERALD-LEADER, Mar. 29, 1988, at B1.

28. Ky. S.B. 268.

29. Confirmation of Voter's Identity, 1988 Ky. Acts ch. 341, § 9 (current version at KY. REV. STAT. § 117.227).

30. H.R. 33, 2002 Gen. Assemb., Reg. Sess. (Ky. 2002) (amending KY. REV. STAT. § 117.227 (1988)) (deleting: “If the voter has no identification in his possession, the election officer shall require the voter to complete the affidavit which is required to be completed by a voter whose right to vote is challenged”).

31. S.B. 169, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016) (amending KY. REV. STAT. § 117.227 (2002)) (adding “any identification card that has been issued by the county and which has been approved in writing by the State Board of Elections, any identification card with picture and signature, any United States government-issued identification card, any Kentucky state government-issued identification card with picture” to list of permissible IDs for voting).

Secretary Adams, who took office on January 6, 2020, sought to change that law to eliminate the allowable non-photo IDs and require all Kentuckians to show a photo ID to vote.

2. *Initial Introduction of S.B. 2*

Adams worked with legislators, including Republican Senator Robby Mills, to introduce Senate Bill 2—the photo ID bill.³² Republicans designated the bill as “S.B. 2” to signify it as a top legislative priority (S.B. 1 was about immigration law and sanctuary cities).³³ Adams said he modeled the bill after Indiana’s law, which the U.S. Supreme Court refused to invalidate in 2008 in *Crawford v. Marion County Election Board*.³⁴ Importantly, the Court in *Crawford* did not uphold Indiana’s law against any legal attack; it instead found that the plaintiffs had not introduced enough evidence to make the law unconstitutional on its face.³⁵ In rejecting a facial challenge, the Court opened the door for future plaintiffs to offer better evidence about the harms of a photo ID law. That said, Adams believed that the Indiana model was a good starting place for Kentucky’s bill given that the Supreme Court had allowed the Indiana law to go into force.

Under Indiana’s photo ID requirement, voters must show a photo identification that has their name and picture. This ID either cannot be expired or must expire after the most recent general election, and it must be issued by the United States or the State of Indiana.³⁶ U.S. military IDs without an expiration date are also permissible.³⁷ A voter who does not have a photo ID can cast a provisional ballot but then must appear before the county clerk within ten days of the election to either show an ID or fill out an affidavit saying that the voter has a religious objection to being photographed or is too indigent to obtain a photo ID.³⁸ Otherwise, the ballot will not count.

In my early discussions with Secretary Adams about the Kentucky photo ID proposal, I pointed out that Indiana’s law should not be a model, at least in all respects. I noted that judicial consideration of voter ID laws did not end in 2008 with the Supreme Court’s decision

32. S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>].

33. Joe Sonka, *Controversial Immigration Bill Given Top Priority by Kentucky Senate Republicans*, LOUISVILLE COURIER J. (Jan. 7, 2020, 5:06 PM), <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/01/07/kentucky-legislature-immigration-bill-top-priority-gop/2834132001/> [<https://perma.cc/ZY28-YCUT>].

34. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008).

35. Joshua A. Douglas, *The History of Voter ID Laws and the Story of Crawford v. Marion County Election Board*, in *ELECTION LAW STORIES* 453 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

36. IND. CODE ANN. § 3-5-2-40.5 (West 2014).

37. *Id.*

38. *Id.*

in *Crawford* and that, to avoid both disenfranchisement and costly litigation, the Kentucky version needed to be more expansive in the kinds of IDs that would suffice and more forgiving for voters without a photo ID. In particular, several courts have upheld photo ID laws only after the states adopted a “reasonable impediment” provision that allows voters to sign, under penalty of perjury, an affidavit that attests to their identity and indicates why they cannot obtain a photo ID.³⁹ For instance, a three-judge federal district court approved South Carolina’s law, with then-Judge Brett Kavanaugh authoring the opinion, only because the law included a reasonable impediment provision that would allow voters to designate their own reason for not having a photo ID when voting.⁴⁰

The initial version of the Kentucky bill, introduced in January 2020, used Indiana’s law as a model but included a reasonable impediment provision.⁴¹ Yet the bill was still too restrictive. The proposed law would have required voters to show a U.S.- or Kentucky-issued photo ID but would not have permitted IDs from other states.⁴² The law also would have allowed university IDs, but only from universities within the state.⁴³ The name on the ID had to “conform[] to the name in the individual’s voter registration record.”⁴⁴ Unless it was a military ID, the identification also had to have an expiration date that was at least after the date of the most recent regular election.⁴⁵

There were several problems with the types of IDs allowed for voting. The list of acceptable IDs included only those issued by the United States or the State, not local governments. The law would have required IDs to have an expiration date, but student IDs from most universities in Kentucky do not include expiration dates—meaning that university IDs would not actually qualify as valid for voting. And a voter who possessed an ID listing a name that did not match the name on the registration list—perhaps because the ID used a nickname—could not use that ID.

Under the initial version of S.B. 2, voters without a photo ID would be allowed to fill out an affidavit attesting to their identity but then would have to cast a provisional ballot.⁴⁶ That provisional ballot would not count unless the voter appeared personally at the county clerk’s office within three days to present a photo ID or show a non-photo identifying document and fill out an additional form choosing,

39. See, e.g., *Veasey v. Abbott*, 888 F.3d 792, 796 (5th Cir. 2018).

40. *South Carolina v. United States*, 898 F. Supp. 2d 30, 51 (D.D.C. 2012).

41. S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>].

42. *Id.* at § 24(12)(a).

43. *Id.* at § 24(12)(c).

44. *Id.* at § 24(12)(a)(1).

45. *Id.* at §§ 24(12)(a)(3)–(b)(2).

46. *Id.* at § 1(1)(c).

among a set list, the reasonable impediment that precluded the voter from having a photo ID.⁴⁷ Those reasons included, for example, a lack of transportation, lack of birth certificate, or religious objection to being photographed.⁴⁸ This list was somewhat nonsensical: if a voter lacks transportation to obtain an ID, the voter would also likely lack the means to travel to the county clerk's office within three days after election day to fill out the reasonable impediment form to attest to their lack of transportation! In addition, if a voter's reason did not fall under one of the listed explanations, the voter could not use the reasonable impediment form to have the ballot count.

Indeed, few voters—especially those who already do not have a photo identification—are likely to take the further step of traveling to the county clerk's office within three days of election day to show an ID or fill out an additional form. One study, looking at the effect of Indiana's photo ID law—which gives voters who cast a provisional ballot up to ten days after election day to visit the county clerk's office—found that “out of the roughly 2.8 million persons who cast ballots during Indiana's 2008 general election, 1,039 arrived at the polls without valid identification and then cast a provisional ballot.”⁴⁹ “Of those 1,039 persons without valid identification who cast a provisional ballot, 137 ultimately had their provisional ballot counted” because they appeared at the county clerk's office after election day.⁵⁰ Thus, although the impact was relatively small in terms of overall percentage, over 900 voters still did not have their ballots count. The same issue—voters who likely would not jump through the hoops of the provisional balloting process—would have affected Kentucky elections under the initial version of S.B. 2.

The proposed Kentucky law, as first introduced, also created unnecessary hurdles for voters using absentee ballots. Voters would have to include a copy of their photo ID along with an application for an absentee ballot.⁵¹ If the voter did not send a copy of their photo ID, then the county clerks would include the reasonable impediment affidavit along with the absentee ballot.⁵² But to use the reasonable impediment form, the voter would need to have it notarized.⁵³ Thus, an absentee voter who did not have a photo ID, or faced a hard time ob-

47. S.B. 2 § 2(1)(b)(2), 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/orig_bill.pdf [<https://perma.cc/W9DE-R539>].

48. *Id.*

49. Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 330 (2009).

50. *Id.*

51. Ky. S.B. 2 § 6(2).

52. *Id.* at § 6(3)(b).

53. *Id.*

taining a photocopy of it, would have had to find a notary to notarize the reasonable impediment affidavit—not something many voters would likely do.

Thus, the initial version of S.B. 2 had several fatal flaws: the kinds of permissible IDs were too restrictive; IDs would have to include an expiration date, but student IDs from universities in Kentucky did not have that information; voters with a reasonable impediment that prevented them from presenting a photo ID would have to fill out a provisional ballot and then travel to the county clerk’s office within three days to have that ballot count; and voters using absentee ballots would need to provide a photocopy of their ID or find a notary to verify their reasonable impediment form.⁵⁴ It is quite possible that, had that version passed, a court would have invalidated the law as essentially disenfranchising many voters, as the law would have been among the strictest photo ID laws in the country.

3. *Substantive Changes During the Legislative Debate*

Luckily, the legislature amended the law significantly during the legislative process. Of course, those changes do not take away the fact that the law is unnecessary and the reality that the law will make it harder for some people to vote, with a likely disproportionate impact on poor and minority voters.⁵⁵ But at least the law is better than it otherwise might have been. And, as we will see from Part IV, the process exhibited deliberative democracy through robust debate and meaningful changes in direct response to input from various voices.

After reading the original version of S.B. 2, I met with Secretary Adams and his staff to discuss my concerns, so I know that he was a driving force behind this initial set of alterations. First came the Committee Substitute in the Senate.⁵⁶ That amended version made several important changes. The new version eliminated the expiration date requirement, meaning that university IDs—which typically do not have an expiration date—would suffice.⁵⁷ But the other require-

54. Joshua A. Douglas, Opinion, *Kentucky’s Proposed Photo ID Law Would Make It Harder To Vote, Not Stop Fraud*, LOUISVILLE COURIER J. (Jan. 9, 2020, 10:07 AM), <https://www.courier-journal.com/story/opinion/2020/01/09/kentuckys-proposed-photo-id-law-would-make-harder-vote/4418267002/> [https://perma.cc/ZKK3-CFWC].

55. See, e.g., John Kuk, Zoltan Hajnal & Nazita Lajevardi, *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, POL. GRPS. & IDENTITIES, June 4, 2020, at 1, <https://www.tandfonline.com/doi/full/10.1080/21565503.2020.1773280> [https://perma.cc/78EV-8BSE] (conducting an empirical analysis of county turnout statistics to find that states with stricter photo ID laws had lower turnout in more racially diverse counties).

56. S. Comm. Substitute 1, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/SCS1.pdf> [https://perma.cc/9DBQ-9QBW] (proposing to amend Ky. S.B. 2).

57. *Id.* at § 24(12)(a).

ments of ID cards remained, including that they are issued by either the U.S. or Kentucky and that the name conformed with the name on the voter registration list.⁵⁸ In addition, voters without a photo ID at the polls would no longer have to use a provisional ballot.⁵⁹ So long as they showed a non-photo ID, such as a credit card or Social Security card, they could fill out the reasonable impediment affirmation at the polls and then vote using a regular ballot.⁶⁰ But the reasons listed on the reasonable impediment form changed slightly in a negative direction. The initial version said that one possible impediment was “lack of” a birth certificate or other documents required to obtain an ID, but the Senate Committee Substitute changed that language to “inability to financially afford” a birth certificate or other documents.⁶¹ That change was concerning because a voter might lack the documents necessary to obtain a photo ID for another reason besides an inability to afford them.

The Senate Committee Substitute also included changes for voters who do not have a photo ID and also do not bring a non-photo ID or cannot claim a reasonable impediment: Those voters could cast a provisional ballot, which would count only if the voter appeared at the county clerk’s office within three days to show a photo ID or fill out the reasonable impediment affidavit.⁶² Previously, Kentucky used provisional ballots only in federal elections, so this provision would expand provisional ballots to all elections in the state.

The absentee balloting rules also changed in the Senate Committee Substitute. A voter still would be required to provide proof of identification with a request for an absentee ballot, and if the voter did not do so, then election officials would include the reasonable impediment form along with the mailed ballot.⁶³ A voter would then return the ballot either with a copy of their photo ID or the reasonable impediment form, but in a change from the initial version, the voter would not need to have that form notarized.⁶⁴

Thus, the Senate Committee Substitute represented a meaningful, positive advancement of the bill to minimize the negative impact on voters. As I wrote in both the *Louisville Courier Journal* and the *Lexington Herald-Leader*, the state’s two largest newspapers, “[t]hese changes are significant in turning the law from what would have been among the strictest in the nation to a milder form that should have

58. *Id.*

59. *Id.* at § 1(2).

