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# Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement

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# LESS THAN FUNDAMENTAL: THE MYTH OF VOTER FRAUD AND THE COMING OF THE SECOND GREAT DISENFRANCHISEMENT

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## I. INTRODUCTION

The history of American voting rights is marked by two traditions.[1] One expresses a continuing expansion of the formal right to vote beyond that found when the Constitution was framed, when only white male property owners of Protestant faith and specific age and citizenship had franchise rights.[2] As former Supreme Court Justice Thurgood Marshall aptly put it:

> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the Framers, "the whole Number of free Persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes at threefifths [sic] each. Women did not gain the right to vote for over a hundred and thirty years.[3]

According to Marshall, it would take "several amendments, a civil war, and momentous social transformation" before the right to vote began even to remotely approximate the promise of "We the people."[4]

But while one American tradition is marked by an expansion of franchise, Alexander Keyssar notes another tradition characterized by efforts to deny the right to vote.[5] There were repeated periods in American history where efforts were made to disenfranchise voters or to scare them away from the polls. For example, after the Civil War, many Southerners used Jim Crow laws, poll taxes, literacy tests, grandfather laws, and not so subtle means, such as lynchings, cross burnings, and other techniques to prevent newly freed slaves from voting.[6]

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1. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES xvi–xx (2000).

2. DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW, 41–65 (2004); KEYSSAR, *supra* note 1, at xvi.

3. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), http://www.nyulaw global.org/graduateaffairs/documents/Marshall-Bicentennial-Speech.pdf (citation omitted).

4. *Id.*

5. KEYSSAR, *supra* note 1, at xvi–xvii.

6. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d

In the late nineteenth and early twentieth centuries, bans on fusion tickets, instant runoff voting, proportional voting, and other so-called reforms were instituted to discourage immigrants and urban poor from voting.[7] In both cases, the pretext for the suppression of voting rights was the claim of fraud; the efforts resulted in significant drops in voter turnout.[8] This was America's first great disenfranchisement.

A second great disenfranchisement is afoot across the United States as, yet again, voter fraud is raised as a way to intimidate immigrants, people of color, the poor, and the powerless, and prevent them from voting.[9] This time the tools are not literacy tests, poll taxes, or lynch mobs, but rather the use of photo IDs when voting. Members of the Republican and Democratic parties have dueled over proposals to make voting requirements more stringent or more relaxed since the 1980s,[10] but the real battle began in the Florida 2000 and Ohio 2004 presidential contests. It continues today as allegations of fraud in both of those states have led to efforts to increase voting requirements.[11] Following the disputed 2000 presidential election in Florida, Congress enacted the Help America Vote Act of 2002 (HAVA) as an effort to improve voting, but it came with some picture ID requirements.[12] According to the *Wall Street Journal*, at least half of the states have added additional alleged anti-fraud mechanisms since HAVA.[13] Moreover, several states, including Arizona, Georgia, Indiana, Michigan, and Missouri, have imposed photo ID requirements to

rev. ed. 1974) (discussing the various techniques used to intimidate African-Americans away from voting).

7. KEYSSAR, *supra* note 1, at 127–41.

8. STEPHENSON, *supra* note 2, at 143–54; KEYSSAR, *supra* note 1, at 159–62.

9. *See* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 168–69 (2007) (discussing efforts to rig elections in contemporary America).

10. KEYSSAR, *supra* note 1, at 314; *But see* STEVEN E. SCHIER, BY INVITATION ONLY: THE RISE OF EXCLUSIVE POLITICS IN THE UNITED STATES 1–5, 194–97 (2000) (arguing that contemporary politics is less characterized by mobilization of voters than it is by the activation of selected individuals, thereby making neither the Democrats or Republicans necessarily champions of universal franchise).

11. *See* ROBERT FITRAKIS ET AL., WHAT HAPPENED IN OHIO: A DOCUMENTARY RECORD OF THEFT AND FRAUD IN THE 2004 ELECTION (2006) (arguing that the Secretary of State engaged in numerous attempts to suppress voter turnout before the 2004 presidential election in that state).

12. 42 U.S.C. § 15301 (2002).

13. Christopher Conkey, *Attention, Voters: Have Your ID Ready,* WALL ST. J., Oct. 31, 2006, at D1.

vote at the polls.[14] Proponents justify these efforts on the premise that voter fraud is real and that these measures are needed to control it.[15] As the 2008 presidential and congressional elections approach, claims of voter fraud and the issue of photo IDs are heating up. Fraud has become a partisan issue, with Republicans appearing to support voter IDs and Democrats opposing it.[16] In addition, the United States Supreme Court granted certiorari to a photo ID case—*Crawford v. Marion County Election Board*[17]—setting the stage for constitutional resolution of the new requirements just in time for the 2008 elections.[18] A Supreme Court decision upholding voter ID laws could encourage even more states to adopt such laws, further enabling the second great disenfranchisement.

This article examines voter fraud and efforts to regulate it through new photo ID requirements. The overall thesis is that voter fraud is used as a pretext for a broader agenda to disenfranchise Americans and rig elections. But the more specific focus of this article is to examine the evidence of fraud and the litigation surrounding voter IDs thus far, and to analyze what supporters of voting rights can learn from both as they move forward to challenge these laws. The article argues that the evidence being offered to support photo IDs does not justify the restrictions being imposed. In addition, the article contends that the courts have generally reached the wrong conclusions when adjudicating photo ID claims. Specifically, the article takes aim at the apparent test articulated in *Burdick v. Takushi*[19] that seems to justify treating franchise as less than a fundamental right, thereby permitting the adoption of some regulations that adversely impact

14. ARIZ. REV. STAT. ANN. § 16.121.01 (2006); GA. CODE. ANN. § 21-2-417 (a) (Supp. 2007) *validity questioned by* Common Cause/Ga. League of Women Voters, Inc. v. Billups, 439 F. Supp. 2d 1294 (N.D. Ga. 2006) (holding that requiring photo identification at the polling booth was substantially likely to violate the Equal Protection Clause); IND. CODE. § 3-11-8-25.1 (b) (Supp. 2007); MICH. COMP. LAWS § 168.523 (1) (Supp. 2007); MO. ANN. STAT. § 115.427 (1) (Supp. 2007).

15. United States Senate Republican Policy Committee, *The Need for New Federal Reforms: Putting An End To Voter Fraud*, Feb. 15, 2005, http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf.

16. Adam Liptak, *Fear But Few Facts in Debate on Voter IDs*, N.Y. TIMES, Sept. 24, 2007, at A12.

17. 472 F.3d. 951 (7th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3122, 3154 (U.S. Sept. 25, 2007) (No. 07-21).

18. Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. TIMES, Sept. 26, 2007, at A24.

19. 504 U.S. 428 (1992).

voting rights. Courts, this article will contend, have generally misapplied this test. Additionally, as this article puts forth, the test itself is incoherent and unworkable.

Part I briefly describes the evolution of voting rights in the United States and reviews the implications of *Burdick*. Part II critically examines the literature and evidence on voting fraud. Part III evaluates litigation surrounding state efforts to enact photo ID requirements for voting and discusses how courts have ruled thus far on these new requirements. Finally, Part IV puts forth a critical analysis of the litigation so far and presents a road map showing how voting rights supporters can successfully challenge future attempts to limit voting rights. Overall, the article concludes that the photo ID laws are unconstitutional, but unless plaintiffs can provide better arguments in opposing these laws, America will face the next great wave of voter disenfranchisement.

## II. THE RIGHT TO VOTE

*Bush v. Gore*[20] was a controversial landmark decision in which the Supreme Court halted the ballot recount in the 2000 Florida presidential election. But in so holding, the Court reminded voters that the Constitution does not guarantee the right to vote in presidential elections.[21] In fact, while the Court has ruled that voting is a fundamental right protected under the Constitution,[22] it has done so in a way that belies the original text of the document.

Nowhere in the United States Constitution is there an explicit declaration of the right to vote. More specifically, Article II, section 1 grants to the states the authority to determine how they will select electors who will choose the president. The original Constitution also permitted state legislatures to select the U.S. Senators,[23] while members of the Supreme Court were to be appointed by the President, subject to confirmation by the Senate.[24] The only public officials whom the people could select were the members of the House of Representatives,[25] rendering rather thin any notion that the citizens had broad franchise rights when selecting the national government.

20. 531 U.S. 98 (2000).
21. *Id.* at 104 (referencing Article II, section 1 of the Constitution).
22. Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).
23. U.S. CONST. art. I, § 3, cl. 1.
24. U.S. CONST. art. II, § 2, cl. 2.
25. U.S. CONST. art. I, § 2, cl. 1.

Initially, the Constitution appears to have left that right up to the states, which generally limited franchise to white male property owners who were citizens of a certain age and, occasionally, members of a specific religious faith.[26] For example, in *Minor v. Happersett*[27] the Supreme Court rejected a claim by a Missouri woman that as a citizen she had a right to vote under the Constitution. The Court dismissed her claim, indicating that citizenship did not necessarily include the right to vote; states could decide who had that right.[28]

After the Civil War, the nation adopted a series of constitutional amendments that addressed the right to vote. The Fifteenth Amendment prohibited states from denying the right to vote on account of "race, color, or previous condition of servitude." The Seventeenth Amendment permitted the direct election of United States Senators. The Nineteenth Amendment enfranchised women. The Twenty-Fourth Amendment banned poll taxes. The Twenty-Sixth Amendment directed states to allow qualified citizens who were age eighteen or older to vote. Yet, none of these amendments affirmatively granted the right to vote.

It was not until the 1940s that the Supreme Court affirmatively addressed the constitutional right to vote. In *United States v. Classic*,[29] a case arising out of voter fraud in a Louisiana federal election primary, the Court addressed whether one has a right to vote.[30] Secondarily, it addressed whether depriving a person of that right came within the meaning of a federal criminal law that made it illegal to "injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States."[31] The Court stated:

> We come then to the question whether that right is one secured by the Constitution. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the

26. KEYSSAR, *supra* note 1, at 21–25.
27. 88 U.S. 162 (1874).
28. *Id.* at 177.
29. 313 U.S. 299 (1941).
30. *Id.* at 307.
31. *Id.*at 308 (quoting 18 U.S.C. § 51 (1940)).

> Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right.[32]

Later, in *Reynolds v. Sims,*[33] reaffirmed that the Constitution protects the right to vote in federal elections.[34] In so doing, the Court embraced the principle of equal representation for equal numbers of people—one person, one vote—for reapportionment purposes.[35] Furthermore, the Court in *Reynolds* drew a parallel between the right to vote and the right to procreate, which was at issue in *Skinner v. Oklahoma*,[36] declaring the right to vote as fundamental.[37]

Locating constitutional text to support the right to vote in state elections is more problematic. In *Harper v. Virginia State Bd. of Elections*,[38] the Supreme Court, in striking down the imposition of a poll tax in state elections, ruled that the right to vote in state elections was located in the Fourteenth Amendment's Due Process and Equal Protection Clauses.[39] Although the tax met traditional constitutional standards because it was neither racially discriminatory nor indefensible as rational policy, the Court still found that it unconstitutionally singled out the poor.[40] More importantly, the Court yet again affirmed the importance of voting, stating that "[l]ong ago in *Yick Wo v. Hopkins,* the Court referred to 'the political franchise of voting' as a 'fundamental political right, because [it is] preservative of all rights.'"[41] Again, as in *Reynolds*, the Court drew a parallel between voting and the right of procreation found in *Skinner*, ruling that where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[42] Specifically, the Court cited

32. *Id.* at 314.
33. 377 U.S. 533 (1964).
34. *Id.* at 554.
35. *Id.* at 558.
36. 316 U.S. 535 (1942).
37. *Reynolds*, 377 U.S. at 561.
38. 383 U.S. 663 (1966).
39. *Id.* at 665.
40. *Id.* at 666-67.
41. *Id.* at 667 (quoting 118 U.S. 356, 370 (1886)).
42. *Id.* at 670.

to language in *Skinner* dictating that efforts to interfere with the right to procreation must be subject to strict scrutiny.[43]

The legacy of *Classic*, *Reynolds*, and *Harper* is judicial recognition of voting as a fundamental right, subject to strict scrutiny. In addition to these three cases, the Court reached similar conclusions elsewhere.[44] Collectively, these cases suggest that interference with or regulation of the fundamental right to vote must be subject to strict scrutiny and that the right may only be limited if a compelling government interest overrides it.[45] Unfortunately, the Court created some confusion on this point in *Burdick v. Takushi*.[46]

In *Burdick*, the issue was a Hawaii state law prohibiting write-in voting.[47] In rejecting the First and Fourteenth Amendment challenges to the law,[48] the Supreme Court described its approach to voting rights regulations:

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art.

43. *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

44. *See e.g.,* Bush v. Gore, 531 U.S. 98, 104 (2000); Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724, 756 (1974) ("[W]hen legislation burdens such a fundamental constitutional right, it is not enough that the legislative means rationally promote legitimate governmental ends. Rather, 'governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.'" (citations omitted)); Rosario v. Rockefeller, 410 U.S. 752, 767–68 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Oregon v. Mitchell, 400 U.S. 112, 142 (1970); Williams v. Rhodes, 393 U.S. 23, 38 (1968) (declaring "[w]hen 'fundamental rights and liberties' are at issue, a State has less leeway in making classifications than when it deals with economic matters." (citations omitted)); Cardona v. Power, 384 U.S. 672, 676 (1966) (ruling that "[w]here classifications might 'invade or restrain' fundamental rights and liberties, they must be 'closely scrutinized and carefully confined.'"(citations omitted)).

45. *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917 (1988) (presenting a general discussion of the interplay between fundamental rights and compelling governmental interests).

46. 504 U.S. 428 (1992).

47. *Id.* at 430.

48. *Id.* at 430–31.

> I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.[49]

According to the Court, states or the government must structure elections to promote fairness and honesty.[50] Thus, not all regulations need to be subject to strict scrutiny simply because they impose some burdens on voters.

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."[51]

Apparently replacing the strict scrutiny standard previously used to examine the right to vote, the Court proposed a different test to be used:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[52]

Thus, in examining Hawaii's ban on write-in voting, the Court used this new flexible standard to uphold it.[53]

The *Burdick* decision is confusing. While it perhaps looks as if the Court ruled that all regulations affecting voting need to be

49. *Id.* at 433 (citing *Ill. Bd. of Elections,* 440 U.S. at 184; Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).

50. *Id.*

51. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Bullock v. Carter, 405 U.S. 134, 143 (1972)).

52. *Id.* at 434 (quoting *Anderson,* 460 U.S. at 789).

53. *Id.*

examined from this new flexible and less rigorous standard, the language citations suggest otherwise. First, in referencing the cases where the Court held that the right to vote is not absolute, it cited not to cases about voting rights per se, but to cases involving ballot access and the rights of political parties.[54] These references question the degree to which the Court diluted its previous strict scrutiny test. Second, and more importantly, the Court sowed seeds of doubt by distinguishing between two different types of voting regulations—those which impose "severe" versus "reasonable" burdens.[55] Regulations imposing the former types of burdens would continue to be examined under the strict scrutiny standard under which they must be "narrowly drawn to advance a state interest of compelling importance."[56] But for the latter, the new standard would be used "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, as 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[57] Unfortunately, the Court failed to describe what constituted a severe burden versus a reasonable one, creating confusion about which standard applies to which regulation. This confusion set the stage for later disputes over efforts to enact voter ID laws.

## III. THE SPECTER OF VOTER FRAUD

### *A. The Legacy of Florida 2000*

Allegations of voter fraud and election rigging go back to the earliest days of American history. George Washington was accused of using rum to buy votes.[58] Efforts to tighten restrictions on African-American franchise rights after the Civil War and upon urban, immigrant, and poor voters during the Populist and Progressive eras were ostensibly to combat election fraud,[59] even though, as Keyssar notes, there was little hard evidence to support

54. *See id.* at 432–33.
55. *Id.* at 434.
56. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).
57. *Id.*
58. MELVIN I. UROFSKY, MONEY & FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 4-5 (2005).
59. Keyssar, *supra* note 1, at 159.

the rumors and allegations that this type of corruption was systematic.[60]

The most recent efforts to restrict or regulate voting rights in the name of combating fraud grew out of the disputed Florida 2000 presidential election. The 2000 presidential race between George W. Bush and Al Gore was close, with the allocation of Florida's electoral votes determining who became president. The popular vote in Florida gave Bush a lead of less than 1800 votes,[61] but concern soon surfaced on many fronts about the fairness and accuracy of the voting procedures and counting.[62]

Kathryn Harris, the Florida Secretary of State and state chair of the Bush election committee, was embroiled in the middle of major controversies that alleged pre-election voter purges directed at African-Americans, the random opening and closing of polls, the intimidation of minority voters, the use of faulty and different voting technologies across the state, bad ballot designs, and outright allegations of ineligible voters falsely identifying themselves in order to vote.[63] While *Bush v. Gore* only addressed the issues of vote counting arising under the Equal Protection clause,[64] rumors arising out of the election persisted,[65] fueling allegations stemming back to the 1990s purporting that passage of the Motor Voter Act, which permitted mail-in and same-day voter registration, would enable voter fraud.[66] Again, after the close 2004 presidential race between John Kerry and George W. Bush, similar allegations of both voter intimidation and fraud arose in Ohio.[67]

60. *See id.*

61. ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 43 (2001).

62. *Id.* at 44–49.

63. GERALD M. POMPER, THE ELECTION OF 2000 127–28 (2001); Greene, *supra* note 61, at 42–45. *See generally* VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINDED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (detailing the litany of allegations about the rigging of the Florida 2000 election).

64. Bush v. Gore, 531 U.S. 98, 108–110 (2000).

65. *See* David Schultz, *Election 2000: The Bush v. Gore Scholarship*, 4 PUB. INTEGRITY 360 (2002) (reviewing ten books that examined allegations of voter fraud and irregularities surrounding Bush v. Gore and the Florida 2000 presidential election results).

66. Keyssar, *supra* note 1, at 314.

67. *See generally* STEVE FREEMAN & JOEL BLEIFUSS, WAS THE 2004 PRESIDENTIAL ELECTION STOLEN?: EXIT POLLS, ELECTION FRAUD, AND THE OFFICIAL COUNT (2006);

### *B. Documenting Voter Fraud*

Is there widespread voter fraud in the United States that is affecting elections? The answer is not easy, given that there are no comprehensive peer-reviewed studies examining voting fraud in the United States.[68] For the most part, most of the stories about fraud are just that—stories and anecdotal tidbits of information not well corroborated or systematically studied. On top of that, the term "voter fraud" is vague.[69] Lorraine Minnite seeks to define voter fraud by drawing upon a broader Department of Justice definition: election fraud is "conduct that corrupts the process by which ballots are obtained, marked, or tabulated; the process by which election results are canvassed and certified; or the process by which voter are registered."[70]

Minnite locates voter fraud as a subcategory of this broader concept of election fraud, defining it as the "intentional corruption of the electoral process by voters."[71] She wishes to distinguish this form of fraud from that which takes place at the hands of election officials, parties, candidates, and others who are involved in election administration and political campaigns.[72] This article employs Minnite's definition of voter fraud. But it is important to note that besides voter fraud, this article also refers to other forms of election fraud as "election official fraud." The latter includes situations in which election officials or parties other than voters falsely register or permit ineligible individuals to vote, engage in vote buying or swapping, or engage in other forms of vote suppression or manufacturing.[73]

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FITRAKIS, *supra* note 11 (discussing allegations of voter fraud in 2004 presidential election).

68. U.S. ELECTIONS ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 20 (2006), *available at* http://www.eac.gov/clearinghouse/docs/reportsandsurveys2006electioncrimes.pdf/attachment_download/file.

69. LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD 6 (2007), *available at* http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2007). *See generally* DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES (2002) (presenting discussions of vote suppression and manufacturing techniques).

Even within the category of voter fraud it is important to realize that a host of activities can be included under this term. Voter fraud could include intentional efforts to register falsely to vote or actually to vote falsely. Allegations of voter fraud include claims that illegal immigrants, ex-felons, and impersonators are stealing the identities of others, including the dead, in order to vote illegally.[74] Voter fraud could also take place in several venues, like the election-day polls, in completing absentee ballots, or in completing the paperwork necessary to register to vote. Given these distinctions, the evidence is clear: there is little systematic or widespread voter fraud in the United States that is changing the outcome of elections. This is at least true among the types of fraud that voter ID laws are meant to address.

The three most persistent claims of voter fraud come from the *Wall Street Journal's* John Fund, a report from the Senate Republican Policy Committee in Congress, and the Carter-Baker Report. Fund's *Stealing Elections*[75] calls for mandatory photo identification to be displayed when voting to counteract widespread fraud occurring in the United States. Yet what evidence is there that voter fraud is rampant? Fund offers little. *Stealing Elections* draws upon interviews around the country to whip up hysteria that droves of dead people, illegal immigrants, vote brokers, and ex-felons are cheating their way into voting booths, stealing elections from honest decent Republicans, and diluting the votes of red, white, and blue Americans. But when the smoke from Fund's allegations clears, there is little voter fraud fire, at least of the kind he alleges.

For example, Fund alleges that the Florida 2000 presidential election demonstrated "sloppiness that makes fraud and foul-ups in election counts possible . . . ."[76] Even if one accepts all of his comments as true, the sloppiness he alleges is not voter fraud; the problems are with election officials. Fund also alleges that "lax standards for registration encouraged by the Motor Voter Act have left the voter rolls in a shambles in many states."[77] Again, this mere allegation does not document which states, define what shambles means, or describe how the problems affect voting or whether

74. *See* Craig C. Donsanto, *Prosecution of Electoral Fraud Under States Federal Law*, 1558 PLI/CORP 655 (2006).

75. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (2004).

76. *Id.* at 3–4.

77. *Id.* at 25.

those problems constitute voter fraud. *Stealing Elections* is rife with these types of unsubstantiated allegations of election fraud, let alone voter fraud, that Fund claims have actually risen to a level that affects elections. Fund seems only to offer anecdotal evidence that election officials have erred in letting some individuals register when they should not have or that a few persons have tried to vote twice in the same election, such as showing up to the polls to vote after forgetting they voted by absentee ballot. Fund, in a recent op-ed,[78] seems not to have learned the errors of his ways. In that *Wall Street Journal* essay he referenced a felon named Ben Miller in Florida who voted illegally for the last sixteen years, and mentioned that in the Florida 2000 election there were 5643 voters' names that "perfectly matched the names of convicted felons."[79] But what Fund does not say or apparently seek to investigate or prove is whether Ben Miller knew he was ineligible to vote or whether election officials incorrectly registered him. And of the 5643 names, Fund fails to show that these individuals were barred from voting or that they were doing anything wrong. Ex-felons, after all, are not barred from voting in all states and in all circumstances as Fund's insinuations would imply.[80] For the most part, Fund's allegations are based upon rumor, half-truths, and innuendos that fail the test of any valid social science study.

