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

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Introduction

When it comes to voting and voting rights, American history is marked by two traditions.[1] One expresses a continuing expansion of the formal right to vote beyond that found at the time of the framing of the Constitution where only white males who owned property, of protestant faith, and of specific age and citizenship, had franchise rights under the Constitution.[2] As former Supreme Court Justice Thurgood Marshall aptly put it:

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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 at xvi.

> 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 three-fifths 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 to even remotely approximate the promise that "We the people" held out.[4]

But while one American tradition was marked by an expansion of franchise, Alexander Keyssar notes another one characterized by efforts to deny the right to vote.[5] There are repeated periods in American history to disenfranchise voters or to scare them away from the polls. For example, after the Civil War many in the South 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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[3] Thurgood Marshall, "Remarks of Thurgood Marshall At The Annual Seminar of the SAN FRANCISCO PATENT AND TRADEMARK LAW ASSOCIATION In Maui, Hawaii" (May 6, 1987)

[4] *Id.*

[5] Keyssar at xvi-xvii.

[6] *See generally, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed.

In the late 19th and early 20th centuries bans on fusion tickets, instant runoff voting, proportional voting, and other so-called reforms were instituted as "reforms" to depress immigrants and urban poor from voting.[7] In both cases,the pretext for the suppression of voting rights was the claim of fraud, [8] resulting in significant drops in voter turnout as a result. 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 from voting. This time the tools are not literacy tests, poll taxes, or lynch mobs, but instead it is the use of photo IDs when voting. While at least since the 1980s members of the Republican and Democratic parties have dueled over proposals to restrict or ease the ability to vote, [9] the real battle began in the Florida 2000 and Ohio 2004 presidential contests and continues today where allegations of fraud in both of those states led to efforts to increase the requirements to vote.[10] Following the 2000 disputed presidential election in Florida, Congress enacted the Help America Vote Act (HAVA) as an effort to improve voting, but it

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1974) (*discussing* the various techniwues used to intimidate African-Americans away from voting).

[7] Keyssar at 127-141.

[8] Stephenson at 143-154; Keyssar at 159-162.

[9] Keyssar at 314. *Compare:* STEVEN E. SCHIER, BY INVITATION ONLY: THE RISE OF EXCLUSIVE POLITICS IN THE UNITED STATES, 1-5, 194-197 (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.).

[10] *See:* BOB FITRAKIS, 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 prior to the 2004 presidential election in that state).

came with some picture ID requirements. According to the *Wall Street Journal* at least half of the states since HAVA have added additional alleged anti-fraud mechanisms,[11] and several states, including Arizona, Georgia, Indiana, Michigan, and Missouri have imposed photo ID requirements to vote at the polls. All of these efforts have been justified upon the premise that voter fraud is real and that these measures are needed to control it. As the 2008 presidential and congressional elections approach, the claims of voter fraud and photo identification are heating up. First, fraud has become a partisan divide, with Republicans appearing to support voter IDs and Democrats opposing it.[12] Second, the United States Supreme Court has granted *cert.* to a photo ID case—*Indiana Democratic Party v. Rokita*[13]—setting the stage for it to resolve the constitutionality of these new requirements in time for the 2008 elections.[14] A decision upholding voter ID laws from the Supreme Court could encourage even more states to adopt such laws, further enabling the second great disenfranchisement.

This article examines the issue of voter fraud and efforts to regulate it through new photo identification requirements. The overall thesis is that voting fraud is a pretext for a broader agenda to disenfranchise Americans and rig elections. However, the more specific focus of this article is both to examine the evidence of fraud and the litigation around voter IDs thus far, and what supporters of voting

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[11] Christopher Conkey, *Attention, Voters: Have Your ID Ready,* WALL STREET J. (October 31, 2006) at A1.

[12] Adam Liptak, *Fear but Few Facts in Debate on Voter I.D.'s*, N.Y. TIMES (September 24, 2007) at A12.

[13] ___S.Ct. ___ 2007 WL 1999963 (Mem) U.S., 2007.