60. *Id.*

61. *Id.* at § 1(1)(c)(8).

62. *Id.* at § 2.

63. *Id.* at § 5(2).

64. *Id.* at § 6(3).

adverse effects on far fewer voters.”⁶⁵ Yes, it is backward to celebrate a policy development that would merely disenfranchise fewer people than it otherwise might have, but that was the reality given the political landscape at the time.

The Senate State and Local Government Committee passed this version of the bill, and the full Senate approved it along party lines by a 29–9 vote.⁶⁶ The tenor of the debate in the Senate was fairly mild, especially as compared to the rhetoric to come in the House, yet Democrats and advocacy groups spoke out against the measure as unnecessary. Of course, with solid majorities in both chambers, Republicans in the state would not heed the pleas to scuttle the bill entirely.

The next stop was the House Committee on Elections, Constitutional Amendments, and Intergovernmental Affairs. As delivered, the bill still had several problems. However, the sponsors made changes even before the House Elections Committee considered the bill. Most significantly, this newer version—the House Committee Substitute—expanded the kinds of permissible photo IDs a voter could use. Instead of allowing only an ID issued by the United States or Kentucky, the House Committee Substitute would have allowed a photo ID from *any* state as well as from local governments within Kentucky.⁶⁷ University identifications could also come from any educational institution in the United States, not just Kentucky.⁶⁸ And the amendment eliminated language requiring the name on a photo ID to “conform” to the voter registration record, instead now simply requiring IDs to have the voter’s name and photograph.⁶⁹

But, although the House Committee Substitute eased some of the rules from the Senate version, it still had its own problems. First, in a significant change from prior practice, this latest proposal did not allow poll workers to verify a voter’s identity based on personal recognition.⁷⁰ Rural voters in particular use this mechanism, as everyone

65. Joshua A. Douglas, Opinion, *Kentucky Photo ID Bill Needs More Work and Should Take Effect After 2020 Election*, LOUISVILLE COURIER J. (Jan. 28, 2020, 9:20 AM), <https://www.courier-journal.com/story/opinion/2020/01/28/kentucky-voting-laws-photo-id-bill-should-delayed-until-2021/4587852002/> [https://perma.cc/J6S6-SM36].

66. Vote History, S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/record/20rs/sb2/vote_history.pdf [https://perma.cc/8LAM-BD54] (Senate vote on the proposed changes implemented in the Senate Committee Substitute version).

67. H.R. Comm. Substitute 1 § 23(12)(a), 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/HCS1.pdf> [https://perma.cc/T6T3-MQCE] (proposing to amend S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf>) [https://perma.cc/B8ME-JGEX]).

68. *Id.* at § 23(12)(c).

69. *Id.* at § 23(12)(a)(1).

70. *Id.* at § 1.

knows everyone else in these small communities, such that poll workers can simply check off the neighbors they recognize at the polls. The House Committee Substitute completely eliminated any use of personal recognizance.⁷¹ Data from the state board of elections revealed that, at least in the counties that used e-poll books, which accounted for over 800,000 voters in the 2019 gubernatorial election, 0.61% of voters (just under 5,000 voters) checked in based on personal recognizance.⁷² Second, the bill provided that all reasonable impediment forms—like other election documents such as the “oath of voter” form a person might fill out if they are not on the precinct roster—would be referred to the commonwealth’s attorney and county attorney, meaning a potential grand jury investigation.⁷³ Although opponents argued that this provision might deter voters from using the form, it remained throughout the rest of the legislative process and is part of the enacted law. Secretary Adams insisted that referral of these forms to law enforcement was routine and that the new law simply brought the handling of reasonable impediment forms in conformity with the process used for other election documents.⁷⁴ Third, the list of possible reasonable impediments a voter could select still said “inability to financially afford” a birth certificate or other documents, instead of the original “lack of.”⁷⁵ That minor difference could have had a big impact: Imagine a voter who could financially afford to pay for a birth certificate but simply requested one too late, perhaps from a different state. That person could not validly indicate an inability to financially afford a birth certificate and therefore could not use the reasonable impediment form, which voters sign under penalty of perjury. Fourth, unlike the reasonable impediment mechanisms in other states such as North Carolina and South Carolina, the Kentucky form would not have a catch-all option, where a voter could fill in another reason not already preprinted on the list.⁷⁶ That omission could impact voters facing an

71. *Id.*

72. E-mail from Jared Dearing, Exec. Dir., Ky. State Bd. of Educ., to Joshua A. Douglas, L. Prof., J. David Rosenberg Coll. of L. (Feb. 4, 2020 5:39 P.M.) (on file with author).

73. H.R. Comm. Substitute 1 § 1(4), 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/HCS1.pdf> [<https://perma.cc/T6T3-MQCE>] (referencing § 17) (amending S.B 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]).

74. Interview with Secretary of State Michael G. Adams (Dec. 15, 2020).

75. H.R. Comm. Substitute 1 § 1(8)(b), 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/HCS1.pdf> [<https://perma.cc/T6T3-MQCE>] (proposing to amend S.B 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]).

76. N.C. GEN. STAT. ANN. § 163-166.16 (West 2020) (“Other reasonable impediment. If the registered voter checks the ‘other reasonable impediment’ box, a further brief written identification of the reasonable impediment shall be required, in-

issue that the legislature did not contemplate—such as, as it turned out, complications in obtaining an ID during a pandemic. Finally, the law would go into effect for the November 2020 election, a short time period even without changing election procedures due to COVID-19. Elsewhere, courts have put photo ID laws on hold when states have tried to implement them through too close to an election.⁷⁷

On February 20, 2020, I testified before the House Elections Committee and argued that, even though a photo ID law was unnecessary and could harm voters, the legislature should at least address these five issues. The questioning was heated, with many Republicans on the committee expressing skepticism about a photo ID law’s disenfranchising effects and many Democrats focusing on the lack of voter fraud to highlight how the law would not combat any actual problem in Kentucky elections.⁷⁸ Opponents also noted the potential racially discriminatory impact of a new photo ID requirement for voting.⁷⁹

The House Elections Committee also heard from other advocates, including representatives of the ACLU of Kentucky, the League of Women Voters, and the NAACP.⁸⁰ These individuals explained the harms that a photo ID law can impose, especially on marginalized communities, and asked the legislators what problems they were trying to solve given that there is no evidence of in-person impersonation.⁸¹ The ACLU of Kentucky, for instance, explained why, in the bill’s current form, litigation would be necessary to challenge some of the law’s substantive problems and delay it until after 2020 so the State could have time to implement it properly.⁸²

cluding the option to indicate that State or federal law prohibits listing the impediment.”); S.C. CODE ANN. § 7-13-710 (West 2011) (“[T]he elector suffers from a reasonable impediment that prevents him from obtaining photograph identification. The elector also shall list the impediment, unless otherwise prohibited by state or federal law.”).

77. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *27 (Pa. Commw. Ct. Jan. 17, 2014); *South Carolina v. United States*, 898 F. Supp. 2d 30, 49 (D.D.C. 2012) (approving the new photo ID law for future elections but not the upcoming election); *Frank v. Walker*, 574 U.S. 929 (2014) (vacating Seventh Circuit’s stay of district court decision that had enjoined new Wisconsin photo ID law).

78. *House Elections, Constitutional Amendments and Intergovernmental Affairs Committee* (Kentucky Educational Television broadcast Feb. 20, 2020), <https://www.ket.org/legislature/archives/?nola=WGAOS+021122&stream=AHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzAyMTEyMi5tcDQvcGxheWxpc3QubTN1OA=&jwsourc=CL> [<https://perma.cc/TZA2-7E3Y>].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

Although Democrats sought a delay of the committee vote to incorporate some of the suggested changes, the committee passed the House Committee Substitute on a party-line vote.⁸³

The process up to this point was collaborative but also opaque. The legislature should improve its transparency by releasing new versions of a law it will consider in advance of a hearing so that the public can actually comment on the law. Often, the legislative sponsors would release a new version of the bill right as lawmakers were set to address it at a hearing, and the public was unable to consider the changes ahead of time. For example, representatives of the advocacy groups had not seen the House Committee Substitute before the hearing during which they were to testify about the bill. Thus, these individuals could not comment on the significant substantive changes within the latest version. The same was true of the next iteration, House Floor Amendment 40, which incorporated at least three of my suggested changes—it simply appeared on the House floor without advance public notice.

Representative James Tipton, the original sponsor of the photo ID law in the House, introduced House Floor Amendment 40 on March 2, 2020, just a week and a half after the committee sent the bill to the full House.⁸⁴ Again, this process lacked transparency, as Representative Tipton simply introduced the amendment right as the House was set to consider it, making it difficult for the public to weigh in. Representative Tipton's amendment incorporated many of the changes suggested in numerous amendments that Democrats had introduced (which largely tracked the recommendations from my testimony), rendering those amendments moot.⁸⁵ The bill, at this stage, included some significant improvements. First, it re-introduced personal recognition as a method of proving a voter's identity: a voter would not need to show any ID if the poll worker personally knew the voter.⁸⁶ That provision reinstated prior Kentucky law, which is used especially in rural communities where everyone knows each other. The only difference from prior practice is that poll workers would have to fill out an election officer affirmation for that voter.⁸⁷ Second, the list of excuses for not having a photo ID on the reasonable impediment form changed back to inability to obtain a birth certificate or other docu-

83. Vote History, S.B 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/record/20rs/sb2/vote_history.pdf [<https://perma.cc/8LAM-BD54>].

84. H. Floor Amend. 40, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/record/20rs/sb2.html#HFA40> [<https://perma.cc/WCR4-3BR7>] (proposing to amend S.B 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]).

85. *Id.*

86. *Id.* at § 1(4).

87. *Id.*

ments instead of an inability to *afford* a birth certificate or other documents.⁸⁸ Third, House Floor Amendment 40 included a catch-all in the reasonable impediment provision, so a voter could provide another reason for not having a photo ID that was not preprinted on the list.⁸⁹ The amendment also eliminated provisional voting for non-federal elections, reverting back to prior practice, which uses provisional ballots only for elections that include federal offices.⁹⁰ Thus, House Floor Amendment 40 was mostly good news for advocates of a relaxed bill: it re-inserted personal recognizance as a permissible way to confirm a voter's identity and expanded the ability of voters without a photo ID to use the reasonable impediment form. But the amendment did not address the concerns about the implementation date, such that the new law would still go into effect for November 2020.

The House engaged in a vigorous debate over the bill on March 3, 2020. Representative Charles Booker, a Black Democrat who ran in the Democratic primary for U.S. Senate that year,⁹¹ gave an impassioned speech in which he extolled, “this is going to block people from voting. Just call it plain. It’s going to block people from voting. Even if you don’t want that to happen. That will be a result. And we can’t afford that. We need to be breaking down barriers to democracy, not building them up.”⁹² Representative Booker, invoking his grandfather’s experience in being forced to count the number of beans in a jar to vote, equated the photo ID requirement to the country’s prior efforts to disenfranchise minority voters.⁹³ By contrast, Representative Tip-ton, the law’s sponsor in the House, responded to criticism that the bill was a solution in search of a problem given that there is no in-person voter fraud by noting, “my home has never been broken into, but I still lock the doors at night.”⁹⁴

Republicans were frustrated by the tenor of the debate on the House floor, especially when some Democrats asserted that the Republican push for a photo ID law was racially motivated. One high-

88. *Id.* at § 1(1)(c)(8)(b).

89. *Id.* at § 1(1)(c)(8)(i).

90. *Id.* at § 3.