A second report by the Senate Republican Policy Committee, entitled *Putting an End to Voter Fraud*,[81] asserts that "[v]oter fraud continues to plague our nation's federal elections . . . ."[82] The basis of its allegations rests in assertions that the National Voter Registration Act of 1993[83] has made it difficult to maintain accurate lists to keep people from voting illegally,[84] that non-citizens are voting illegally,[85] and that there may be risks associated with early and absentee voting.[86] Again, little evidence of voter fraud, either of a substantive or systematic nature, is offered. For example, the

78. *See* John Fund, Editorial, *Vote-Fraud Demagogues*, WALL ST. J., June 13, 2007, at A19.

79. *Id.*

80. 25 AM. JUR. 2D *Elections* § 174 (2007).

81. UNITED STATES SENATE REPUBLICAN POLICY COMMITTEE, PUTTING AN END TO VOTER FRAUD (2005), http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf.

82. *Id.* at 1.

83. National Voter Registration Act (Motor Voter Act) of 1993, 42 U.S.C. § 1973gg-gg-10 (2000 & Supp. 2007).

84. UNITED STATES SENATE REPUBLICAN POLICY COMMITTEE, *supra* note 81, at 5.

85. *Id.* at 7.

86. *Id.* at 8.

report cites allegations of illegal voting in the 2004 Wisconsin presidential elections[87] but provides no firm numbers to show if the allegations are true or significant. In terms of the threat of non-citizens voting, the report mainly references efforts in many jurisdictions to change the law to allow non-citizens to vote legally.[88]

Those who argue that there is widespread voter fraud requiring new measures such as voter IDs often cite a third report entitled *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*,[89] which was chaired by former president Jimmy Carter and former Secretary of State James Baker ("Carter-Baker Commission").[90] The report asserts that "while election fraud is difficult to measure, it occurs."[91] Proof of this assertion is citation to 180 Department of Justice investigations resulting in convictions of fifty-two individuals from October 2002 until the release of the report.[92] Yet while the Carter-Baker Commission called for voter photo IDs, it also noted that "there is no evidence of extensive fraud in U.S. elections, or of multiple voting, but both occur, and it could affect the outcome of a close election."[93] As with other studies, absentee voting is singled out as the place where fraud is most likely to occur, followed by registration drives by third parties.[94]

Empirical evidence supporting the Carter-Baker Commission findings of fraud is scant at best. As noted, the report concludes that fraud is not extensive, but when the report cites to support its claims, it references newspaper articles and other accounts that are not corroborated or subject to critical analysis.[95] As the Brennan Center stated in its analysis and response to the Carter-Baker call for a voter photo ID: "[T]he Report attempts to support its burdensome identification requirements on four specific examples of purported fraud or potential fraud. None of the Report's cited

87. *Id.* at 7.

88. *Id.*

89. CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, AMERICAN UNIVERSITY, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM (2005) [hereinafter Carter-Baker Commission], http://www.american.edu/ia/cfer/report/full_report.pdf.

90. *Id.* at 18 (calling for voter IDs when voting).

91. *Id.* at 45.

92. *Id.*

93. *Id.*

94. *Id.* at 46.

95. *See* Carter-Baker Commission, *supra* note 89, at 18, 73 n.19 (citing to Section 1.1 of the report).

examples of fraud stand up under closer scrutiny."[96] Even if all of the documented accounts of fraud were true, the Brennan Center points out that in the state of Washington, for example, six cases of double voting and nineteen instances of individuals voting in the name of the dead yielded twenty-five fraudulent votes out of 2,812,675 cast—a 0.0009% rate of fraud.[97] Also, assume the fifty-two convictions by the Department of Justice are accurate instances of fraud. This means that fifty-two out of 196,139,871 ballots cast in federal elections, or .00003% of the votes were fraudulent.[98] While critics might assert that these cases represent only the tip of the iceberg, it is important to underscore that prosecutions occurred on the heels of the Justice Department taking an aggressive stance on this crime.[99] There is a greater chance of one being hit by lightning than of an election being affected by fraud.[100]

While studies seeking to prove voter fraud offer a paucity of evidence, studies reaching the opposite conclusion are more plentiful. The United States Elections Assistance Commission ("EAC") undertook a broad review of literature and expert interviews on what was then known about voter fraud when the EAC was operating, creating the report *Election Crimes: An Initial Review and Recommendations for Future Study*.[101] It concluded that "[m]any of the allegations made in the reports and books . . . were not substantiated[,]" even though they were often cited by many parties as evidence of fraud.[102] The report held that the same was true regarding media accounts[103] and that even stories about prosecutions lacked reliable follow up.[104] Overall, the report noted that while "impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election."[105] Instead of impersonation, absentee ballot voting was described as

96. WENDY WEISER ET AL., RESPONSE TO THE REPORT OF THE 2005 COMMISSION ON FEDERAL ELECTION REFORM 9 (2005) (emphasis omitted).

97. *Id.*

98. *Id.* at 10.

99. Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007, at A1, *available at* 2007 WLNR 6949847.

100. WEISER, *supra* note 96, at 10.

101. U.S. ELECTION ASSISTANCE COMMISSION, *supra* note 68, at 2–3.

102. *Id.* at 16.

103. *See id.*

104. *See id.* at 16–19.

105. *Id.* at 9.

most susceptible to voter fraud,[106] but, even with it, the EAC called for more statistical analysis to determine its seriousness.[107]

But even as this version of the EAC report downplayed voter fraud while calling for more study of the subject, the original draft was more conclusive in dismissing allegations. According to the *New York Times*, "a federal panel, the Election Assistance Commission, reported last year that the pervasiveness of fraud was debatable. That conclusion played down findings of the consultants who said there was little evidence of it across the country, according to a review of the original report."[108] As reported in the *New York Times*, experts hired by the EAC to consult with them largely found that mistakes and errors by election officials—as well honest mistakes by voters—have caused some problems.[109] Yet overall, according to Richard G. Frohling, assistant United States attorney in Milwaukee, "[t]here was nothing that we uncovered that suggested some sort of concerted effort to tilt the election . . . ."[110] In effect, while the final version of the EAC report seemed tentative in dismissing fraud as a phenomenon, the experts and perhaps even the original version of the report were even more conclusive on this point.

Lorraine Minnite has conducted several studies on the extent of voter fraud in the United States.[111] One of those studies cites statistics provided by the Department of Justice, indicating that between 2002 and 2005, when the Attorney General made election fraud and corruption a priority, only twenty-six individuals were convicted or pled guilty to illegal voting. The twenty-six individuals included five who could not vote because of felony convictions, fourteen non-citizens, and five who voted twice in the same election.[112] During that same time period, another fourteen individuals were prosecuted but not convicted by the Justice Department.[113] Minnite has also noted how states have heavily

106. *Id.*
107. *Id.* at 18–19.
108. Lipton & Urbina, *supra* note 99.
109. *See id.*
110. *Id.*
111. MINNITE, *supra* note 69.
112. LORRAINE C. MINNITE, AN ANALYSIS OF VOTER FRAUD IN THE U.S. 11 (2007), http://www.demos.org/pubs/analysis_voter_fraud.pdf. This is a later version of the original Minnite study that reached the same conclusions. References in this article are to the original study.
113. *Id.*

criminalized voter fraud,[114] and local law enforcement officials do not seem to be shying away from election fraud issues as a result of a lack of desire, ability, or resources to combat fraud.[115] Moreover, when Minnite examined the often told allegations of illegal voting or registration in Wisconsin during the 2004 presidential race, she found that either the individuals did not know they voted illegally, that the stories were later recanted, or that prosecutions (a total of three) were dropped due to a lack of evidence.[116] Minnite concluded that voter fraud allegations are really partisan Republican efforts to suppress voting.[117]

Other studies have reached similar conclusions about the lack of voter fraud. While some, such as the Republican Senate Policy Committee, express concern that the Motor Voter Act is a potential source of voter fraud, an EAC report on the law's impact did not discuss fraud.[118] In the report, voter fraud is not discussed in the section on voter verification.[119] In fact, the report seems to suggest that states have this issue under control. The problem getting the most attention is removal from voter rolls for non-voting.[120] An Office for Democratic Institutions and Human Rights report found only isolated reports of voter fraud or impersonation.[121] Additional analysis on the impact of the Motor Voter Act by Jonathan E. Davis,[122] the Carter-Baker report,[123] and a Rutgers University study of the impact of provisional voting procedures as outlined in the

114. *Id.* at 9.

115. *Id.*

116. MINNITE, *supra* note 69, at 32–35.

117. *Id.* at 36.

118. U.S. ELECTIONS ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2005–2006: A REPORT TO THE 110TH CONGRESS (June 30, 2007), *available at* http://projectvote.org/fileadmin/ProjectVote/Publications/EAC_NVRArpt2006.pdf.

119. *Id.* at 12.

120. *Id.* at 11.

121. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS , UNITED STATES OF AMERICA MID-TERM CONGRESSIONAL ELECTIONS 7 NOVEMBER 2006: OSCE/ODIHR ELECTION ASSESSMENT MISSION REPORT 16 (Mar. 9, 2007), *available at* http://www.osce.org/documents/odihr/2007/03/23567_en.pdf.

122. Jonathan E. Davis, *The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud*, 6 TEMP. POL. & CIV. RTS. L. REV. 117, 135–37 (1997).

123. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 648 (2007).

Help America Vote Act of 2002[124] also found little if any evidence of fraud in American elections.

Overall, despite some episodic and sporadic accounts, the best available evidence shows that voter fraud is a minor issue in American elections. There is little hard evidence that it occurs, even less evidence that it is widespread, and almost no indication that it has altered election outcomes.

### *C. Assessing the Impact of New Voting Requirements*

In addition to a lack of evidence about voting fraud, one can also assess the impact of new election procedures by examining how they affect decisions to vote.

Political scientists have long noted how decisions to register and vote are affected by numerous variables, including income, age, and generation.[125] Social capital and trust may also have an impact.[126] In general, the more barriers placed in front of potential voters, such as decreased time allotments to register to vote, the less likely they are to vote.[127] The same is true with voter ID laws. They impose a cost on citizens that may make it less likely that they will vote. At least three studies discussed below substantiate this claim.

First, Timothy Vercellotti and David Anderson examined the likely impact of voter ID laws across the United States. They found that photo ID laws would reduce the probability of voting by 3.7%

124. *See generally* EAGLETON INSTITUTE OF POLITICS CENTER FOR PUBLIC INTEREST POLLING, APPENDIX A: NATIONAL SURVEY OF LOCAL ELECTION OFFICIALS' EXPERIENCES WITH PROVISIONAL VOTING (July-Aug. 2005), *available at* http://www.eagleton.rutgers.edu/NewsResearch/AppendA_National_Survey_Local_Election_Officials.pdf (surveying elections officials' experiences with provisional voting).