91. Booker lost the Democratic primary to Amy McGrath, who then lost the general election to Republican Mitch McConnell. Adam Edelman, *McGrath Defeats Booker in Kentucky Senate Democratic Primary*, *NBC News Projects*, NBC NEWS (June 30, 2020, 5:06 PM), <https://www.nbcnews.com/politics/2020-election/charles-booker-amy-mcgrath-neck-neck-kentucky-senate-democratic-primary-n1232513> [<https://perma.cc/PH82-QUBP>].

92. Charles Booker (@Booker4KY), TWITTER (Mar. 3, 2020, 9:50 PM), <https://twitter.com/booker4ky/status/1235019878345605124> [<https://perma.cc/C3A7-LBQC>].

93. *Id.*

94. Joe Sonka, *Kentucky House Passes Amended Bill Requiring Photo Identification To Vote*, *LOUISVILLE COURIER J.* (Mar. 4, 2020, 6:23 AM), <https://www.courier-journal.com/story/news/politics/2020/03/03/kentucky-voter-id-bill-house-passes-amended-legislation/4939138002/#> [<https://perma.cc/9ACX-CZVG>].

level Republican involved in the negotiations said that “the end product would have been friendlier to the Democratic perspective if they hadn’t trashed the integrity of the Republicans.”⁹⁵ The rhetoric, this Republican told me, made Republicans fearful of additional compromise because they worried that Democrats would still brand them as racist regardless of whether they made any further changes. This Republican also said that the political goal was not to suppress votes but instead was to create a wedge issue that would energize their base. Of course, Democrats believed that the only point was to make it harder for some people who skewed Democratic, including racial minorities, to vote.

The bill passed the House by a 62–35 vote, with all Republicans voting yes and all but two Democrats voting no.⁹⁶

Because the Senate and House passed different versions, either the Senate had to concur with the House version, or the two houses would have to appoint a conference committee to work out the differences. During all of these proceedings, many individuals engaged in both public and private conversations with Secretary Adams and legislators about the bill’s details. For instance, before the amendments that came next, a lawyer for the ACLU of Kentucky indicated that if the Senate would agree to the House version of the bill, the organization would not challenge the substantive portions of the law in court, but still might bring a lawsuit to delay the implementation of the bill until after 2020.⁹⁷

Yet, the Senate quickly refused to concur. The bill then went to a Free Conference Committee, comprised of members of both chambers, that could make any changes it wanted to the law. The committee included three legislators from each chamber with a total of four Republicans and two Democrats.⁹⁸ The committee did not really meet,

95. Personal interview with Republican official (this comment was not for specific attribution).

96. *See*, Vote History, S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), http://kftc.org/sites/default/files/docs/sb_2_house_floor_vote.pdf [<https://perma.cc/B2C4-F8XV>] (voting history of the House of Representatives on the Senate Committee Substitute) (indicating that three representatives did not vote); Sonka, *supra* note 94.

97. E-mail from Corey Shapiro, Legal Dir., ACLU of Ky., to Joshua A. Douglas, Professor of L., J. David Rosenberg Coll. of L. (Mar. 9, 2020, 12:04 PM) (forwarding email from Shapiro to Secretary Adams) (on file with author).

98. Free Conf. Comm. Rep., 2020 Gen. Assemb., Reg. Sess. (Ky. 2020) <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/FCCR1.pdf> [<https://perma.cc/23VP-BX9B>] (reporting on S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]); H. Floor Amend. 40, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/record/20rs/sb2.html#HFA40> [<https://perma.cc/WCR4-3BR7>] (proposing to amend S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]).

according to Dallas Hurley, the general counsel for the House Democratic caucus, or at least the committee did not include the two Democratic members in its discussions.⁹⁹ Hurley said that Representative Tipton simply told Democratic lawmakers what the committee had decided just before the revisions went to the floor of the House. Hurley indicated that “there was no real actual meeting with any minority [Democratic] members present” and that “[t]hey didn’t even give the appearance of process.”¹⁰⁰ Once again, the behind-the-scenes deliberations lacked transparency.

The Free Conference Committee report made three changes.¹⁰¹ First, it removed the ability to use an out-of-state ID as a permissible identification for voting, although out-of-state student IDs are still allowed.¹⁰² Second, the committee report slightly altered the personal recognizance provision: a poll worker who checks in a voter without a photo ID based on personal recognizance must affirm on an affidavit that the poll worker “knows the voter’s name and that the voter is a resident of the community.”¹⁰³ Finally, the amended bill removed the catch-all line from the reasonable impediment form; a voter without a photo ID, but who shows a non-photo identification, no longer would have the opportunity to provide an excuse not already listed on the form.¹⁰⁴

Importantly, the Free Conference Committee made these changes just as the coronavirus pandemic began to sweep the nation. Governor Andy Beshear had declared a state of emergency on March 6, 2020.¹⁰⁵ However, the legislature pushed forward undeterred, considering the three changes within the Free Conference Committee report on March 19. The committee report passed by party-line votes in both chambers. The final bill passed on March 19 in the House by a vote of 58–25 and the Senate by a vote of 25–2, with seventeen members of the House

99. E-mail from Dallas Hurley, Gen. Couns., Ky. H. Democratic Caucus, to Joshua A. Douglas, Professor of L., J. David Rosenberg Coll. of L. (Mar. 18, 2020, 3:04 PM) (on file with author).

100. *Id.*

101. Free Conf. Comm. Rep., 2020 Gen. Assemb., Reg. Sess. (Ky. 2020) <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/FCCR1.pdf> [<https://perma.cc/23VP-BX9B>] (reporting on S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb2/bill.pdf> [<https://perma.cc/B8ME-JGEX>]).

102. *Id.*

103. *Id.*

104. *Id.*

105. Executive Order from Andy Beshear, Governor of Kentucky, Executive Order 2020-215 (Mar. 6, 2020), https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf [<https://perma.cc/R5A7-E7H6>].

and eleven members of the Senate not voting.¹⁰⁶ Three Democrats joined all of the Republicans in favor of the final bill.¹⁰⁷ The legislature took this action even though advocates strongly criticized lawmakers for moving forward with a measure to make it harder to vote during a pandemic.¹⁰⁸ As I wrote at the time, “Why is the legislature even considering the bill at all in this environment? It would be absurd—and likely unconstitutional—to pass a photo ID law right now when Kentuckians without an ID cannot even visit a state office to obtain an identification.”¹⁰⁹

Nevertheless, both houses of the Kentucky legislature passed a final bill to impose a photo ID requirement for voting, although the bill is milder than the stricter laws in other states.¹¹⁰ Under the law, as passed, voters now must show a photo ID to vote. Permissible IDs include a U.S. or Kentucky-issued ID, a U.S. military or Kentucky National Guard ID, a university or professional school ID from any state, or a Kentucky city or county ID. The IDs must have the name of the voter and a photograph, though the legislature removed the language requiring the name to conform to the name on the voter registration list.¹¹¹ As an alternative, an individual may vote based on personal recognizance if the poll worker knows the voter’s name and that the voter resides in the community, but the poll worker must now fill out a form attesting to this knowledge. Voters without a photo ID, but with a non-photo ID such as a credit card or Social Security card, can fill out the reasonable impediment form—which lists eight possible impediments from which the voter can choose—and then cast a regular ballot. Voters without any form of ID whatsoever can fill out a provisional ballot if there is a federal election, but they are out of luck in election years with only state races. That provisional balloting process represents no change to the prior practice. Absentee voters also have to comply with the photo ID requirement by either providing a copy of their photo ID with their ballot request form or with the ballot itself, or by including the reasonable impediment form with their completed

106. Vote History, S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/record/20rs/sb2/vote_history.pdf [<https://perma.cc/8LAM-BD54>].

107. *Id.*

108. Joshua A. Douglas, Opinion, ‘Perversion of Democracy’ Underway in Frankfort as Lawmakers Continue To Meet Amid Pandemic, LEXINGTON HERALD-LEADER (Mar. 19, 2020, 12:46 PM), <https://www.kentucky.com/opinion/op-ed/article241335376.html>.

109. *Id.*

110. Christina Beeler, Comment, *Voter Photo ID Laws: A Solution in Search of a Problem*, 55 HOUS. L. REV. 479, 505–06 (2017) (discussing strict voter ID laws in Texas and Wisconsin).

111. S.B. 2 § 23(12), 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/SB2/HFA40.pdf> [<https://perma.cc/4T99-HG4U>] (amending KY. REV. STAT. § 117.375).

ballot. The Kentucky State Board of Elections eventually approved a regulation to allow voters to provide their driver’s license info on the online absentee ballot request portal to satisfy the requirement.¹¹²

Democratic Governor Andy Beshear was not involved much in the legislative debate up to this point: he said that he opposed any measure that would make it harder to vote but wanted to see what version of the law passed before he commented further.¹¹³ On April 3, 2020, Governor Beshear vetoed the bill. His veto statement read, in its entirety,

I am vetoing Senate Bill 2 because the provisions of the law would create an obstacle to the ability of Kentuckians to exercise their right to vote, resulting in fewer people voting and undermining our democracy. Furthermore, no documented evidence of recent voter fraud in the form of impersonation in Kentucky has been presented in support of Senate Bill 2 and, therefore, the legislation would be attempting to resolve a problem that does not exist. The provisions of Senate Bill 2 would also likely threaten the health and safety of Kentuckians by requiring them to obtain an identification during the novel coronavirus (COVID-19) pandemic, a public health emergency. During this time, the offices that would provide this identification are not open to in-person traffic, which would be necessary to create the actual identification.¹¹⁴

The bill then went back to the legislature, which could override the Governor’s veto by a majority of those elected (not just those present) in both houses.¹¹⁵ The legislature overrode the veto easily, by a 27–6 vote in the Senate and a 60–29 vote in the House, with all Republicans and two Democrats voting to override the veto.¹¹⁶ The measure is now law.

One interesting aspect of this legislative enactment is that once Republican Michael Adams became the secretary of state, under a campaign promise of supporting a voter ID law, opponents seemed resigned to the fact that the state would enact a stricter photo ID requirement for voting. The main goal for many opponents was to influence the debate about what actually went into that law. Thus, the

112. Emergency Administrative Regulation from Andy Beshear, Kentucky Governor, 31 KY. ADMIN. REGS. 4:19OE § 11 (2020), <https://newsroom.ky.gov/SOS/PressReleasesAttachments/Attachments/311/SBE%20Covid19%20Emergency%20Regulation.pdf> [<https://perma.cc/76Q7-S3RR>].

113. Joe Sonka, *Voter Photo ID Bill Passes Kentucky Legislature, Heads to Gov. Beshear’s Desk*, LOUISVILLE COURIER J. (Mar. 19, 2020, 9:44 PM), <https://www.courier-journal.com/story/news/politics/2020/03/19/voter-photo-id-bill-passes-legislature-head-gov-andy-beshear/2881374001/> [<https://perma.cc/3KAJ-7U57>].

114. Veto Message from Andy Beshear, Kentucky Governor, *Veto Message from the Governor of the Commonwealth of Kentucky Regarding Senate Bill 2 of the 2020 Regular Session* (Apr. 3, 2020), <https://apps.legislature.ky.gov/record/20rs/sb2/veto.pdf> [<https://perma.cc/P6QH-3Z87>].

115. KY. CONST. § 88.

116. Vote History, S.B. 2, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/record/20rs/sb2/vote_history.pdf [<https://perma.cc/8LAM-BD54>].

advocacy was less about derailing the bill in its entirety and instead focused on adding as many fail-safe mechanisms for voters as possible.

Another enlightening part of the debate was that the coronavirus pandemic had little effect on the legislative action given that the bill had proceeded so far before the pandemic hit. That reality contrasts significantly with another Republican-backed bill, H.B. 596, which was intended to ease Kentucky election law by, among other things, easing the voter registration deadline, expanding polling hours, and adding to the excuses allowed for absentee voting.¹¹⁷ That bill, initially scheduled for a committee hearing in March 2020, never saw the light of day. But the legislature pushed forward undeterred with the photo ID bill. Secretary Adams repeatedly affirmed that his goal was to make it “easy to vote and hard to cheat” in Kentucky elections.¹¹⁸ He claimed that the photo ID bill would make it hard to cheat, even though he could cite no evidence of in-person impersonation. Thus, the photo ID bill remained a priority, but once the pandemic hit, his main concern shifted away from the easy-to-vote bill and instead to the upcoming primary election. Secretary Adams worked to delay the May 19, 2020 primary to June 23, 2020, and adopt new, one-time rules for that primary to allow any voter to cast an absentee ballot without an excuse. Yet because the photo ID bill was so close to the finish line, Secretary Adams continued to advocate for the legislature to pass and then override the Governor’s veto of what he saw as a signature accomplishment.¹¹⁹

The new photo ID requirement took effect on July 15, 2020. Even amidst cries that the legislature was acting inappropriately during a pandemic, the state planned to implement it for the first time during the November 2020 election.¹²⁰

117. H.B. 596, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/recorddocuments/bill/20RS/hb596/orig_bill.pdf [<https://perma.cc/UZ6E-6CBP>].

118. Adams, *supra* note 14.

119. KY Senate Majority (@KYSenateGOP), TWITTER (Apr. 14, 2020, 8:46 PM), <https://twitter.com/KYSenateGOP/status/1250224053555773447> [<https://perma.cc/U6D7-5W7B>].

120. Joe Sonka & Morgan Watkins, *Kentucky Legislature Overrides 5 of Gov. Beshear’s Vetoes, Passes Marsy’s Law*, LOUISVILLE COURIER J. (Apr. 15, 2020, 9:42 AM), <https://www.courier-journal.com/story/news/politics/2020/04/14/kentucky-legislature-overrides-five-beshear-vetoes-passes-marsys-law/2990434001/> [<https://perma.cc/JWK4-NEDF>].

III. EVERY GOOD LAW STORY NEEDS SOME LITIGATION:
THE LAWSUIT AND THE SUBSEQUENT CHANGES
FOR THE NOVEMBER 2020 ELECTION DUE
TO THE PANDEMIC

On May 27, 2020, just six weeks after the legislature overrode the Governor’s veto of S.B. 2, a coalition of plaintiffs filed suit.¹²¹ This coalition included the ACLU of Kentucky, the League of Women Voters of Kentucky, the Kentucky State Conference of the NAACP, and the Lawyers’ Committee for Civil Rights Under Law.¹²² The complaint included two claims: first, that Kentucky should use the same relaxed absentee voting rules it adopted for the upcoming June 2020 primary in the November 2020 election, and second, that the court should prevent the state from implementing the new photo ID law, which would be in effect for the first time in November 2020.¹²³

On the photo ID bill, the complaint alleged that “S.B. 2, enacted in the midst of a global pandemic, places a severe burden on Kentuckians’ fundamental voting rights by mandating dangerous or impossible actions to vote by mail-in absentee ballot.”¹²⁴ The complaint noted that the state had closed DMV offices during the pandemic and that, even when these offices opened, they would not have the capacity to deal with a deluge of requests for new IDs.¹²⁵ The complaint also challenged the requirement that absentee voters include a copy of their photo ID:

Practically, this means that, in the middle of a pandemic, voters will be forced to choose between entering public businesses or libraries—many of which are not yet open—to use copying and printing equipment, a possible vector for contracting COVID-19, or losing the “precious” and “fundamental” right to vote.¹²⁶

Echoing the concerns about the removal of the catch-all portion of the reasonable impediment form, the complaint noted that “S.B. 2’s Impediment Requirement does not provide a basis for excusing the requirements of the Photo ID Law if the COVID-19 pandemic prevents the voter from obtaining a photo ID or procuring a copy of their photo ID.”¹²⁷

The relief the plaintiffs sought was somewhat limited: they asked the court to enjoin the use of the new photo ID requirement “while the risk of community transmission of COVID-19 continues to threaten

121. Complaint, *Collins v. Adams*, No. 3:20-CV-375-CRS, 2020 WL 2747371 (W.D. Ky. May 27, 2020).

122. *Id.*

123. *Id.*

124. *Id.* para. 194.

125. *Id.* para. 200.

126. *Id.* para. 202 (citations omitted).

127. *Id.* para. 205.

the health and safety of Kentucky voters.”¹²⁸ The plaintiffs challenged the law under the First Amendment and the Fourteenth Amendment’s Equal Protection Clause—essentially, the constitutional right to vote.¹²⁹ Despite evidence that photo ID requirements disproportionately impact minority voters, the plaintiffs did not challenge S.B. 2 under the Voting Rights Act. Nor did the plaintiffs challenge the law in its general application outside of the pandemic. That is, the plaintiffs seemed to recognize that the photo ID law, as a general matter, would likely pass legal muster, and therefore they focused their arguments on its implementation during the pandemic. This challenge was probably narrow because the law included several fail-safe mechanisms not present in many other states’ strict photo ID requirements, which would minimize its negative impact. Of course, the litigation posture does not mean that opponents agreed the law would not have an adverse impact on minorities and others. Instead, the litigants focused on the pandemic as the best course to challenge the law for the 2020 election.

The timing of the lawsuit raised some eyebrows. Kentucky’s 2020 primary was initially scheduled for May 19.¹³⁰ The Governor and secretary of state used their emergency powers during a state of emergency to delay the primary until June 23.¹³¹ Yet the plaintiffs brought suit in late May, almost a month before they even knew if the June primary—for which the Governor and secretary of state altered the state’s rules to allow anyone to vote via absentee ballot without an excuse—would be successful. Perhaps the plaintiffs were concerned that a court would fault them if they filed suit too close to November’s election day under the *Purcell* Principle, which dictates that courts should not change election rules too close to the election.¹³² These timing issues ultimately rendered the lawsuits moot once the Governor and secretary of state issued new rules for the November 2020 election, as discussed below.

There was also litigation in state court, with plaintiffs filing suit on July 7, 2020, under the Kentucky Constitution, which provides that

128. *Id.* at Requested Relief, para. C.

129. *Id.* para. 16.

130. Daniel Desrochers, *Kentucky’s Primary Election Pushed Back Until June amid COVID-19 Outbreak*, LEXINGTON HERALD-LEADER (Mar. 16, 2020, 6:58 PM), <https://www.kentucky.com/news/politics-government/article241243426.html>.

131. *Id.*

132. *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/> [https://perma.cc/DX6Z-PQE3] (last visited Sept. 14, 2021); Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. STATE U. L. REV. 427 (2016).

“all elections shall be free and equal.”¹³³ The plaintiffs made the same basic arguments as the ones in the federal lawsuit but couched their litigation on the more explicit protection of voting rights under the Kentucky Constitution.

Yet neither the federal nor state courts ultimately weighed in on the issue, as the Governor and secretary of state promulgated new rules for the November 2020 election that resolved the controversy. On August 14, Secretary of State Michael Adams delivered to Governor Andy Beshear his recommendations for emergency rules for the November election due to the pandemic.¹³⁴ In addition to allowing anyone with concerns about COVID-19 to vote via absentee ballot, the emergency regulations—adopted by the Kentucky State Board of Elections—eased the photo ID law significantly. First, an absentee voter could comply with the photo ID requirement by providing their driver’s license info on the new online portal when requesting an absentee ballot.¹³⁵ The online system allowed the voter registration database to verify a person’s identity through DMV records, so a voter would not need to do anything else—such as printing out a copy of their photo ID to include with an absentee ballot. Second, the regulations expanded several definitions on the reasonable impediment form to take account of the fact that some voters could not obtain an ID due to the pandemic. The regulation defined “disability or illness”¹³⁶ on the reasonable impediment form to include

an inability to procure photographic proof of identification due to office closure, temporary work stoppage, or backlog of issuing authorities of such photographic proof of identification, as caused by the COVID-19 pandemic; or, possession of a health condition or vulnerability that the voter believes subjects the voter to unacceptable risk of harm from the novel coronavirus, including unacceptable risk of transmission of the virus from the voter to others.¹³⁷

The regulation also expanded the definition of “[i]nability to obtain his or her birth certificate or other documents needed to show proof of identification”¹³⁸ to include “the inability to provide a copy of proof of identification possessed by the voter.”¹³⁹ Thus, a voter who showed up to vote in person without a photo ID could present a non-photo ID and

133. Complaint at 3, *Sterne v. Adams*, No. 20-CI-00538 (Cir. Ct. Ky., July 7, 2020) (citing KY. CONST. § 6), <https://clearinghouse.net/chDocs/public/VR-KY-0011-0001.pdf> [<https://perma.cc/V3DZ-XZ33>].

134. Letter from Michael Adams, Ky. Sec’y State, to Andy Beshear, Ky. Governor (Aug. 14, 2020), <https://governor.ky.gov/attachments/SOS%20General%20Election%20Manner%20Recommendation.pdf> [<https://perma.cc/4BB4-Z5PG>].

135. Emergency Administrative Regulation, *supra* note 112.

136. *Id.* at § 2(2) (expanding KY. REV. STAT. § 117.228(1)(c)(8)(e)).

137. *Id.*

138. *Id.* at § 2(3).

139. *Id.*

then fill out a new voter affirmation form,¹⁴⁰ which included these expanded definitions to account for the pandemic. The form itself allowed a voter to attest “[t]he following impediment has prevented me from obtaining proof of identification as defined under KRS 117.375” and select one of eight checkboxes, including: “Disability or illness (including risks associated with transmission of COVID-19).”¹⁴¹

These new rules for November 2020 essentially rendered the litigation moot: the state had changed its rules to allow for expanded absentee voting and also implemented the new photo ID requirement while easing its burdens. Most voters who wanted to vote by mail would request an absentee ballot through the online portal and submit their driver’s license information, satisfying the photo ID requirement. The portal also provided an online affirmation that served as a reasonable impediment form if a voter did not input their driver’s license information. In-person voters without a photo ID could show a non-photo ID, select among an expanded list of reasons for not presenting a photo ID on a Voter Affirmation Form, and then cast a regular ballot. It was probably difficult for the plaintiffs to identify voters who they could prove would suffer disenfranchisement under these rules. A few days after the state issued these new guidelines for the November election, the plaintiffs in the federal case issued a press release celebrating the new rules as a “great victory for voting rights and public health in Kentucky” and crediting the pending lawsuit for helping to achieve these changes.¹⁴² Both the federal and state plaintiffs then dismissed their lawsuits.

The new voting mechanisms for the November 2020 election, such as early voting and increased access to absentee ballots, entailed the most lenient voting rules Kentucky has ever seen. Kentucky law requires an excuse to vote via absentee ballot and does not allow for no-excuse early voting.¹⁴³ The Governor and secretary of state’s emergency regulation, which enhanced voter access in the name of public safety, allowed anyone to vote via absentee ballot if they stated they had concerns about COVID-19, offered three weeks of early voting (including three Saturdays), and mandated countywide vote centers for in-person voting on election day. Voter turnout was high, with over 2.15 million Kentuckians casting a ballot, for a turnout of 64.9% (com-

140. Voter Affirmation Form, Ky. State Bd. Elections Form 71 (2020) (on file with author).

141. *Id.*

142. *Kentucky Drops Requirements That Put Voters in Harm’s Way During COVID-19 Pandemic*, ACLU KY. (Aug. 20, 2020), <https://www.aclu-ky.org/en/press-releases/kentucky-drops-requirements-put-voters-harms-way-during-covid-19-pandemic> [<https://perma.cc/6A9W-9EQY>].

143. KY. REV. STAT. ANN. § 117.085 (West 2020) (amended 2021).

pared to 1.95 million votes, or 59.6% turnout, in 2016).¹⁴⁴ And the new photo ID law appeared to impede few voters: according to the Kentucky Secretary of State’s office, just 0.04% of all voters (757 voters in total) used the reasonable impediment form after presenting a non-photo ID.¹⁴⁵ Of those 757 voters, 507 showed their Social Security card, 167 presented their credit card, 68 offered a county ID without a photograph, and 15 showed a public assistance card. In addition, 1,933 voters, or about 0.129%, checked in to vote using personal recognition, with the poll worker signing an affidavit to confirm the voter’s identity.¹⁴⁶

Of course, these numbers cannot capture the potential deterrent effect of the new photo ID law on voters who chose not to show up at all. The fact of higher turnout and few voters using the reasonable impediment form should not minimize the potential harm of the photo ID law on any particular voter. If the law disenfranchised even one person, that is one too many given that the law provided no benefit whatsoever to election integrity.