125. *See, e.g.*, WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 88-90, 111 (1996) (discussing the New Deal and Post-New Deal generations). *See generally* PAUL R. ABRAMSON, JOHN H. ALDRICH, & DAVID W. ROHDE, CHANGE AND CONTINUITY IN THE 2000 AND 2002 ELECTIONS (2003) (discussing voting behavior in the 2000 Presidential election); M. MARGARET CONWAY, POLITICAL PARTICIPATION IN THE UNITED STATES (1985) (discussing social and political characteristics of voting patterns); Expert Report and Affidavit of Marjorie R. Hershey, Ind. Democratic Party v. Rokita, 2005 WL 4019117 (S.D. Ind. October 25, 2005) (providing a bibliography documenting this proposition).

126. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 404–14 (2000).

127. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 61–62 (1980).

for whites, 6% for African-Americans, and nearly 10% for Hispanic-Americans.[128]

Second, a study by the Brennan Center for Justice found that 7% of the population lacked ready access to the citizenship type papers, such as passports and birth certificates that are necessary to vote, that 11% of the population does not have a government-issued ID, and that low-income individuals are less likely to have the requisite identification to vote.[129] The Brennan Center study indicates that the requirements, time, and money to secure a valid photo ID for voting imposed costs on certain populations that would discourage voting.

Finally, Professor Marjorie Hershey prepared testimony[130] as an expert witness for the plaintiffs in *Indiana Democratic Party v. Rokita*[131] assessing the likely impact of a state's new photo ID law on voter turnout.[132] In developing her analysis, Hershey indicated that perhaps the dominant mode political scientists use to assess voting laws is a rational choice or economic model, which asks what costs are imposed by new procedures upon individuals deciding whether or not to vote.[133] According to Hershey, "people are likely to vote as long as the perceived costs of voting do not outweigh the perceived benefits."[134] "Costs of voting" include time to register to vote, waiting times, financial and informational costs, registration laws, and physical barriers.[135] Hershey provides in her affidavit ample empirical evidence from political scientists to demonstrate that as the costs of voting increase, registration and turnout decrease.[136] Overall, her argument is that photo ID requirements for voting are

128. Timothy Vercellotti & David Anderson, *Protecting the Franchise or Restricting it? The Effect of Voter Identification Requirements on Turnout* 13 (Aug. 31–Sept. 3, 2006), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_50903.pdf.

129. Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 2–3 (Nov. 2006), http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf.

130. Hershey aff., *supra* note 125.

131. 458 F. Supp. 2d 775 (S.D. Ind. 2006).

132. Hershey aff., *supra* note 125, at *1.

133. *Id.* at *3.

134. *Id.*

135. *Id.* at *3–4.

136. *Id.* at *6–8. For example, Hershey references studies showing how improvements in transportation in the nineteenth century had a dramatic increase in voter turnout. *Id.* at *6. Also, she notes how political scientists have concluded that "[r]egistration raises the costs of voting." *Id.* at *7.

a definite cost,[137] especially for some groups such as the poor,[138] those without government-issued IDs, and people of color.[139]

Taken together, these three studies, along with other political and social science literature, demonstrate that new voting requirements, such as photo IDs, impose costs on citizens deciding to go to the polls. These costs are likely to impact voting negatively. Combine these studies with those that examine voter fraud in the United States and the conclusion becomes obvious: voter ID laws are not neutral. Not only is there negligible (at best) evidence of voter fraud to support the necessity of voter ID laws, but these laws are also negative because they might actually suppress real voter turnout by imposing additional burdens on voters.

## IV. STATE PHOTO ID LITIGATION

Evidence and potential impact notwithstanding, several states have recently enacted photo ID laws for voting. In cases arising out of Indiana,[140] Michigan,[141] Georgia,[142] and Arizona,[143] courts have upheld the photo ID voting laws, while similar laws in Missouri[144] and in New Mexico[145] have been struck down. Critical to the decisions in these cases was the attitude of the courts towards both the standard of review required to evaluate the ID law and the level of deference and recognition given to the purported evidence of voter fraud.

### *A. Indiana and* Crawford v. Marion County Election Board

At issue in *Crawford v. Marion County Election Board*[146] was an Indiana law mandating that "persons wanting to vote in person in either a primary or a general election must present at the polling

137. *Id.* at *4.
138. *Id.* at *6.
139. *Id.*
140. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007).
141. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich. 1 (2007).
142. Common Cause/Georgia v. Billups, 504 F. Supp. 2d 1333 (N.D.Ga. 2007).
143. Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007).
144. Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006).
145. Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes, 506 F.Supp.2d 598 (D.N.M. 2007).
146. 472 F.3d 929, 950 (7th Cir. 2007).

place a government-issued photo ID,"[147] unless voting in a nursing home or by absentee ballot. Both the district court[148] and the Seventh Circuit upheld the ID requirement.

The challenge in *Indiana Democratic Party v. Rokita* was to the Senate Enrollment Act No. 483 ("SEA")[149] requiring voters to present a photo ID at the polls when voting.[150] According to SEA, the identification was required to have:

> (1) A photograph of the individual to whom the "proof of identification" was issued; (2) The name of the individual to whom the document was issued, which "conforms to the name in the individual's voter registration record"; (3) An expiration date; (4) The identification must be current or have expired after the date of the most recent general election; and (5) The "proof of identification" must have been "issued by the United States or the state of Indiana."[151]

The law was challenged as a facial violation of the First and Fourteenth Amendments, as well as a violation of various provisions of the Indiana Constitution.[152] Voters lacking an acceptable ID would be subject to challenge by a member of a precinct election board but would have been allowed to file a provisional ballot and given an opportunity to prove eligibility and to have the ballot accepted if an acceptable photo was later produced before the clerk or the election board.[153] The court recited a list of documents that would be considered acceptable and sufficient under state law to obtain the state-issued photo ID.[154] In addition to the documents necessary to obtain the state-issued ID, there was a minimum $10 fee that had to be paid.[155]

In order to justify the photo ID requirement the state contended that it needed to address voter fraud.[156] But the state conceded that it "is not aware of any incidents or person attempting to vote, or voting, at a voting place with fraudulent or

147. *Id.* (citing IND. CODE ANN. §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (West 2007)).
148. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006).
149. IND. CODE § 3-5-2-40.5 (2007).
150. *Rokita*, 458 F. Supp. 2d at 782.
151. *Id.* at 786 (citing IND. CODE ANN. § 3-5-2-40.5).
152. *Id.* at 782.
153. *Id.* at 786–87.
154. *Id.* at 789–91.
155. *Id.* at 792.
156. *Id.* at 792–93.

otherwise false identification."[157] But, as the district court noted, the defendants in the case justified the voter ID requirement by stating:

> [E]ven though there is no evidence of voter fraud as such, there is significant inflation in the Indiana voter registration lists; and in any event, based on reports documenting cases of in-person voter [fraud] from other states . . . [d]efendants maintain that voter fraud is or should be a concern in Indiana.[158]

In terms of the inflated voter lists, the court noted, among other things, that "there were 4.3 million registered voters in 2004, while there were only 3 million residents who reported being registered, resulting in estimated inflation of 41.4%."[159] The court also pointed out that 35,699 of the Indiana registered voters are now deceased.[160] Second, the state offered evidence of voter fraud in other jurisdictions, citing, among other sources, John Fund's *Stealing Elections* and other instances of purported election corruption.[161] The state and the court noted what appears to be a corrosive impact upon voter confidence in elections if fraud occurs, using among other sources both *Stealing Elections* and the Carter-Baker Report, as well as public opinion surveys to support the photo ID requirement.[162] Finally, in addition to searching for evidence of fraud, the court also assessed the evidence offered by the plaintiffs to demonstrate that costs and impact that SEA would have on voters.[163] This evidence included the Hershey report and other surveys by groups in Indiana,[164] and another expert study, called the Brace Report, which documented a potential 989,000 voters in the state that did not have the required state-issued ID.[165] The court largely ignored the Hershey report and rejected introduction of the Brace Report as unreliable under the Federal Rules of Evidence.[166]

157. *Id.*
158. *Id.* at 792.
159. *Id.* at 793.
160. *Id.*
161. *Id.*
162. *Id.* at 794. Specifically, the surveys are used to show that large majorities of those polled support the presentation of photo IDs when voting. *Id.*
163. *Id.* at 794–96.
164. *Id.*
165. *Id.* at 803.
166. *Id.*

In terms of the substantive legal analysis challenging SEA,[167] the court began by noting that the right to vote is fundamental, but then it shifted to *Burdick* in declaring that it is not an absolute right.[168] The court again referenced *Burdick* in noting that not all regulations of the right to vote impose the same burdens; those imposing lesser burdens deserve lesser scrutiny.[169] The court, following *Burdick*, rejected the application of strict scrutiny to SEA because not every voting regulation required that level of analysis, even if it resulted in denying some people the right to vote.[170] In addition, the court rejected the notion that the photo ID requirement is a severe burden under *Burdick* (therefore triggering strict scrutiny) because the plaintiffs, while showing a burden in securing the ID, did not show a severe burden in actually voting.[171]

In using the lower standard of review as dictated by *Burdick*, the court indicated that the test was to

> weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.[172]

Thus, the court balanced the state's interest in preventing fraud against the plaintiffs' voting rights.[173] Here, the court found no evidence of a significant burden on voting, specifically pointing out that the plaintiffs could not name a single person burdened by the new law.[174] The court found that the Brace report was inadmissible or unreliable,[175] ignored the Hershey study, and concluded that it is not difficult to obtain a photo ID.[176] Overall, it

167. *Id.* at 809–20. This article passes over the extensive discussion of plaintiffs' standing found in these pages.

168. *Id.* at 820.

169. *Id.* at 821.

170. *Id.* at 822.

171. *Id.* at 822–23.

172. *Id.* at 821 (quoting *Burdick*, 504 U.S. at 434).

173. *See id.* at 825-26 (remarking that requiring a photo ID to vote was no different than similar requirements to cashing a check).

174. *Id.* at 822–23.

175. *Id.* at 823–24.

176. *Id.* at 824–25.

saw no evidence to outweigh the state's interest,[177] and therefore it upheld the law against the First and Fourteenth Amendment challenges.[178]

The Seventh Circuit opinion upheld and followed the district court analysis. While noting initially that many people choose not to vote for a variety of reasons (and therefore presumably would not be burdened by the photo ID requirement),[179] the court rejected the application of strict scrutiny, again preferring to use the weighing test articulated in *Burdick* when regulations do not impose a severe burden.[180] As the court effectuated the balance:

> On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at the polls claiming to be someone else-someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day.[181]

This interest must be weighed against "the effect of requiring a photo ID in inducing eligible voters to disfranchise themselves. That effect, so far as the record reveals, is slight."[182] Given this balance and the fact that, according to the court, voter fraud is hard to detect and is often viewed as a minor, poorly prosecuted crime, it is reasonable for the state to require voter IDs, even if there is no evidence of such fraud in Indiana.[183]

There are several characteristics core to the opinions of both the district court and the Seventh Circuit. First, the cases accepted that the state interest in preventing fraud was valid, even if no empirical evidence of false identity at the polls could be documented in the state. As a fallback position, the courts contended that evidence from other jurisdictions was sufficient or that abating potential fraud was a permissible interest. Second, the cases dismissed evidence of a significant burden on voting rights, finding that, at best, it was difficult but not impossible to get a state-

177. *Id.* at 826. The court rejected the assertion that the state had to provide empirical evidence of fraud to support its interest, but were there such a mandate, enough evidence from other jurisdictions existed to sustain it. *Id.*

178. *Id.* at 830.