That said, we should celebrate the Kentucky developments for what they were: The minimization of greater harm to voters during a particularly vitriolic time in our politics and an overall expansion of voting opportunities during the pandemic. We are more polarized than ever, so it is poignant that a state with a Democratic Governor and Republican secretary of state was able to come to an agreement that gave both officials a political win and also protected voters and the election. Moreover, Republicans could have enacted a much stricter photo ID law but instead moderated their approach in the face of opposition and advocacy. The next Part situates this story within the broader theory of deliberative democracy, offering a path forward for other states—and courts—to follow.

IV. LESSONS FROM THE KENTUCKY EXPERIENCE

The debate over Kentucky’s photo ID law offers best practices for legislatures to employ when they consider new voting laws—as well as a few pitfalls to avoid. The process was not perfect, but the end product was a law that both sides could generally accept. Although we should not just acquiesce to rules that will lead to voter suppression, a mild photo ID law that likely passes constitutional muster under cur-

144. Michael P. McDonald, *2020 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2020g> [https://perma.cc/ZA7L-NKVN] (Dec. 7, 2020); Michael P. McDonald, *2016 November General Election Turnout Rates*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/2016g> [https://perma.cc/W7M6-5CX9] (Sept. 5, 2018).

145. Telephone Interview with Michael G. Adams, Ky. Sec’y of State (Dec. 15, 2020).

146. *Id.*

rent jurisprudence¹⁴⁷ may be the price to pay for an accompanying measure to expand voter access.¹⁴⁸ Indeed, in 2020 the Kentucky legislature was set to consider a bill to ease the voter registration deadline and expand polling hours, which many saw as a companion to the new photo ID law.¹⁴⁹ The voter expansion bill died in committee after the pandemic hit, but the momentum for a pro-voter measure carried into 2021. That year, the legislature enacted a bipartisan voter-friendly bill that made permanent some of the election law reforms from the pandemic, such as early voting and the online portal to request absentee ballots.¹⁵⁰ That positive development probably would not have occurred if the legislature had not enacted the 2020 photo ID law first, giving the secretary of state political capital to advocate for these changes.

Thus, seen through a long-term lens, trading a mild photo ID law for expanded voter access may be worth it so long as the photo ID law does not actually disenfranchise voters. The key is that the details of the photo ID law must be responsive to the opponents' concerns. Of course, this is not to minimize the risk of disenfranchisement, especially the historical discrimination against minority voters with measures such as strict photo ID requirements. Courts should declare unlawful any voting rule that has a disproportionate impact on minority voters. But a milder law that includes numerous fail-safes can open the door to compromise, which may also lay the groundwork for voter expansions.

Such was the case in Kentucky. The frequent meetings and genuine input that Kentucky policymakers sought from those who opposed the law helped to improve the final legislation. To be sure, the legislature's decision to ignore calls to delay the law when the pandemic arrived delegitimized the final outcome, ultimately forcing the state to backtrack for the November 2020 election by adding additional safeguards for voters who could not obtain an ID due to COVID-19.¹⁵¹ Yet

147. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008).

148. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 73 (2014) (“[T]his article proposes a Grand Election Bargain: federal legislation that would expand the opportunities for voter registration (a priority for Democrats) while requiring voter identification (a priority for Republicans) in federal elections.”).

149. H.B. 596, Gen. Assemb., Reg. Sess. (Ky. 2020), https://apps.legislature.ky.gov/recorddocuments/bill/20RS/hb596/orig_bill.pdf [<https://perma.cc/3KF6-42C8>].

150. H.B. 574, Gen. Assemb., Reg. Sess. (Ky. 2021), <https://apps.legislature.ky.gov/record/21rs/hb574.html> [<https://perma.cc/BZ9Q-M6PR>].

151. Executive Order from Andy Beshear, Kentucky Governor, Executive Order 2020-688 (Aug. 14, 2020), <https://www.sos.ky.gov/elections/Documents/2020GeneralElection/EO-GeneralElection.pdf> [<https://perma.cc/C6KG-EBYJ>]; Letter from Michael Adams, Ky. Sec'y State, to Andy Beshear, Ky. Governor (Aug. 14, 2020), <https://www.sos.ky.gov/elections/Documents/2020GeneralElection/EO-GeneralElection.pdf> [<https://perma.cc/CUM8-FGL9>].

from a macro perspective, the process offered a glimpse into how genuine debate and input can ease a voting rule, such that it will appease proponents while minimizing the harm to voters.

The Kentucky process was emblematic of a legislative theory known as deliberative democracy.¹⁵² This model of legislative decision making is beneficial in its own right and can also help courts facing challenges to new voting laws by providing a potential rule of thumb: a court can more readily defer to a state’s voting rules when those rules are the product of deliberative democracy. This Part sketches out those thoughts on the legislative process, demonstrating how the Kentucky story is generalizable across the country.

Importantly, the Kentucky legislative story on voter ID—which included meaningful substantive changes to the law in response to critiques—differs markedly from the stricter legislation in other states, such as Texas. Texas passed a strict photo ID bill in 2011 while ignoring calls to ease the law. As Professor Gilda Daniels recounts, the Texas legislature had several amendments in front of it “that might have allowed the law to withstand legal scrutiny.”¹⁵³ The legislature refused those changes. “Texas’s passage of the voter ID law demonstrates an inflexible and tenacious approach to pursuing disenfranchising voter legislation. In the face of arguments that the legislation could adversely affect minorities and students, the State of Texas seemed determined to implement the legislation.”¹⁵⁴ It took a court order to require changes, such as a reasonable impediment form for voters who showed up without an ID.¹⁵⁵

The Kentucky experience also compares nicely with the North Carolina photo ID law. North Carolina enacted a strict photo ID requirement in 2013 right after the Supreme Court invalidated the preclearance regime of the Voting Rights Act in *Shelby County v. Holder*.¹⁵⁶ The Fourth Circuit, in striking down the North Carolina law, noted the rushed legislative process, which concluded in just three days: “one day for a public hearing, two days in the Senate, and two hours in the House.”¹⁵⁷ “This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny. Indeed, neither this legislature—nor, as far as we can tell, any other legislature in the

152. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873, 874 (1987).

153. Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 *GEO. WASH. L. REV.* 1928, 1949 (2013); see H. Rsch. Org., S.B. 14, 82nd Tex. Leg., Reg. Sess., at 11 (Tex. 2011), <https://hro.house.texas.gov/pdf/ba82R/SB0014.PDF> [<https://perma.cc/3JZ2-NBVW>].

154. Daniels, *supra* note 153, at 1950.

155. *Veasey v. Abbott*, 265 F. Supp. 3d 684 (S.D. Tex. 2017).

156. *Shelby County v. Holder*, 570 U.S. 529 (2013); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 228 (4th Cir. 2016).

157. *McCrory*, 831 F.3d at 228.

country—has ever done so much, so fast, to restrict access to the franchise.”¹⁵⁸ The state’s voters then enacted a state constitutional amendment to authorize a photo ID law and the legislature took on the task again, but this time at a more deliberate pace: “The 2018 Voter-ID Law underwent five days of legislative debate and was permitted time for public comment.”¹⁵⁹ Opponents also successfully offered several amendments to the bill.¹⁶⁰ As just one example, a Democratic senator introduced an amendment—which passed—to ensure that voter education materials would explain:

All registered voters will be allowed to vote with or without a photo ID card. When voting in person, you will be asked to present a valid photo identification card. If you do not have a valid photo ID card, you may obtain one from your county board of elections prior to the election, through the end of the early voting period. If you do not have a valid photo ID card on election day, you may still vote and have your vote counted by signing an affidavit of reasonable impediment as to why you have not presented a valid photo ID.¹⁶¹

As the Fourth Circuit explained, “[i]n all, the enactment was not the ‘abrupt’ or ‘hurried’ process that characterized the passage of the 2013 Omnibus Law.”¹⁶² The Kentucky process also was not hurried and saw the passage of several amendments that opponents had offered.

Thus, the Kentucky legislation is important to study because it demonstrates how we are nearing an equilibrium on photo ID legislation. The final product incorporated suggestions from opponents that eased the burdens of the law and strengthened it against judicial attack. Recall that the ACLU and other organizations did not challenge the law on its substance and dismissed their lawsuits once the state added COVID-19 as a permissible reason for not showing an ID in November 2020. Kentucky, and the process of deliberative democracy it employed, can serve as a model for this kind of legislation.

A. Voter ID Laws as Inherently Partisan

It is not surprising that Kentucky passed a new photo ID law in 2020. The politics were ripe for this measure, which has been particularly popular in Republican-controlled states.¹⁶³

158. *Id.*

159. N.C. State Conf. of NAACP v. Raymond, No. 20-1092, 2020 WL 7050109, at *305 (4th Cir. Dec. 2, 2020).

160. *Id.* at *306.

161. 2018 N.C. Sess. Laws 144, § 1.5(a)(10); <https://webservices.ncleg.gov/ViewBillDocument/2017/7562/0/S824-AST-165-V-2> [<https://perma.cc/ARS6-D8A2>].

162. *Raymond*, 2020 WL 7050109, at *306. As of 2021, the North Carolina law was still subject to ongoing litigation.

163. Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RSCH. 560, 562 (2017).

In 2017, Republicans won control of the Kentucky House of Representatives for the first time since 1921.¹⁶⁴ Republicans have enjoyed a majority in the state Senate since 2000.¹⁶⁵ The 2017 Republican takeover of the House gave Republicans a trifecta at the time, as they controlled both houses of the legislature and the Governor’s office.¹⁶⁶

Political scientists have shown that states are much more likely to adopt strict voter ID laws after Republicans take over majority control of the legislature. As Professors Daniel R. Biggers and Michael J. Hanmer wrote after studying the introduction and passage of photo ID laws over the past several decades, “We consistently find that the propensity to adopt is greatest when control of the governor’s office and legislature switches to Republicans (relationships not previously identified), and that this likelihood increases further as the size of Black and Latino populations in the state expands.”¹⁶⁷ They further note that a change to Republican control over the legislature or Governor’s office “dramatically increases the likelihood a state will pass an ID law”.¹⁶⁸

This finding comports with a common belief about voter ID laws: they help Republicans and hurt Democrats in a close election.¹⁶⁹ As another political science study of the propensity for legislatures to pass ID laws explains, “polarized partisan voting on restrictive voter ID bills is now the norm in state legislatures, as Republicans consider them to be a discrete electoral advantage.”¹⁷⁰ Those political scientists found that Republican control and relatively close elections in the state were key predictors of a new photo ID requirement for voting:

[c]ompetition coupled with the ability to bring about this kind of electoral reform is a primary factor accounting for the enactment of this restrictive voting measure. Within the context of closely fought elections, when Republican lawmakers are prominent enough to control the legislative agenda, they are much more likely to enact restrictive voter ID laws.¹⁷¹

164. Jack Brammer & Linda Blackford, *Republicans Take the Kentucky House After 95 Years of Democratic Control*, LEXINGTON HERALD-LEADER (Nov. 8, 2016, 9:12 PM), <https://www.kentucky.com/news/politics-government/article113464563.html>.

165. *Party Control of Kentucky State Government*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Kentucky_state_government [<https://perma.cc/Y5K3-YA7J>] (last visited July 15, 2021).

166. *Id.* Democrats took over the Governor’s mansion in 2019 when Democrat Andy Beshear ousted incumbent Republican Matt Bevin.

167. Biggers & Hanmer, *supra* note 163, at 560.

168. *Id.* at 562.

169. *See, e.g.*, Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html> [<https://perma.cc/EBV3-W227>].

170. William D. Hicks, Seth C. McKee, Mitchell D. Sellers, & Daniel A. Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RSCH. Q. 18, 21 (2015).

171. *Id.* at 29.

One might wonder, then, why Kentucky Republicans did not push for a photo ID law in 2017 after they won control of the entire legislature with a Republican also in the Governor's mansion. The Biggers and Hanmer findings would suggest that this new unified control would likely lead to a voter ID law.¹⁷² The answer may be that, at that time, Republicans did not believe that upcoming elections in the state would be particularly competitive. As the political scientists explain, "While the prevalence of Republican lawmakers strongly and positively influences the adoption of voter ID laws in electorally competitive states, its effect is significantly weaker in electorally uncompetitive states."¹⁷³ At the time, Kentucky seemed to be turning more and more "red," thereby not satisfying the competitiveness condition of other states that have enacted new strict voter ID requirements.

Three things changed in 2020 to create a stronger environment for the Republican-controlled Kentucky legislature to make voter ID a priority. First, the incumbent Republican Governor, Matt Bevin, lost a very close re-election campaign to Democrat Andy Beshear. Bevin lost by 5,136 votes out of more than 1.4 million votes cast.¹⁷⁴ This result may have prompted Republicans to recognize that the state is still competitive, at least in certain races, such that small changes in who can vote might sway an election. Second, Republican Michael Adams campaigned on the promise of a new voter ID law during his successful bid for secretary of state.¹⁷⁵ Thus, there was now a champion for voter ID who could direct the legislation as the state's chief election official. Third, Senator Mitch McConnell was up for re-election in 2020, facing off against Democrat Amy McGrath, who had "smashed" fundraising records,¹⁷⁶ and Republicans may have been concerned about that 2020 election as being potentially competitive given McGrath's fundraising prowess.¹⁷⁷ As the political scientists note, "The

172. Biggers & Hanmer, *supra* note 163.

173. Hicks et al., *supra* note 170, at 18; *see also* Biggers & Hanmer, *supra* note 163, at 564–66 ("We argue that the probability of ID law adoption is amplified when the respective branch of government switches to Republican control. That is, we believe that the motivation for innovation is stronger when a party newly comes into power, as it reflects a new level of competition that spurs greater interest in maintaining power as well as apprehension about future electoral prospects.").

174. Campbell Robertson, *In Kentucky, a Governor Who Picked Fights Loses a Big One*, N.Y. TIMES (Nov. 14, 2020), <https://www.nytimes.com/2019/11/14/us/kentucky-governor-race-matt-bevin.html> [<https://perma.cc/MXW3-LALQ>].

175. Adams, *supra* note 14.

176. Karl Evers-Hillstrom, *Democrats' Kentucky Senate Hopeful Smashes Fundraising Records, but Can She Win the Primary?*, OPEN SECRETS (June 16, 2020, 4:08 PM), <https://www.opensecrets.org/news/2020/06/kentucky-senate-race-could-be-most-expensive-ever/> [<https://perma.cc/KU5N-6NS5>].

177. As it turned out, McGrath lost by almost twenty points. *See* State Board of Elections, *Results: 2020*, COMMONWEALTH KY., <https://elect.ky.gov/results/2020-2029/Pages/2020.aspx> [<https://perma.cc/BNU6-6ZL6>] (last visited Sept. 16, 2021).

political party in control of state government might try to change a state’s electoral rules as a way to reduce participation among supporters of the opposing party in the short term—even if such rules might include long-term electoral costs for their own party.”¹⁷⁸

These factors—Republicans winning a majority of the state House and retaining their Senate majority in 2017, the competitive nature of the 2019 gubernatorial election, and the prospective of a tough re-election fight for the Republican senior U.S. Senator—created an ideal environment for a new photo ID law in 2020, and it is therefore not surprising that Republicans made it their second-most-important priority that year (second only to an immigration law).¹⁷⁹ But why didn’t the legislature then go for broke and enact the most restrictive photo ID law Republicans could craft? They had the political motivation and the legislative votes. Politics alone cannot explain it, as the Republican-controlled legislature had enough votes to pass whatever law it wanted and then override the Governor’s veto. So why was the resulting law much more reasonable than in other states?

The answer takes us to the second aspect of this story, in that Republican leaders mostly acted within a legislative theory of deliberative democracy. That process added legitimacy, offering lessons for Republicans in other states to follow if they choose to enact their own new voter ID requirement or other law that impacts the right to vote.

B. Deliberative Democracy

As explained above, Republicans in Kentucky could have rammed through the strictest form of a photo ID law they could conjure, following states like North Carolina, Texas, and Wisconsin.¹⁸⁰ But they took a different path, in part because they sought to avoid protracted litigation over a new law.¹⁸¹ That path provided greater legitimacy—both procedurally and substantively—to the final result.

Legislation scholars define deliberative democracy as a process in which decision makers hear from all sides of a debate, resulting in legislation that meaningfully incorporates ideas from those voices:

178. Hicks et al., *supra* note 170, at 18.

179. Sonka, *supra* note 33.

180. John W. Vaudreuil, *Voting Rights Under Attack in North Carolina, Wisconsin, and Texas*, AM. CONST. SOC’Y (Feb. 13, 2019), <https://www.acslaw.org/expertforum/voting-rights-under-attack-in-north-carolina-wisconsin-and-texas/> [https://perma.cc/5MZ9-K8RF].

181. *House Elections, Constitutional Amendments and Intergovernmental Affairs Committee* (Kentucky Educational Television broadcast Feb. 20, 2020), <https://www.ket.org/legislature/archives/?nola=WGAOS+021122&stream=AHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcnRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzAyMTEyMi5tcDQvcGxheWxpc3QubTN1OA=&jwsource=CL> [https://perma.cc/TZA2-7E3Y] (Secretary Adams stating his desire to avoid litigation over S.B. 2).

Deliberative democrats hold that political decisions are more legitimate if they are made in consultation with all who will be affected by them. Whether the decision-makers are elected officials or bureaucrats, there are multiple avenues for democratic elites to reciprocally consult with the people who will be affected by their decisions. Not only can input from citizens serve an important advisory role, aiding in the crafting and implementation of public policy, citizens who have been given an opportunity to serve in this advisory capacity will likely regard the eventual decisions made as more legitimate.¹⁸²

An alternative theory of legislative decision making—and one that can make the final outcome of legislation less legitimate in the eyes of opponents—is pluralism: “Under the view of the political process that often is called ‘pluralism,’ legislative outcomes simply reflect the equilibrium of private political power.”¹⁸³ Pluralism can often lead to a process in which opponents feel cut out entirely. Their voices do not matter because they are in the minority.

A third school of thought derives from economics, or public choice theory, which sees the legislative process “as a microeconomic system in which ‘actual political choices are determined by the efforts of individuals and groups to further their own interests.’”¹⁸⁴ Of course, none of these theories fully explain all legislation; as Professors Daniel A. Farber and Philip P. Frickey note, “Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all influence legislative conduct.”¹⁸⁵

Even though legislation has various theoretical underpinnings, and one theory cannot describe all legislative enactments, the Kentucky voter ID story demonstrates how deliberative democracy should be a driving force any time a legislature considers a voting law with partisan implications. Both the public’s acceptance of the final law and the actual content of the new requirements will benefit from greater deliberation of all voices. Deliberative democracy as a procedure, and the resultant substantive compromises, are a better path for voting laws than a pluralistic model where the current majority enacts rules simply intending to entrench itself in power.¹⁸⁶

182. Green, Kingzette & Neblo, *supra* note 6; see also Miriam Seifter, *Countermajoritarian Legislatures*, COLUM. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782224 [<https://perma.cc/AK9R-996M>] (“[C]ompared to the other branches, legislatures differ in their ‘sheer numbers,’ which builds in the possibility of pluralism and deliberation.” (citation omitted)).

183. Farber & Frickey, *supra* note 152, at 875.

184. *Id.* at 878 (citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983)).

185. *Id.* at 900.

186. See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lock-ups of the Democratic Process*, 50 STAN. L. REV. 643, 647–48 (1998) (arguing that when “there is an appropriately robust market in partisan competition, there is less justification for judicial intervention,” but that when “courts can discern that existing partisan forces have manipulated these background rules, courts should

1. Procedure

The Kentucky legislature heard from multiple voices during its deliberations over a new voter ID law, including active opponents. The procedure exhibited various indicia of deliberative democracy, at least until the very end, when the legislature then abandoned its deliberative focus in favor of ramming the bill through final passage when the most pressing issue was responding to a burgeoning pandemic.

As three political scientists explain, legislation enacted through deliberative democracy can ultimately enjoy greater legitimacy:

First, it provides an opportunity for citizens to voice their opinions up the ladder of power and to demand that lawmakers be held accountable for their decisions, contributing to the procedural legitimacy of government authority *prima facie*. Whatever decisions are actually made, that they were made in consultation with the public is important. Second, deliberation may be instrumental in achieving better outcomes at various sites in the democratic system. Sometimes, deliberation may lead to individual reflection and clarification, helping people render their own belief systems more coherent.¹⁸⁷

Under this view, legislatures gain legitimacy because of their deliberative abilities: “[t]he legislative arena, at least in theory, is the clearest institutionalized setting for democratic deliberation—the arena in which ‘participants of deliberation, before counting votes, are open to transform their preferences in the light of well-articulated and persuasive arguments.’”¹⁸⁸

The Kentucky process mostly followed these guidelines. Early in the development of the law, Secretary of State Michael Adams consulted with the ACLU of Kentucky, the League of Women Voters of Kentucky, the state’s NAACP leaders, a local group called Kentuckians for the Commonwealth, another local group called Together Frankfort, and me as an election law scholar. Secretary Adams invited representatives from each of the advocacy groups to his office for meetings. Individuals from those organizations also testified before the legislative committee that considered the bill. And perhaps most importantly, the legislation went through several drafts in an attempt to respond to the opponents’ most salient points. The legislative sponsors listened for ways to make the law more palatable.

For instance, in late February 2020, Secretary Adams emailed Corey Shapiro, the legal director of the ACLU of Kentucky, to explain

strike down those manipulations in order to ensure an appropriately competitive partisan environment”).

187. Green, Kingzette & Neblo, *supra* note 6, at 3.

188. See Seifter, *supra* note 182, at 22 (citing Samuel Issacharoff, *Democracy’s Deficits*, 85 UNIV. CHI. L. REV. 485, 519 (2018)). Seifter (and Issacharoff) note, however, that deliberative democracy does not always occur in practice. As Seifter puts it, “It is not clear that today’s state legislatures are significantly more deliberative than the coordinate branches, or that there is typically meaningful cross-party deliberation or cross-party voting on significant policy issues.” *Id.*

that the photo ID law “was posted for House floor action two days ago but I persuaded House leadership to yank it at the last minute so that your concerns could receive further consideration by the GOP caucus.”¹⁸⁹ Shapiro had already threatened litigation over the law if the legislature did not make various changes. He sent a quick response back to Adams and added, “Any communication is always helpful, and I hope you did not take the brevity of my response to mean I do not appreciate your ongoing outreach.”¹⁹⁰ Adams and Shapiro disagreed on whether the legislation was even necessary—and they would become opponents in the ensuing litigation—but they still engaged in cordial negotiations over the scope of the bill. In fact, after Adams said he might support some of the proposed changes to the law that I had suggested in my testimony—especially if that might avoid litigation once the law was in force—Shapiro wrote to Adams that though he would reserve the right to litigate situations where the law might infringe a voter’s rights (such as if the state sought to implement the law in full during a pandemic), “I can confirm that these changes make it extremely unlikely that we would bring a pre-enforcement facial challenge.”¹⁹¹

It is impossible to know whether opponents would have felt the same about the final outcome had they been shut out of the negotiations entirely, without Secretary Adams and Republican legislators practicing deliberative democracy. But it is at least plausible that the legislative approach reduced tensions between opposing sides and helped opponents feel that the process was more legitimate than it otherwise might have been.