179. Crawford v. Marion County Election Bd., 472 F.3d 949, 951 (7th Cir. 2007).

180. *Id.* at 952.

181. *Id.* at 953.

182. *Id.* at 952.

183. *See id.* at 953.

issued ID that would meet the requirements of SEA. Third, because the burden was not significant, strict scrutiny was not required (following *Burdick*). Finally, weighing state interests against the slight burden of the photo ID, courts upheld the latter. Other cases likely to uphold state voter ID laws would probably include points similar to these.

### *B. Michigan and* In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71

The issue in Michigan was the state and federal constitutionality of 2005 PA 71, a state law that requires either presentation of a photo ID when voting or signing an affidavit stating that one does not have the required identification.[184] The Michigan Supreme Court, in an advisory opinion, found the law to be constitutional under the *Burdick* balancing test.[185]

In 1996, the state adopted a voter photo identification law.[186] Before that law took effect, the Michigan Attorney General issued an advisory opinion concluding that, lacking evidence of substantial voter fraud in the state, the requirement was unconstitutional because it did not advance a compelling state interest.[187] But as a result of events, such as those surrounding the 2000 presidential election,[188] the state reenacted the voter ID law in the form of 2005 PA 71. Upon request from the Michigan House of Representatives, which is permitted to ask for an advisory opinion, the Michigan Supreme Court invited briefs to determine the facial constitutionality of 2005 PA 71.[189]

As in the Indiana case, the Michigan Supreme Court began its analysis by declaring that the right to vote is fundamental but not absolute.[190] The court noted that in the state's constitution the Legislature was given the authority to "*enact laws to preserve the purity of elections,* to preserve the secrecy of the ballot, *to guard against abuses of the elective franchise,* and to provide for a system of voter

184. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 449 (Mich. 2007).
185. *Id.* at 469 (citing Burdick v. Takushi, 504 U.S. 428 (1992)).
186. *Id.* at 448.
187. *Id.*
188. *Id.* at 449
189. *Id.*
190. *Id.* at 450.

registration and absentee voting."[191] The court noted that the purpose of this constitutional language was to grant the state the power to prevent fraudulent voting.[192] The Court also noted that under federal jurisprudence states were given the authority to regulate their own elections[193] in order to prevent fraud and to protect the right of lawful voters to exercise their franchise.[194]

Thus, while the Michigan Supreme Court indicated that fundamental rights generally must be examined under strict scrutiny,[195] the United States Supreme Court rejected that analysis as applied to election law, preferring instead the more "flexible standard" as articulated in *Burdick*.[196] According to the Michigan Supreme Court, the first step is to determine

> the nature and magnitude of the claimed restriction inflicted by the election law on the right to vote, weighed against the precise interest identified by the state. If the burden on the right to vote is severe, then the regulation must be "narrowly drawn" to further a compelling state interest. However, if the restriction imposed is reasonable and nondiscriminatory, then the law is upheld as warranted by the important regulatory interest identified by the state.[197]

The court quickly disposed of the burden question. It noted that the burden is slight: "[2005 PA 71] merely requires the presentation of photo identification that the voter already possesses."[198] The court stated that the Attorney General did not claim that the photo ID requirement burdens voters who already have an ID but merely that it might do so for those lacking the ID at present.[199] The court quickly disposed of this objection by stating that the alternative to the photo ID is signing an affidavit, which itself is not burdensome.[200] Hence, the court used the more flexible standard under *Burdick* to analyze the ID requirement.[201]

191. *Id.* at 453 (quoting MICH. CONST. art. II, § 4).
192. *Id.*
193. *Id.* at 454 (citing inter alia, Burdick v. Takushi, 504 U.S. 428, 433 (1992)).
194. *Id.*
195. *Id.* at 455.
196. *Id.*
197. *Id.* at 455–56.
198. *Id.* at 456.
199. *Id.*
200. *Id.* at 457.
201. *Id.* at 469.

The court thus weighed the state's constitutional interest in preventing fraud against what it perceived as the slight burden of the voter ID requirement. It found that the article II, section 4 state constitutional requirements to preserve the purity of the elections and to guard against abuses were compelling interests.[202] In addition, the court noted that the state was not required to provide empirical evidence of voter fraud and that instead it may take prophylactic action to prevent it.[203] Even if some proof is demanded, however, the court said that in-person fraud is covert and hard to detect, and therefore it could not see how such proof could be undertaken.[204] Thus, under the *Burdick* flexible standard, the Michigan Supreme Court upheld 2005 PA 71 against federal constitutional challenges[205] and found that it was not a violation of the state constitution.[206] Finally, similar to the Indiana case,[207] the court rejected the claim that the photo ID was an unconstitutional poll tax, finding that no fee was required to vote, and that, in any event, there was an affidavit bypass.[208]

### *C. Georgia and* Common Cause/Georgia v. Billups

In 2005, the Georgia Legislature adopted and the governor signed House Bill 244, or Act 53 ("HB 244"),[209] requiring all registered voters in Georgia who vote at the polls in person to present a government-issued photo ID to election officials before being allowed to vote.[210] Subsequently, the state adopted the 2006 Photo ID Act ("the 2006 Act"), which repealed the 2005 amendment and replaced it with nearly identical language.[211] The one difference between the 2005 amendment and the 2006 Act was that the latter also required the Board of Elections in each county

202. *Id.* at 455.
203. *Id.* at 458.
204. *Id.* at 458 n.64.
205. *Id.* at 459.
206. *Id.* at 463.
207. *See* Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).
208. *Constitutionality of 2005 PA 71*, 740 N.W.2d at 466.
209. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1342 (N.D. Ga. 2005). HB 244 amended O.C.G.A. § 21-2-417, which did not require the production of a government-issued ID but instead allowed it among several other forms of proof of identification to be used when voting in person. *See* GA. CODE ANN. § 21-2-417 (2007).
210. *Common Cause/Ga.*, 504 F. Supp. 2d at 1342.
211. *Id.*

to issue a Georgia photo voter identification card without charge to voters upon presentation of certain identifying documents.[212] This changed the law's previous requirement that individuals complete an affidavit of indigency if they could not afford the ID.[213] For individuals who did not have a state driver's license, the 2006 Act also listed numerous other acceptable identifying documents, including passports and military or tribal IDs.[214] Finally, the 2006 Act also mandated that each county issue IDs for a minimum of eight hours each day of the week before election day.[215]

Common Cause Georgia, the NAACP, and several individuals challenged the 2006 Act as a violation of the Fourteenth and Twenty-Fourth Amendment rights to vote and as a poll tax.[216] They also alleged various state constitutional claims and sought a preliminary injunction to halt enforcement of the law.[217] Following a rather complicated history of litigation in both state and federal courts,[218] a federal district court upheld the 2006 Act and rejected demands to enjoin its enforcement.[219]

In reviewing the case, the district court began its substantive legal analysis on the constitutionality of the 2006 Act by affirming that voting is a fundamental right.[220] The court found that the right to vote is not absolute, but that the state cannot unduly burden that right.[221] The question for the court was what test to use to determine an undue burden. After recounting several possibilities, it settled on the *Burdick* flexible standard approach.[222]

212. *Id.*

213. *Id.* at 1343; s*ee also* GA. CODE ANN. § 40-5-103 (2007).

214. *Common Cause/Ga.*, 504 F. Supp. 2d at 1343.

215. *Id.* at 1346.

216. *Id.* at 1337–42.

217. *Id* at 1337.

218. *Id.* at 1337–42. The Plaintiffs filed several complaints and amended motions for temporary and permanent injunctions. *Id.*

219. *Id.* at 1382–83.

220. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1375 (N.D. Ga. 2005).

221. *Id.*

222. *Id.* at 1376.

> The Court finds that the appropriate standard of review for evaluating the 2006 Photo ID Act is the *Burdick* sliding scale standard. Under that standard, the Court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed

Interestingly, in arriving at this standard, the court implicitly rejected claims that the restriction of the 2006 Act's ID requirement was severe, therefore making the more flexible weighing approach the appropriate standard for review.[223]

In terms of the State's interests, the court noted that "[t]he State and the State Defendants assert that the 2006 Act's photo ID requirement is designed to curb voting fraud."[224] In looking to ascertain instances of voter fraud in Georgia, the court's findings of fact acknowledge statements by the Secretary of State that in the previous ten years the "office received no reports of voter impersonation involving a scenario in which a voter appeared at the polls and voted as another person, and the actual person later appeared at the polls and attempted to vote as himself."[225] The Secretary of State also declared that the "photo ID requirement for in-person voting was unnecessary, created a significant obstacle to voting for many voters,"[226] and that absentee voting was the source of many of the problems.[227] Despite these acknowledgments by the Secretary, the court dismissed them along with the need for the state to provide evidence of voting fraud.[228] Instead, the court noted that because it was not applying strict scrutiny, the state did not have to offer empirical support and, moreover, "the legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them."[229]

In weighing this state interest against the injury to the plaintiffs' right to vote, the court noted that the burden to the latter is not severe.[230] It noted that the ID is free,[231] that each

> by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

*Id.* at 1377 (citing Burdick v. Takushi, 504 U.S. 428, 433–34 (1992)).

223. *Id.* at 1377 (analyzing the two tier approach to voting regulations but then simply adopting the flexible standard without explaining why the burden is not severe).

224. *Id.* at 1381.

225. *Id.* at 1356.

226. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1357 (N.D. Ga. 2005).

227. *See id.*

228. *See id.* at 1382.

229. *Id.* at 1381–82 (quoting Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 829 (S.D. Ind. 2006)).

230. *Id.* at 1380.

231. *Id.* at 1379.

county has an office that is easily accessible to secure the ID,[232] and that none of the plaintiffs who were granted standing would have difficulty securing the ID.[233] It also pointed out that a public education program to inform voters about the ID requirements was aimed at mitigating the burdens.[234] Thus, the court refused to grant the injunction.[235]

### *D. Arizona and* Gonzalez v. Arizona

*Gonzalez v. Arizona*[236] is the fourth instance where the courts have decided to permit states to go forward with an ID law. At issue here was an ID law enacted as Proposition 200 via a ballot initiative in 2004.[237] Proposition 200 required "persons wishing to register to vote for the first time in Arizona to present proof of citizenship and to require all Arizona voters to present identification when they vote in person at the polls."[238] A coalition of groups challenged it, claiming the measure was a poll tax that violated the Fourteenth Amendment Equal Protection Clause and the right to vote; they also claimed that it violated the Voting Rights Act.[239] The plaintiffs sought to enjoin enforcement of Proposition 200 before the 2006 election and were initially rejected by a federal district court[240] which rejected the parallels between an ID and a poll tax.[241] The court also indicated that the factual record necessary to show a burden on voting rights had not been developed.[242] The Ninth Circuit reversed and granted the injunction,[243] but the Supreme Court vacated the stay and remanded the case back to the court of appeals.[244] In its reasoning, the Supreme Court noted that while the right to vote was important, so too was addressing voter fraud; it also noted that the Ninth Circuit had failed to give reasons for why

232. *See id.* at 1343.
233. *Id.* at 1379.
234. *Id.* at 1380.
235. *Id.* at 1383.
236. 485 F.3d 1041 (9th Cir. 2007).
237. *Id.* at 1046.
238. *Id.*
239. *Id.*
240. Gonzalez v. Ariz., No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006).
241. *Id.* at *4–5.
242. Gonzalez v. Ariz., 485 F.3d 1041, 1048 (9th Cir. 2007).
243. *Id.* at 1046.
244. Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006).

it reversed the lower court.[245] On remand, the Ninth Circuit upheld the district court's denial of preliminary injunctive relief.[246]

In upholding the photo ID law, the Ninth Circuit quickly rejected the poll tax argument by distinguishing showing identification from paying a fee.[247] In the Virginia case *Harman v. Forssenius,*[248] the right to vote was "abridged . . . by reason of failure to pay the poll tax."[249] In Arizona, however, voters need only show proof of citizenship, which does not constitute a form of poll tax.[250] Next, the court, drawing upon *Burdick,* indicated that they need not use strict scrutiny in this case because the plaintiffs failed to show how the ID requirement imposed a severe burden upon the right to vote.[251] Thus, examining Proposition 200 under the more flexible *Burdick* standard, the court found that four affidavits of individuals claiming to be burdened by the photo ID law were insufficient or inappropriate to show the hardship claimed.[252] Since the plaintiffs were unable to provide a record to show the alleged harms, the Ninth Circuit upheld the decision of the district court to deny the injunction.[253]

### *E. Missouri and* Weinschenk v. Missouri

Among the initial challenges to photo ID laws, *Weinschenk v. Missouri*[254] was the only decision invaliding this voting requirement using strict scrutiny. At issue was SB 1014, a Missouri photo ID requirement, adopted in 2006.[255] SB 1014 amended state law, mandating that as a condition of voting "Missourians present as identification a document issued by the state or federal governments that contains the person's name as listed in the voter registration records, the person's photograph, and an expiration date showing that the ID is not expired."[256] According to the

245. *Id.* at 7–8.
246. *See Gonzalez*, 485 F.3d at 1047.
247. *Id.* at 1049.
248. 380 U.S. 528 (1965).
249. *Id.* at 529.
250. *Gonzalez*, 485 F.3d at 1049.
251. *Id.* at 1049–50.
252. *See id.* at 1050–51.
253. *See id.* at 1052.
254. 203 S.W.3d 201 (Mo. 2006).
255. *See id.* at 205.
256. *Id.* (citing MO. REV. STAT. § 115.427.1 (Supp. 2006)).

Missouri Supreme Court, the change in the law effectively meant that for most residents, only a state-issued driver's or non-driver's license or United States passport would be considered an acceptable ID.[257] Voters challenged SB 1014 as a poll tax, both as First and Fourteenth Amendment claims, and as a violation of various provisions of the Missouri Constitution.[258] The Missouri Supreme Court sustained the challenges.

Two points are critical to the decision in *Weinschenk* that distinguish it from the other cases upholding voter ID laws. First, the court noted that the case

> stands in stark contrast to the Georgia and Indiana cases, for their decisions were largely based on those courts' findings that the parties had simply presented theoretical arguments and had failed to offer specific evidence of voters who were required to bear these costs in order to exercise their right to vote.[259]

In this case, plaintiffs provided the empirical evidence to show the actual burden that the ID would cause. They documented the real costs in terms of what it would take to obtain proper identification to vote.[260] Specifically, the court noted that in some cases, the plaintiffs would have to pay $11 for a non-driver's license and up to $20 for a birth certificate.[261] Documenting real costs proved an actual burden; thus, the court was convinced that the severe burdens test as mandated in *Burdick* had been met.[262] Second, the court emphasized that notwithstanding *Burdick*, the photo ID requirement must be examined under the Missouri State Constitution, which appeared to offer more protection for the right to vote than found under the federal Constitution.[263] The combination of empirical documentation and appeal to state constitutional law led the court to reach conclusions contrary to the decisions in Indiana, Georgia, Michigan, and Arizona.

In its analysis of SB 1014, the Missouri court highlighted several burdens that the law imposed upon its citizens. First, it noted that:

257. *Id.* at 205–06.
258. *See id.* at 204.
259. *Id.* at 214.
260. *Id.* at 206–10.
261. *Id.* at 208.
262. *See id.* at 216.
263. *See id.* at 212–14.

> [B]etween 3 and 4 percent of Missouri citizens lack the requisite photo ID and would, thus, need to obtain a driver's or non-driver's license or a passport in order to vote. Specifically, the trial court noted that the Secretary of State's analysis in August 2006 estimated that approximately 240,000 registered voters may not have the required photo ID and that the Department of Revenue's estimate of the same was approximately 169,215 individuals. Each of these forms of ID, however, normally costs money to obtain. This presents a practical problem for Missourians who will be discouraged from attempting to vote because of concern that they must pay a fee to do so.[264]

In calculating how many lacked current IDs, the court could rely upon statistics that did not seem in dispute, unlike in Indiana where the record was unclear as to how many individuals would be burdened by the new ID requirement.[265] Second, as noted above, the court was able to attach real dollar costs to securing identification; e.g., fees for driver's and non-driver's licenses and birth certificates.[266] Third, the court considered non-monetary costs, such as time and ability to navigate bureaucracies in order to obtain the necessary identification to vote,[267] an especially difficult process for the elderly and handicapped.[268] In addition, the court noted the burden the law would place upon those born out of state seeking to obtain the required birth certificate necessary to obtain the approved ID.[269]

The Missouri Supreme Court showed several instances where obtaining a driver's or non-driver's license would cost time, effort, and money.

> Nevertheless, under the new law these eligible registered voters will not be able to cast a regular ballot (or after 2008 any ballot at all) unless they undertake to obtain one of the requisite photo IDs. This will constitute a dramatic increase in provisional ballots over the previous law, as only 8,000 provisional ballots were cast statewide in the 2004 general election. As conceded by Appellants, denial

264. *Id.* at 206.
265. *Id.* at 214 n.21.
266. *See id.* at 206, 214.
267. *See id.* at 215.
268. *See id.*
269. *Id.* at 211.

> of the right to vote to these Missourians is more than a *de minimis* burden on their suffrage.[270]

Thus, the court was able to document the real costs and burdens to Missourian voters associated with the new ID requirement. These costs, for the court, were sufficient for it to find that the photo ID requirement was an unconstitutional poll tax.[271]

Next, applying strict scrutiny, the court mandated that the state show a narrowly tailored compelling interest to support SB 1014.[272] The court conceded that although combating fraud is compelling,[273] the state failed to make that demonstration. First, the state could not show that recent elections had serious problems with fraud.[274] Second, the fraud that did exist was not associated with voter impersonation but with absentee voting.[275] Instead, according to the court:

> To the contrary, Appellants concede that the only type of voter fraud that the Photo-ID Requirement prevents is in-person voter impersonation fraud at the polling place. It does not address absentee voting fraud or fraud in registration. While the Photo-ID Requirement may provide some additional protection against voter impersonation fraud, the evidence below demonstrates that the Photo-ID Requirement is not "necessary" to accomplish this goal. As the trial court found: "No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri."[276]

Thus, while the interest in addressing fraud is compelling, the lack of evidence for the type of fraud to be remedied by the ID requirement meant that the state's interest was neither narrowly

270. *Id.* at 213.
271. *Id.* at 214–15.
272. *See id.* at 215–16.
273. *Id.* at 217.
274. *Id.* at 210 (stating that "the record contains two letters written in 2004 by then-Secretary of State Matt Blunt on the subject of voter fraud. He described Missouri's statewide elections in 2002 and 2004 to then-Governor Bob Holden as 'two of the cleanest and problem free elections in recent history.' To the *St. Louis Post-Dispatch*, Blunt characterized the same elections as 'fraud-free.'").
275. *Id.* at 218 n.28.
276. *Id.* at 217.

tailored nor compelling enough to survive strict scrutiny.[277] Hence, SB 1014 was found to be unconstitutional under state constitutional clauses.[278]

### *F. Albuquerque, New Mexico and* Women Voters of Albuquerque/Bernalillo County v. Santillanes

*American Civil Liberties Union of New Mexico v. Santillanes*[279] is a second case where a court struck down a photo ID requirement. But unlike *Weinschenk*, where state constitutional law and strict scrutiny were used, the federal district court in *Santillanes* employed the U.S. Constitution and the flexible standard under *Burdick* to invalidate the requirement.

At issue in *Santillanes* was a 2005 amendment to the City of Albuquerque, New Mexico Election Code mandating that its citizens present a valid photo ID when voting at the polls in future municipal elections.[280] The requirement excluded absentee ballots, and it was adopted, according to the city, to address voter fraud.[281] The plaintiffs sought an injunction to bar enforcement of the amendment, contending that the photo ID requirement was an unconstitutional burden on voting rights.[282] The district court judge agreed, granting an injunction under both First and Fourteenth Amendment (Equal Protection) grounds.[283]

Judge Armijo began her analysis of the 2005 amendment by noting that the case involved striking a balance between the right to vote and the city's right to regulate elections in order to prevent voter fraud.[284] Judge Armijo recognized that voting was a fundamental right under both the state and federal constitutions.[285] The plaintiffs called for strict scrutiny based on voting as a fundamental right.[286] But the Court agreed with *Burdick*'s requirement to base the level of scrutiny upon the severity of the

277. *Id.* at 217–19.
278. *Id.* at 221–22.
279. 506 F. Supp. 2d 598 (D.N.M. 2007).
280. *Id.* at 606 (addressing the constitutionality of Albuquerque, N.M., City Charter art. XIII, §14 (amended 2005)).
281. *Id.*
282. *Id.*
283. *See id.* at 645.
284. *Id.* at 606.
285. *Id.* at 627.
286. *Id.* at 626.

burden imposed.[287] Similarly, the judge rejected the use of a rational basis test to examine the 2005 amendment, finding that the inability to predict the actual injury to voting rights requires more than a minimal level of analysis.[288] Hence, the district court interpreted the *Burdick* test to require a more intermediate level of analysis, balancing the state interest against the severity of the burden on voting rights.[289]

By employing this test, the court agreed that preventing voter fraud is a compelling or important governmental interest.[290] The court rejected the notion that simple assertion of this interest will suffice.