Cutting the other way, however, was the lack of transparency at times. Most saliently, Secretary Adams and the legislative sponsors worked behind the scenes to amend the bill, releasing new versions just before the committee hearings. That process made it difficult for advocates to study the changes and respond accordingly. Several members of the public had to comment on a proposed law that contained updates they had not yet reviewed, making their testimony less informed through no fault of their own. A procedure that is fully committed to deliberative democracy would ensure greater transparency or at least give advance notice of changes before legislators debate and vote on a new version of a proposed bill. Although Secretary Adams and legislators expressed a willingness to meet with and consider views from opposing organizations, this lack of transparency under-

189. Email from Michael Adams, Ky. Sec’y of State, to Corey Shapiro, Legal Dir., ACLU of Ky. (Feb. 27, 2020) (on file with author).

190. Email from Corey Shapiro, Legal Dir., ACLU of Ky., to Michael Adams, Ky. Sec’y of State (Feb. 27, 2020) (on file with author).

191. Email from Corey Shapiro, Legal Dir., ACLU of Ky., to Michael Adams, Ky. Sec’y of State (Feb. 21, 2020) (on file with author).

mined the full value of a deliberative democracy approach: members of the public could not meaningfully offer their thoughts.

In addition, the very end of the legislative process took away some of the goodwill, as the legislature abandoned a deliberative democracy approach in favor of using its majority power without listening to new concerns based on new circumstances. As the coronavirus pandemic struck, the Kentucky legislature continued to meet, pushed the bill through to final passage, and then overrode the Governor’s veto. Obviously, the circumstances of running an election had changed dramatically, but the Republican caucus essentially acted as if everything was normal so as to secure final enactment. The time for deliberation and negotiation had apparently passed, even though the world was upended virtually overnight. The Republicans had garnered some goodwill from opponents, but that dissipated when they insisted on moving forward even though the pandemic had changed so much. This final move was more in the line of pluralism, in that Republicans held political power and used it to their advantage.

Thus, although the legislative process mostly exhibited deliberative democracy, that approach was missing at the end: the Republican majority refused to step back to consult with all stakeholders and determine whether they needed to make changes to respond to the coronavirus outbreak. In fact, had they made substantive changes before a final vote, they could have both reduced the likelihood of the ensuing litigation (and its costs to the state) and the need for an emergency rule to ease the new law for the November 2020 election.

Even in this one law, then, we see different theories of legislation at play. But setting aside the breakdown of deliberative democracy at the end, most of the bill’s evolution tracked this stronger approach to legislation, in that many voices were part of the process. That holistic methodology provided greater legitimacy and produced meaningful, substantive changes.

In fact, the Kentucky voter ID law itself could serve as a model for other states that decide to enact a photo ID law for voting. Of course, most scholars agree that photo ID laws are unnecessary, so it would be better for legislatures not to pass them in the first place.¹⁹² But we already know, from the political science literature mentioned above, that Republicans are likely to champion these laws if they gain legislative control and if elections are competitive in their state. We should recognize that reality and focus on advocacy to limit the disenfranchising effects of the rules, as the Kentucky law mostly does. The Kentucky law is one of the most reasonable photo ID laws in the country because it was the product of deliberative democracy.

192. See Douglas, *supra* note 3; see also Beeler, *supra* note 110, at 507.

2. *Substance*

The new Kentucky photo ID law has several fail-safe protections for voters, which should limit its disenfranchising effect. The law, though strict in that it requires voters to show a photo ID, is more reasonable than similar laws in many other states. Perhaps that is why plaintiffs such as the ACLU of Kentucky sued only to delay the law due to the pandemic and did not otherwise challenge its underlying provisions.

First, the kinds of IDs that suffice are fairly broad. Any ID issued by the state or local government that has the voter's name and photo is sufficient. Any ID issued by any college or university in the United States also qualifies. IDs need not have an expiration date. Voter ID laws in other states are not as expansive. For instance, the Indiana law requires IDs to be current or at least expired no later than the last federal election.¹⁹³ Texas does not count student identifications as voter IDs.¹⁹⁴ Importantly, as introduced, Kentucky's law would have been stricter—it required expiration dates on all IDs, for example—but the process of deliberative democracy helped to soften the law.

Second, the reasonable impediment process for those who do not have a photo ID is more expansive than in other states. In some states, such as North Carolina, voters using the reasonable impediment declaration may cast only a provisional ballot.¹⁹⁵ Election officials count the ballot only after further review, and the vote might be invalid if the voter made a mistake on the provisional ballot form. But Kentucky's new law allows a voter to cast a regular ballot at the polls after showing a non-photo ID and filling out the reasonable impediment form. This is better for voters: it treats them like any other voter who showed a photo ID. The Kentucky process still refers the reasonable impediment forms to the commonwealth's attorney and county attorney after election day—a provision that some opponents thought dangerous in its potential to intimidate valid voters. But it is still better than state laws that require voters to fill out provisional ballots, which force voters to take additional steps and ultimately might not count. The original version of the Kentucky bill would have required these voters to cast provisional ballots as well, but through the process of deliberative democracy, the legislature eased the law by allowing these voters to cast regular ballots at the polls.

Third, the reasonable impediment form underwent changes during the legislative deliberation. In particular, the legislature expanded the reasons listed on the form for a voter who cannot present a photo ID. The legislature initially narrowed some of the listed reasons before

193. IND. CODE ANN. § 3-5-2-40.5(3) (West 2021).

194. TEX. ELEC. CODE ANN. § 63.0101 (West 2018).

195. N.C. GEN. STAT. ANN. § 163A-1145.1(c) (West 2018).

expanding them once again during the negotiations, thanks to advocacy from various groups and individuals. Unfortunately, the legislature took out one important provision at the last minute. This provision was a catch-all that would have allowed a voter to provide another reason not already on the list. That catch-all would have been particularly useful once the pandemic hit. Under a catch-all, a voter could have stated, “I don’t have an ID because of the pandemic” as a justification for using the reasonable impediment form. The legislature’s removal of the catch-all possibility before final passage required the Governor and secretary of state to adopt this more expansive language in an emergency regulation in response to COVID-19 for the November 2020 election.

Fourth, the new Kentucky law retained the ability of voters to verify their identify through personal recognizance if the poll worker knows them. The initial version of the law had eliminated this possibility. This is an important practice in rural counties where everyone knows each other. The law now requires poll workers to fill out their own form about voters that they check in based on personal recognizance. Although the proponents initially eliminated this aspect of Kentucky law, after listening to advocates, the legislature recognized the need to put this process back in.

Thus, although the Kentucky law is unnecessary given that it does not address any real problem of voter fraud, it is milder than strict photo ID laws in many other states. That is likely one reason why groups such as the ACLU of Kentucky challenged only the implementation of the law during a pandemic and did not otherwise litigate the substance of the provisions. Virtually all voters would have one of the permissible forms of ID, would know a poll worker, or could validly use the reasonable impediment form and cast a regular ballot.¹⁹⁶ Few voters would suffer disenfranchisement. Of course, *any* voter who cannot vote because of an onerous law with no fraud-reducing benefits is one voter too many. And voters should not have to jump through additional hoops, such as filling out an extra form, to exercise their fundamental right to vote. But at least the Kentucky law will likely impact fewer voters than otherwise had the legislature not made these important changes during its deliberations. The statistics from the 2020 election bear this out, with only 757 voters out of 2.15 million needing to use the reasonable impediment form.¹⁹⁷

Kentucky’s law is similar to North Carolina’s, which the Fourth Circuit upheld in the face of a claim that the law violates the Voting

196. Email from Corey Shapiro, Legal Dir., ACLU of Ky., to Michael Adams, Ky. Sec’y of State (Feb. 21, 2020) (on file with author).

197. See Telephone Interview with Michael G. Adams, *supra* note 145.

Rights Act.¹⁹⁸ The court highlighted several fail-safe mechanisms that are intended to help voters without an ID. First, the law requires counties to provide free IDs without the need for voters to show any other documentation. Second, counties must offer IDs at “one-stop” early voting locations, allowing people to obtain an ID and vote at the same time.¹⁹⁹ Third, voters without an ID on election day can fill out a reasonable impediment affidavit and then cast a provisional ballot, which election officials must count unless the five-member county board of elections unanimously finds that there are “grounds to believe the affidavit is false.”²⁰⁰ These fail-safe mechanisms help to mitigate the negative effects of the law by essentially ensuring that those without an ID can still vote.²⁰¹

None of these laws are perfect. The North Carolina voter ID rule includes a catch-all on the reasonable impediment form while Kentucky’s does not. Kentucky allows voters who use the reasonable impediment form to cast a regular ballot but North Carolina voters in this situation must fill out a provisional ballot. But most of their substantive provisions are similar. And, of course, the very requirement to show an ID or fill out an additional form can deter some valid voters for no real purpose. That said, the North Carolina law, like Kentucky’s, demonstrates the kinds of photo ID laws that will likely pass judicial scrutiny. But perhaps more importantly, these laws show a semblance of a substantive equilibrium on this issue, offering a path to enact a law that also includes various safeguards for voters. Opponents of a photo ID law can then trade off that milder form for other pro-voter measures.

Strict photo ID laws are unnecessary: they do not root out any fraud that exists in our system and they make it harder for some valid voters to participate in our democracy. They can have a discriminatory impact on minority voters.²⁰² But we already know from the political science research that Republican legislatures are going to enact these laws, especially if they take over a majority of the legislature or if elections become more competitive in their state.²⁰³ Like it or not, photo ID laws are here to stay. However, the Kentucky law can serve as a model, at least in most of its provisions, thanks to deliberative democracy that created meaningful changes to the bill during the legislative process.

198. N.C. State Conf. of NAACP v. Raymond, No. 20-1092, 2020 WL 7050109 (4th Cir. Dec. 2, 2020).

199. 2018 N.C. Sess. Laws 144, § 1.2(a).

200. *Id.*

201. *See Raymond*, 2020 WL 7050109. As mentioned earlier, as of this writing the North Carolina law is still subject to litigation in state court.

202. *See Kuk, Hajnal & Lajevardi, supra* note 55, at 7.

203. Hicks et al., *supra* note 170, at 24.

Both opponents and advocates must be willing to compromise. In a state such as Kentucky with one-party control, where a new law is all but certain to pass, most opponents did not attempt to derail the proposal entirely but instead tried to make the bill more reasonable. Proponents of the law were willing to negotiate and did not demand the strictest version of their proposal. Both of these truths limited the scope of the lawsuit that eventually resulted from Kentucky’s new photo ID rule, which did not challenge the law in general but instead only sought a delay of its implementation because of the pandemic. In fact, minimizing the risk of a successful lawsuit was likely a major motivating factor for Republicans, showing the importance of litigation (and its threat) to the legislative process. Although opponents would never agree on the need for the photo ID requirement as a general matter, the process of deliberative democracy produced nuances within the law that both sides could accept—and which ultimately created a better final enactment. Perhaps the Kentucky law is a model that can set the outer bounds of what is an acceptable form of a photo ID requirement for voting.

3. *Judicial Review*

The theory of deliberative democracy may also be useful to courts that review voting rules. Courts should carefully scrutinize any rules that infringe upon the fundamental right to vote.²⁰⁴ Unfortunately, Supreme Court case law offers too much deference to state election rules in finding they do not impose a “severe burden” on voters.²⁰⁵ The Court has said that states need deference to be able to run their elections without too much judicial oversight.²⁰⁶ As the Court declared,

To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question “that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”²⁰⁷

204. See Joshua A. Douglas, *(Mis)Trusting States To Run Elections*, 92 WASH. U. L. REV. 553, 557 (2015); Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 162 (2015); Henry L. Chambers, Jr., *Technological Change, Voting Rights, and Strict Scrutiny*, 79 MD. L. REV. 191, 212 (2019).

205. *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983); see also *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that the standard for reviewing “state election law depends upon the extent to which [the] challenged regulation burdens First and Fourteenth Amendment rights”).

206. See *Clingman v. Beaver*, 544 U.S. 581, 593 (2005).

207. *Id.* at 593 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

But that justification rings hollow when it is clear that a partisan majority's true goal is to shape the electorate to entrench itself in power, even if it also claims the rule is intended to run an "efficient and equitable" election.

Deliberative democracy, however, offers a potential justification for slightly greater deference to a legislature, so long as it does not sanction an infringement of the constitutional right to vote. Essentially, courts might consider putting a thumb slightly on the scale of a nonburdensome law if that law is a product of deliberative democracy. That judicial gloss could have the positive effect of encouraging legislatures to engage in deliberative democracy and soften their new laws.

There are shades of deference for deliberative democracy in the Supreme Court's jurisprudence. For instance, Justice Stevens wrote, albeit in dissent:

I see no reason why the character of [Congress's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. . . . [I]t seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process.²⁰⁸

Professors Farber and Frickey noted in 1987:

The contemporary Supreme Court has fully embraced neither rigid pluralism nor the deliberative alternative. The Court's various constitutional strategies—sometimes creating rights immune from legislative interference, at other times protecting politically powerless minorities from disadvantageous statutes, occasionally attempting to promote more careful deliberation about public policy, and frequently deferring to the legislature's judgment—reflect an appreciation of the richness and complexity of public policy formation.²⁰⁹

Professors Farber and Frickey then advocate for judicial review that takes into account the legislative process leading up to the new law:

Despite its weaknesses, the legislative deliberation model sometimes may be useful. The prima facie unconstitutionality of some classes of legislation should be rebuttable, if at all, only by clear and persuasive congressional deliberation. At least, if evidence establishes that Congress did not make a deliberate choice, otherwise "suspect" legislation should receive even less judicial deference. Thus, at the constitutional margin, this model may be useful.²¹⁰

They acknowledge, however, that purely focusing on deliberative democracy is "insufficiently sensitive to institutional reality."²¹¹

Other writers, too, have suggested that courts can oversee the legislative process to encourage greater deliberation, mostly focusing on judicial review of congressional enactments. Hans Linde suggested that courts are better suited to craft "a blueprint for the due process of deliberative, democratically accountable government" than of as-

208. *Fullilove v. Klutznick*, 448 U.S. 448, 550–51 (1980) (Stevens, J., dissenting) (footnotes omitted).

209. Farber & Frickey, *supra* note 152, at 876–77 (footnotes omitted).

210. *Id.* at 919.

211. *Id.* at 920.

sessing whether particular statutes promote public values.”²¹² Professor Laurence Tribe has similarly promoted a concept of “structural due process.”²¹³ Professors Philip P. Frickey and Steven S. Smith explore—and strongly critique—a “legislative deliberation model” of judicial review, seen in several cases about federalism, in which “courts [can] scrutinize the quality of the decisionmaking processes within the legislature that led to the statute under review.”²¹⁴ That process “reflect[s] the idea that judges can force more democratically legitimate actors to improve the quality of their decisionmaking processes.”²¹⁵ Professor Eric Berger, focusing on death penalty cases, suggests that the Supreme Court should analyze a policy’s “democratic pedigree,” which considers “the political authority and epistemic authority underlying the policy.”²¹⁶ That inquiry would justify deference to a state law if it “results from properly functioning democratic and administrative processes helping to ‘ensure broad participation in the processes[,] . . . distributions,’ and benefits of government.”²¹⁷ In a poignant Note, Victor Goldfeld advocates for “legislative due process,” whereby “[c]ourts might be able to help ensure minimal congressional deliberation by reviewing the legislative process that led to a policy’s enactment.”²¹⁸ Goldfeld argues that “if Congress is required to deliberate at least minimally before enacting legislation, important benefits can inure to the legislative process.”²¹⁹ Goldfeld suggests that courts could consider several factors:

Is there any evidence in the legislative record suggesting that the consequences of the challenged policy received any consideration by Congress? Was there any floor debate? Were hearings held or studies commissioned? Are there formal findings in the legislative record? Were alternate means of achieving policy goals considered?²²⁰

Professors Amy Gutmann and Dennis Thompson, in their book *Why Deliberative Democracy?*, go a step further than these process-

212. *Id.* at 915 (quoting Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253 (1976)).

213. Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 269 (1975).

214. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1710 (2002).

215. *Id.*

216. Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 39 (2010).

217. *Id.* (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980)).

218. Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 370 (2004).

219. *Id.* at 369.

220. *Id.* at 383.

based considerations, noting that deliberative democracy should have both procedural and substantive components.²²¹ On the substantive front, they argue that true deliberative democracy should include a mechanism to foster valid rationales for an enactment:

Reciprocity holds that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact. The aim of a theory that takes reciprocity seriously is to help people seek political agreement on the basis of principles that can be justified to others who share the aim of reaching such an agreement.²²²

The goal of substantive deliberative democracy is to ensure that the rationales for a law that will bind people are “just”: “The reason-giving process is necessary for declaring a law to be not only legitimate but also just.”²²³ The Kentucky story, however, entails mostly procedural deliberative democracy, as there was little agreement on core principles underlying the right to vote. Even still, focusing on the process of lawmaking—ensuring that opponents had a seat at the table—offers a positive step toward achieving this more holistic goal.

Although these writers mostly focused on congressional deliberation in explicating a theory of deliberative democracy, there are hints of a similar approach to state legislatures in state courts. The single subject rule, a requirement within forty-one state constitutions, says that state legislation may include only a single substantive issue.²²⁴ This procedural requirement, the impetus for frequent litigation, is intended to prevent legislative shenanigans such as logrolling and to enhance political transparency.²²⁵ Forty states also require that a bill’s title express the subject of the law.²²⁶ Thus, judicial review under these doctrines is less about the substance of the underlying law and more about the procedural mechanism by which the legislature enacted it, all in an effort to ensure fairness.

This model, to use judicial review to encourage deliberative democracy as a procedural matter, may be particularly useful for election

221. AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 95 (2004).

222. *Id.* at 98–99.

223. *Id.* at 101 (“Actual political deliberation at some time is required to justify the law for this society at this time. The reason-giving process is necessary for declaring a law to be not only legitimate but also just. The process is necessary to give assurance that (substantive or procedural) principles that may be right in general are also right in the particular case or rightly applied to this particular case.”).

224. Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 806 (2006). Forty-one states include this requirement for all legislation while Arkansas and Mississippi apply it only to appropriations bills. *Id.* at 812 n.41.

225. *Id.* at 808.

226. Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1249 (2017) (citing Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, app. A at 1005–23).

laws, which are inherently political and have a unique tendency for abuse given their potential to entrench the current majority in power.²²⁷ As Professor Terrance Sandalow suggested, “if governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society.”²²⁸ The right to vote, of course, is perhaps the most fundamental right in our democracy,²²⁹ so a law that makes it harder to vote should be the product of an appropriate legislative process. Judicial review to require some form of deliberative democracy can help to ensure that these laws at least engage with and are responsive to minority party and opponent viewpoints. As Professor John Hart Ely wrote in his iconic *Democracy and Distrust*, judicial review “involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.”²³⁰

The Fourth Circuit invoked concepts of deliberative democracy in upholding North Carolina’s revised photo ID law after criticizing the first iteration of the law in part because of its procedural anomalies.²³¹ The court noted that “four Democratic legislators joined their Republican colleagues in voting for the 2018 Voter-ID Law.”²³² The court also explained that the legislative process for the 2018 version included the introduction of twenty-four amendments, with thirteen winning approval, which “include[d] several proposed by the law’s opponents.”²³³ The court made these observations in the context of an inquiry into whether the legislature enacted the law with a discrimi-

227. There is a separate question as to the level of scrutiny warranted for laws passed by the voters themselves. Indeed, several states have enacted new photo ID requirements for voting through ballot initiatives. For a discussion of judicial review of laws passed through direct democracy, see Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 Ky. L. J. 671, 684 (2016).

228. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1188 (1977).

229. *Reynolds v. Sims*, 377 U.S. 553, 561 (1964); see, e.g., Joshua S. Sellers, *Political Participation, Expressive Association, and Judicial Review*, 69 AM. U. L. REV. 1617, 1623–24 (2020) (“The right to vote is fundamental—in both the colloquial and constitutional senses—and is the cornerstone of our democracy; the voting process should therefore be highly regulated. That said, its designation as a fundamental right ostensibly elevates the burden on government to sustain such regulations.”).

230. ELY, *supra* note 217, at 88.

231. *N.C. State Conf. of NAACP v. Raymond*, No. 20-1092, 2020 WL 7050109 (4th Cir. Dec. 2, 2020).

232. *Id.* at *306.

233. *Id.*

natory intent under the Voting Rights Act, but they could be relevant to a constitutional analysis as well.

The devil is in the details, of course, and determining whether there has been sufficient deliberative democracy is no easy task. At a minimum, a court applying this theory to election statutes might consider:

1. Did legislative leaders bring in individuals and groups with opposing views as they crafted the legislation? Were under-represented voices heard? Did these individuals and groups have a meaningful role in the negotiations from the start?
2. Did the law meaningfully change during the legislative process in response to the substantive concerns—especially regarding the likelihood of disenfranchisement and the potential that the law would help the majority party entrench itself in power?
3. Was there sufficient time for debate from the minority party and other opponents? Did advocates believe that their voices were heard?
4. Was the process bipartisan?

Of course, identifying metrics to satisfy these indicia of deliberative democracy is itself no easy task. In particular, courts would have to determine what it means to have a bipartisan process. Would it be sufficient to allow the opposition party enough time during the floor debate? Might there need to be a threshold of votes from both sides to qualify as bipartisan? Would bipartisanship have to include elements of substantive deliberative democracy, as Gutmann and Thompson suggest, such that the underlying principles behind the law must have valid justifications—that go beyond entrenchment—to support regulating the right to vote?²³⁴ Because these questions are themselves amorphous, it seems that a totality of the circumstances approach is best and that courts could consider any of these factors, though the specific contours may need further explication.

A court that finds indicia of deliberative democracy might defer slightly more to a legislative determination on the need for the law. Again, deliberative democracy cannot serve as a bulwark against an otherwise unconstitutional rule. But it provides a better reason for slightly more legislative deference than courts otherwise employ, which typically involves courts simply accepting platitudes from the state about administering an election.²³⁵ Moreover, by offering slightly more deference for voting rules that are the product of deliber-

234. See GUTMANN & THOMPSON, *supra* note 221.

235. Douglas, *supra* note 204; Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL OF RIGHTS J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720065 [https://perma.cc/X8M3-5QCW].

ative democracy, the judiciary can encourage a better legislative process and fairer substantive outcomes.

V. CONCLUSION

Perhaps compromise and negotiation are too much to expect in such a polarized time, especially over the very rules concerning the administration of our elections. But the Kentucky experience shows that compromise is possible when proponents of a law act reasonably throughout the legislative process. That legitimacy, however, can break down when legislative leaders overreach.

A legislative theory of deliberative democracy can help to explain why the Kentucky process was mostly inclusive and why the resulting law was more reasonable than other states' strict voter ID rules. Proponents achieved their goal of enacting a photo ID law for voting but avoided protracted litigation by easing its burdens; opponents tempered the law so that it negatively impacted fewer voters. The law can serve as a model to other states—both in its procedure (at least until final passage during the pandemic) and its substance. And the process of deliberative democracy might also be useful to courts reviewing a new law.

A final note: this Article could be seen as providing a blueprint for making it harder to vote, giving the green light to legislatures to enact new photo ID requirements for voting. Nothing could be further from the truth. Although I am an idealist—in believing that we can expand democracy²³⁶—I am also a realist. Popular support for photo ID laws is high.²³⁷ Republican legislatures, in particular, will continue to enact these requirements. Opponents could simply fight them outright, but that has not worked well, either in legislatures or in court, seeing that the number of states with these new restrictions has increased over the past decade.²³⁸ Opponents should still advocate against the laws and challenge provisions in court that unnecessarily disenfranchise valid voters. But opponents should also strive for a norm of democratic deliberation in the legislative process so that the inevitable laws are more legitimate and reasonable, harming as few voters as possible. Perhaps the Kentucky version is at least closer to an acceptable equilibrium on one of the most hotly contested election law issues of the past few years.

236. See DOUGLAS, *supra* note 16.

237. Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP (Aug. 22, 2016), <https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx> [<https://perma.cc/MU5G-257S>].

238. Jasmine C. Lee, *How States Moved Toward Stricter Voter ID Laws*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html> [<https://perma.cc/8BLY-W9BP>].