> [T]he *Burdick* test does not call for the Court to look for any conceivable, generalized interest that might serve as a justification for imposing a burden on the exercise of First and Fourteenth Amendment rights in the context of elections. Rather, this test calls for the City to put forward "the *precise* interests [which serve] as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it *necessary* to burden the plaintiff's rights."[291]

As the court interpreted the *Burdick* test, the weighing of state interests and the burden on voting rights required the city to "bear the burden of providing a reasoned explanation, supported by at least some admissible evidence, to show the October 2005 amendment is tailored to advance an important governmental interest."[292] The judge noted that the 2005 Amendment referred only to one instance of alleged voter impersonation, but otherwise, no admissible evidence was put forward to support its contentions of voter fraud.[293] Furthermore, the court responded to claims, as similarly made by Indiana, that the law should be upheld as a valid measure to prevent the possibility of fraud.[294] Yet unlike in Indiana, where the state conceded that it was not up to date in maintenance of its voter-registration rolls, there was no indication or argument

287. *Id.* at 628.
288. *Id.* at 626.
289. *Id.* at 628.
290. *Id.* at 636.
291. *Id.* at 637 (citation omitted).
292. *Id.* at 636.
293. *Id.* at 637.
294. *Id.* (citing Crawford v. Marion County Election Bd., 472 F.3d 949, 953–54 (7th Cir. 2007)).

being offered by the city or the state that this was a problem in New Mexico.[295] In fact, New Mexico had recently acted to improve its record keeping.[296] Thus, the possibility of voter fraud was found to be without merit.[297] Finally, the court addressed whether preventing future impersonation fraud would support the voter ID requirement.[298] Even if this was valid, the court found that exempting absentee voting from the ID requirement undermined claims that it was attempting to address voter fraud.[299] Employing intermediate level analysis, the judge stated:

> My conclusion that the October 2005 City Charter amendment lacks a plausible, close-fitting relationship to the actual prevention of voter impersonation fraud does not imply that all laws which seek to prevent fraud in the conduct of elections suffer from the same defects. In this regard, the 2005 amendments to the State Election Code provide an example of a law that provides less restrictive alternatives for identifying voters at the polls while at the same time leaving fewer loopholes available for stealing another person's vote.[300]

On one side of the scale, the judge found that there was no weight to the city's contention of voter fraud.[301] In comparison, she found that the ID requirement placed several burdens on the plaintiffs' voting rights, including concerns about whether their votes will be counted because their photo IDs may be rejected, and that they will not have enough time to vote absentee or secure other identification.[302] The judge also cited the Missouri Supreme Court for noting the bureaucratic and other real costs associated with securing the required IDs.[303] Unlike Georgia, the city had not undertaken a significant education program to inform voters about the new voting requirements.[304] For all of these reasons,[305] the

295. *Id.* at 638.
296. *Id.*
297. *Id.* at 638.
298. *Id.*
299. *Id.*
300. *Id.* at 640.
301. *Id.* at 615–17.
302. *Id.* at 635.
303. *Id.* at 634.
304. *Id.* at 634–35.
305. *See id.* at 634 (citing Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 197-200 (1999) (supporting the claim that bureaucratic costs associated with securing an ID may constitute a severe burden. Here the judge argued that

court found the new ID law to be a burden on plaintiffs' voting rights.[306] Assessing the weight of the city's claims of voter fraud against the significant burden on voting rights, the court enjoined the new photo ID requirement on both First and Fourteenth Amendment grounds.[307]

*G. Summary*

The courts upheld voter ID laws in four of the six jurisdictions litigating them. In these four cases each court relied upon the flexible standard test articulated in *Burdick,* and using federal constitutional analysis they ruled that ID requirements are not a severe burden on voting rights, thereby precluding the need to use strict scrutiny. Once invoking a lesser standard of analysis, all four of the cases outweighed the state interest in controlling or addressing voter fraud against any of the burdens associated with photo identification. The courts consistently did not demand that the states provide empirical evidence to support or document state interests, instead allowing them broad leeway to enact preventive measures. But when the courts looked to the evidence to support the states' interests, they permitted out of state information, relied upon sources of questionable value (such as John Fund's *Stealing Elections*), or allowed other accounts of fraud not directly tied into in–person voting at the polls to suffice as acceptable proof. In the Indiana and Arizona cases, even evidence or concessions by defendants that fraud did not exist did not seem to matter to the courts.

Conversely, while the states have not been held to a rigid standard of proof, the plaintiffs have. Plaintiffs have been asked to show with particularity how the new photo ID requirement burdened their ability to vote, with the courts generally dismissing time or effort factors surrounding obtaining the necessary ID. The courts also seem to have emphasized that some voting identification cards are free through an indigent bypass process, or whether there are provisional voting processes that get around the ID requirement, at least enough to escape claims that the new laws constitute a poll tax. Thus, weighing an almost unquestioned state

the issue in *Buckley*—requiring petition gatherers to wear ID badges—imposed a severe burden upon the First Amendment free speech rights of these individuals)).

306. *Id.* at 636.

307. *Id.* at 645.

interest against an unsubstantiated asserted burden on the right to vote under a less than exacting if not almost a rational basis scrutiny, it is no surprise that the courts have upheld the ID requirements.

But the litigation in Missouri and New Mexico paint contrasting pictures. The Missouri Supreme Court both rejects the *Burdick* framework and invokes state constitutional law to use strict scrutiny. Conversely, in New Mexico, the *Burdick* test is read as an intermediate level analysis. In both instances, the courts found that the evidence to support the state interest did not survive scrutiny.

Despite the Missouri and New Mexico rulings, the implications of the litigation in Indiana, Michigan, Georgia, and Arizona are not hopeful for voting rights advocates. They suggest that the courts will be receptive to photo ID laws for voting, potentially paving the way for the next great disenfranchisement based upon conjecture and unsubstantiated stories of fraud.

## V. FIGHTING DISENFRANCHISEMENT: LESSONS FOR LITIGATING FUTURE PHOTO ID CASES

Given the track record of litigation, should voting rights advocates simply abandon all hope of challenging photo ID requirements and resign themselves to the reality of either a new disenfranchisement or a strategy that seeks to make the best of a possibly bad voting situation? Not necessarily. While the case law so far has not been promising, both *Weinschenk* and *Santillanes*, as well as dicta and dissents in the other cases, offer some suggestions on a better strategy in challenging both the ID laws in the four states that have already upheld them and in others contemplating adoption. Moreover, voting rights supporters need to be prepared to engage the *Burdick* test, demonstrating flaws in both its logic and in its application.

### *A. Lessons from the Photo ID Laws Already Litigated*

While four losses out of six is not a good track record, the victories in Missouri and New Mexico and the dicta in the other cases, especially *Gonzalez* and the dissent in the Michigan case, offer some important lessons that could prove useful in the future. One way to challenge photo ID laws is to continue to assert that regulations on voting rights require strict scrutiny. Conversely, one should argue that even under *Burdick*'s flexible standard, the

burden on rights outweighs any purported state interest. Ideally, one should argue both as alternative theories. On top of this, one should argue that these issues be raised both at the federal and state constitutional level.

*Weinschenk* is an important victory because it demonstrates how one needs to present a challenge to these laws by using strict scrutiny. *Weinschenk* is also an example of how state law may be an important source of opposing photo ID laws.[308] The courts rejected state challenges in Michigan and to some extent in Georgia. The Missouri Supreme Court distinguished the jurisprudence of its voting rights cases under the Missouri constitution from that found at the federal level.[309] In drawing upon its own jurisprudence, it was able to bypass the *Burdick* analysis, finding that under its own constitution, infringements on the right to vote must be examined under strict scrutiny.[310] In fact, the state constitution appeared to offer a compelling state interest to efforts to protect the right to vote.[311] The shift in level of scrutiny was critical to the challenge to SB 1014, forcing the State to defend its interest in fraud as compelling and real and as narrowly tailored to abating fraud at the polls.[312] The first simple lesson from *Weinschenk* is that state law matters and that the new judicial federalism may be beneficial to voting rights advocates.[313]

Second, plaintiffs in *Weinschenk* documented the real costs and burdens imposed upon them by the photo ID law. As the Missouri Supreme Court pointed out, the litigation in this case was different from the case in Indiana because it could point to real as opposed to hypothetical burdens upon plaintiffs.[314] In part, the challenges failed in the other states because either they were facial challenges to the ID laws or because plaintiffs had not properly and sufficiently documented the real costs or burdens in terms of dollar amounts or numbers of individuals affected by the new voting

308. *See also In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 460 (Mich. 2007) (Kelly, J., dissenting) (invoking the Michigan Constitution in ruling on the voter ID law).

309. Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006).

310. *Id.* at 215.

311. *Id.* at 203.

312. *Id.* at 217.

313. *See generally* David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L. J. 1087 (2006) (discussing how state constitutions are becoming increasingly important in the litigation of election law issues).

314. *Weinschenck,* 203 S.W.3d at 214.

requirements. In Missouri, plaintiffs presented both in pressing their arguments.[315] The value in doing this was twofold. First, in *Weinschenk,* it made it possible to demonstrate how under the *Burdick* dicta the burdens were severe and therefore strict scrutiny was required.[316] Second, using the flexible weighing standard under *Burdick,* it is possible to calculate the actual documentation of burden in the analysis.[317] In looking at the failure of the plaintiffs to prevail in *Gonzalez v. Arizona*, the courts on several occasions noted that the burdens of the new law had yet to be proven.[318] The Supreme Court, in overturning the Ninth Circuit's injunction, said the same.[319] In fact, Justice Stevens, in writing separately on the vacating and remanding, essentially cautioned plaintiffs to secure the data necessary to demonstrate the burdens to voting rights.

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.[320]

Thus, perhaps the second piece of good advice that emerges from the litigation so far is that challenges to photo ID requirements must either be as applied or plaintiffs must be able to provide a picture of the real burdens associated with them.

In contrast to arguing that state law or the level of burden on voting rights demands strict scrutiny, *Santillanes* took seriously the flexible standard test of *Burdick* and argued the burdens.[321] The

315. *Id.* at 204–10.

316. *See id.* at 215–17.

317. *See id.* at 204–10.

318. *See e.g.*, 485 F.3d 1041, 1049–50 (9th Cir. 2007); s*ee also* Common Cause/Georgia v. Billups, 504 F. Supp. 2d 1333, 1382 (contending not enough evidence presented to show a severe burden).

319. Purcell v. Gonzalez, 127 S.Ct. 5, 7–8 (2006).

320. *Id.* at 8.

321. 506 F. Supp. 2d 598, (D.N.M. 2007). *Cf. In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 456–57

judge in this case considered what the test seems to be about when applied, *i.e.,* that a test advocating weighing the relative strength of state interests versus burdens on voting rights requires, in fact, a real weighing. Specifically, the *Santillanes* court gave similar careful consideration to the idea that a government cannot assert an interest without documenting evidence assessing it in light of the available evidence on burdens.[322] In the four cases upholding the ID laws, the courts did not really appear to be applying the flexible *Burdick* standard by engaging in an empirical weighing of interests and burdens. Finally, the judge in *Santillanes* demonstrated a way to handle facial challenges to the ID laws. Here, Judge Armijo indicated that real demonstrated burdens to rights might constitute severe burdens necessitating strict scrutiny; but if the burdens are not certain, then rational basis review is not appropriate and some intermediate level of analysis is a better way to protect a fundamental right when anticipating possible burdens.[323]

Overall, to challenge voter ID laws, one should raise claims under federal and state law; one should argue both for strict and intermediate levels of analysis; and one should seek a challenge that invokes facial arguments as well as documents the burdens, while still advocating for an intermediate level of scrutiny.

### *B. Challenging the* Burdick *Test*

A far more fundamental problem in the photo ID litigation is the *Burdick* test itself. Both in its theoretical structure and in its application, there are flaws on numerous grounds, presenting litigants with an opportunity to challenge its use.

Perhaps the first problem with the test is that the four courts upholding voter ID laws have let the government assert voter fraud as a compelling governmental interest without documenting that such an interest is real or based on appropriate evidence. In fact, in the decisions upholding the photo ID cases, the courts have generally done a poor job reviewing or handling evidence.[324] As

(Mich. 2007) (Cavanagh, J. dissenting) (using the same flexible standard test but imposing little to no burden on the state).

322. *Santillanes*, 506 F. Supp. 2d. at 615–18.

323. *See id.* at 633–35 (examining the Missouri photo ID law under a less than strict scrutiny approach).

324. *See generally* Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention and Administration*, 68 OHIO ST. L. J. 1065 (2007) (discussing a similar point).

the district court judge stated in *Billups*: "the legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them."[325] There are several problems with this approach.

First, the Supreme Court in election law cases has not stated that the compelling interest may be simply asserted without empirical foundations. Instead, evidence must be offered to support the interest to override a fundamental right.[326] For example, in *Buckley v. Valeo*,[327] the Court first reviewed a series of proffered claims to limit political contributions or expenditures.[328] In doing so it rejected several interests—such as equalizing voices or speech—as illegitimate interests.[329] Second, once the Court accepted one interest as compelling—preventing corruption or the appearance of corruption—it demanded that some evidence be offered to support it.[330] The importance of this evidence was underscored in *Nixon v. Shrink Missouri Government PAC*, [331] where the Court, in ascertaining what must be shown in order for political contributions to be upheld, stated: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[332] In *Randall v. Sorrell*,[333] the Court again underscored the important role of evidence to support state interests when it rejected the contribution and expenditure limits imposed by Vermont.[334] In numerous cases the Supreme Court has demanded that the compelling interest be real and not merely conjecture,[335] or at least some evidence be offered to support the

325. Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) (quoting Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 829 (S.D. Ind. 2006)).

326. *See also Constitutionality of 2005 PA 71*, 740 N.W.2d at 456–57.

327. 424 U.S. 1 (1976).

328. *Id.* at 39–50.

329. *Id.* at 48–49.

330. *Id.* at 26–27.

331. 528 U.S. 377 (2000).

332. *Id.* at 378.

333. 126 S.Ct. 2479 (2006).

334. *Id.* at 2514.

335. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001); City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 195 (1997); Rubin v. Coors Brewing Co., 514 U.S. 476, 496–97 (1995); Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995); Edenfield v. Fane, 507 U.S. 761, 762 (1993).

interest.[336] Letting the government off the hook from having to show the reality of the interest is simply an invitation for abuse of rights.

Moreover, the evidence must be relevant and credible to support the interest asserted. Judge Armijo in the New Mexico case said the same. Recall also the district court judge in *Rokita* dismissing the Brace Report as unreliable under the Federal Rule of Evidence 702.[337] The judge in *Santillanes* repeatedly stressed the lack of *admissible* evidence supporting the governmental interest in addressing fraud.[338] Judges need to apply Rule 702 and more fully accept their role under *Daubert* standards when deciding to admit evidence about fraud into court.[339] More specifically, as the first part of the article demonstrated, much of the evidence of fraud is not tied to voters, or the studies rely on conjecture or unproven assertions.[340] Thus, citations or references to Fund's *Stealing Elections* or unproven assertions as found in the Carter-Baker Report should be rendered inadmissible as failing Rule 702's *Daubert* standards. Finally, some types of evidence should not be material to supporting photo ID requirements. For example, in *Rokita* the judge cited to survey data as evidence that the public supports the use of photo IDs for voting.[341] Public opinion and fear as justifying restrictions on fundamental rights are immaterial and tantamount to a "heckler's veto" on free speech.[342] The entire purpose of the Bill of Rights is to check majority factions or the

336. *See, e.g.*, FEC v. Wisconsin Right To Life, Inc., 127 S. Ct. 2652, 2692 (2007); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 (1978); Buckley v. Valeo, 424 US. 1, 46 (1976) (discussing the role of evidence in supporting facial versus applied challenges); *see also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication,* 68 B.U. L. REV. 917, 955–56 (1988) (discussing the importance of the governmental interest being real).

337. *See* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 803 (S.D. Ind. 2006).

338. *See* Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes, 506 F.Supp.2d 598, 637 (D.N.M. 2007).

339. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (assigning judges the role of determining the appropriateness of allowing scientific and expert testimony into the record).

340. *See infra* Part II.B.

341. *Rokita,* 458 F. Supp. 2d at 794.

342. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949) (describing early on the use of public anger to impact fundamental voting rights).

tyranny of the majority from encroaching upon the rights of a minority.[343]

In addition, for the evidence to be real it needs to be jurisdiction–specific. By that, one should not be able to support the compelling interest of addressing fraud in one jurisdiction by pointing to evidence in another. For example, in rejecting efforts to limit campaign contributions, the court in *Kruse v. City of Cincinnati*[344] noted that the city had no experience with contribution limits at the local level at the time the spending limit was passed.[345] As a result, the city had no evidence that contribution limits were inadequate to prevent actual and perceived quid pro quo corruption.[346] The city mistakenly relied on the federal experience in national elections with contribution limitations to support its contention that they will inevitably prove inadequate at the local level.[347] As a result, the court voided the contribution limits.[348]

The *Burdick* test itself also appears to be flawed in several ways. For example, there is an asymmetry in its application to evidence. As the four cases upholding the ID laws demonstrate, plaintiffs were required to document evidence of burden but defendants were not required to do the same. At the very least, the same standards of documentation should apply. Moreover, if the issue in the case is whether the ID is a burden to a constitutionally protected right, the presumption should initially be that the

343. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). The Court stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

*Id.* at 638. *See also* D. Bruce LaPierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 694 (2000) (arguing how appeals to the fears of majorities is pandering and not an appropriate measure to justify restrictions on free speech).

344. 142 F.3d 907 (6th Cir.1998).

345. *Id.* at 916.

346. *Id.* at 915–16.

347. *Id.* at 916.

348. *See generally* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85 (1999) (arguing the necessity of making the evidence real and jurisdiction specific).

government bears the burden to show why the regulation is not severe, instead of requiring the plaintiff to show the severity.

Dissenting in *Constitutionality of 2005 PA 71,* Judge Cavanagh found that 2005 PA 71 was unconstitutional.[349] In reaching that conclusion, he argued that strict scrutiny was required because, following *Burdick*, photo ID requirements impose a severe burden on voting rights.[350] Judge Cavanagh supported this point first by contending that because the photo ID requirement will deny some citizens the right to vote, the presumption that the statute is constitutional is not applicable.[351] Second, Cavanagh noted that the ID requirement will impose classifications upon those who exercise voting rights, *i.e.,* on the poor, elderly, disabled, and upon racial and ethnic populations by subjecting them to different burdens than others.[352] Given the presumption of unconstitutionality and the differential treatment of some groups, 2005 PA 71 must be subjected to strict scrutiny.[353] Moreover, according to Judge Cavanagh, "[t]he government cannot now shield itself from strict scrutiny because it provides only a purported rational basis for the requirement while simultaneously failing to provide *any* evidence to support its purported rationale."[354] In effect, Judge Cavanagh accuses the majority of engaging in circular logic: the state does not need empirical evidence to support its interest in restricting voting because strict scrutiny is not required to restrict the right to vote.

Judge Cavanagh effectively argues that an interest can only be compelling if there is evidence to support it. Even if the interest need not be compelling, but only rational, the "restriction, in this case a photo identification requirement, must be reasonable *given the interest the restriction allegedly serves.*"[355] Whatever the test, real evidence is necessary to support an interest and the burden it

349. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 469 (Mich. 2007).

350. *Id.* at 463.

351. *Id.* at 472.

352. *Id.* at 473.

353. *Id.* at 493 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966)). "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.*

354. *Id.* at 472.

355. *Id.* at 474.

imposes upon voting.[356] Thus, lacking evidence, the restriction is unconstitutional.[357]

For numerous reasons, Judge Cavanagh's comments are significant. First, the test should require the government to detail what constitutes a "severe" burden on a fundamental right. After all, that is the normal requirement whenever the government seeks to infringe upon these types of rights.[358]

The *Burdick* test is also problematic in that it too never explained what "severe" meant, apparently leaving it up to the discretion of judges to ascertain its meaning. Indeed, there is a real circularity and inconsistency to the test. Before one can decide which level of analysis one has to use, the court must make a prior determination about whether the burden is severe or not. If not, then the flexible standard is used. Thus, if *Burdick* is supposed to be a test, the outcome almost seems decided by a prior subjective determination that the burden is not severe. Once that is concluded, it is almost a foregone conclusion that a not-too-severe burden will be classified as a legitimate regulation that will be capable of upholding the ID requirement. In *Fullilove v. Klutznick,*[359] Justice Marshall remarked of strict scrutiny that it is "strict in theory, but fatal in fact."[360] Under *Burdick*, if an ID regulation is not severe in theory, it will not be found severe in fact. The initial determination of burden appears to resolve the case. Thus, the *Burdick* test, used this way, is superfluous to resolving the controversy.

Courts must be more serious in weighing the government's interest against the burden on plaintiffs even if they plan to use the *Burdick* flexible standard of review. If one pits an unproven or unsubstantiated government interest against a demonstrated burden, the weight assigned to the interest has to be nearly zero. Still, the four courts using the *Burdick* flexible standard seem to assume woodenly that if they have decided the burden is not severe, then they will automatically uphold the regulation. This does not appear to be what the *Burdick* Court intended. Plaintiffs should thus assign the weights to the interests and burdens and be

356. *Id.* at 486.

357. *Id.*

358. *See also* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication,* 68 B.U. L. REV. 917, 955-56 (1988) (arguing the importance of the requirement to protect democracy).

359. 448 U.S. 448 (1980) (Marshall, J., concurring).

360. *Id.* at 519.

prepared to present both the severe and not–so–severe burden arguments.

Finally, the four courts thus far upholding voter ID laws have simply gotten it wrong when applying the *Burdick* test. They seem to be applying the test like a light switch in either finding the burden to be severe and therefore requiring strict scrutiny, or not finding the burden to be severe and therefore using what appears to be something more closely resembling rational basis. In effect, they have misread *Burdick* as overturning past precedent that found voting to be a fundamental right. Judge Cavanagh was correct in pointing out this error.[361] The test does not push an examination of the burdens on voting rights to rational basis if the burdens are determined not to be severe.[362] Instead, the Indiana court correctly determined that some form of intermediate scrutiny is demanded.[363]

## VI. CONCLUSION

The purpose of this article has been to document the illusory nature of the evidence purporting voter fraud and to show plaintiffs how best to defend against attacks on the right to vote: by challenging the evidence, the application of the *Burdick* test, and even the test itself.

The battle over voter photo identification is a battle for democracy against a second great wave of voter disenfranchisement. Like the first wave at the end of the Nineteenth and beginning of the Twentieth Centuries, which augmented the fear of voter fraud as a way to disenfranchise African-Americans, ex-felons, urban poor, and ethnic populations, the new disenfranchisement uses similar fears to accomplish the same today. The case for voter fraud—individuals impersonating others at the polls—is largely built on hype and the type of hearsay that should not be permitted in court for the purposes of denying

361. *Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 489 (Cavanaugh, J., dissenting).

362. *See* Jacqueline Ricciani, *Burdick v. Takushi: the Anderson Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949 (1994) (examining the *Burdick* test and concluding that its adoption of the ballot access cases indicate that some form of intermediate level of scrutiny is required when the burdens on voting rights are found to be less than severe).

363. *See also* Crawford v. Marion County Election Bd., 472 F.3d 949, 954, 956 (7th Cir. 2007) (contending that *Burdick's* lesser level of scrutiny calls for at least "strict scrutiny light") (Evans, J., dissenting).

individuals the right to vote. Unfortunately, in four cases so far, the courts have been unwilling to police the evidence, take seriously the fundamental nature of voting rights, and protect franchise rights.