[14] Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. TIMES, (September 26, 2007) at A24.

rights can learn from both as they move forward and challenge these laws in the future. The Article will argue that the evidence being offered for the photo IDs do not justify the restrictions being imposed. In addition, the Article argues that the courts have generally gotten it wrong when it comes to adjudicating the photo ID claims. Specifically, the Article takes aim at the apparent test articulated in *Burdick v. Takushi*[15] that seems to justify treating franchise as less than a fundamental right, thereby permitting the adoption of some regulations that adversely impact voting rights. Courts, this article will contend, have generally misapplied the test. Second, it will be argued, the test itself is incoherent and unworkable.

Part one of the Article briefly describes the evolution of the right to vote in the United States, along with reviewing the *Burdick* decision in terms of what it seems to imply regarding the regulation of voting. Part two of the article critically examines the literature and evidence on voting fraud, while part three evaluates litigation thus far surrounding state efforts to enact photo IDs for voting, seeking to understand what the courts have thus far said about these new requirements. Finally, part four is a critical analysis of the litigation so far and it also provides a road map for how voting rights supporters can successfully challenge them in the future. Overall, the argument of this Article is that the photo ID laws are unconstitutional, but unless plaintiffs can provide better arguments to opposing these laws, America will face the next great wave of voter disenfranchisement.

I. The Right to Vote

[15] 504 U.S. 428 (1992).

Bush v. Gore[16] was a controversial landmark decision in which the Supreme Court halted the recount of ballots in the 2000 Florida presidential election. But in reaching this holding the Court reminded voters that the Constitution does not guarantee the right to vote in presidential elections.[17] In fact, while the Court has ruled that voting is a fundamental right protected under the Constitution,[18] it has done so in a way that belies the original text of the document.

No where 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 it will allow for the selection of electors to choose the president. The original constitution also permitted state legislatures to select the U.S. Senators,[19] and members of the Supreme Court were to be appointed by the president, subject to confirmation by the Senate.[20] The only public officials whom the people could select were the members of the House of Representatives,[21] rendering rather thin any notion that the citizens had broad franchise rights in the selection of the national government.

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, occasionally of a specific religious faith.[22] For example, in *Minor v. Happersett* [23]the United States Supreme Court rejected a

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[16] 531 U.S. 98 (2000).

[17] *Id*. at 104 (*referencing* Article II, section 1 of the Constitution).

[18] Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[19] U.S. Const. Article I, Section 3, Clause 1.

[20] U.S. Const. Article II, Section 2, Clause 2.

[21] U.S. Const. Article I Section 2, Clause 1.

[22] Keyssar at 21-25.

[23] 88 U.S. 162 (1875).

claim by a Missouri woman that as a citizen the Constitution gave her a right to vote. The Court dismissed her claim, indicating that citizenship did not necessarily include the right to vote; states could decide who had that right.

Commencing after the Civil War, a series of Constitutional Amendments were adopted 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 banned poll taxes. The Twenty-sixth 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*,[24] in a case arising out of vote fraud in a Louisiana federal election primary, the Court was faced with the issue of whether one has a right to vote as a primary question,[25] and then whether the depriving a person of that right came within the meaning of a federal criminal law that made it illegal to "injure a citizen in the exercise 'of any right or privilege secured to him by the Constitution or laws of the United States."[26] 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

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[24] 313 U.S. 299 (1941).

[25] 313 U.S. at 308.

[26] *Id.* at 308, *quoting* then 18 U.S.C. 51 (1940).

> respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the 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.[27]

In addition in *Reynolds v. Sims*[28] the Court embraced the principle of equal representation for equal numbers of people–one person, one vote for the purposes of reapportionment.[29] More importantly, in *Reynolds* the Supreme Court again reaffirmed that the Constitution protects the right to vote in federal elections.. Furthermore, in *Reynolds* the Court drew a parallel between the right to vote and right to procreate in *Skinner v. Oklahoma*,[30] declaring the right to vote as a fundamental.[31]

Locating a constitutional text to support the right to vote in state elections is more problematic. In *Harper v. Virginia State Board of Elections*,[32] in striking down the imposition of a poll tax in state elections, the Supreme Court ruled that the right to vote in state elections was located in the First Amendment by way of the Fourteenth Amendment's Due Process and Equal Protection Clauses.[33] Although the tax met traditional constitutional standards: it was neither racially discriminatory nor

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[27] 313 U.S. at 314-5.

[28] 377 U.S. 533 (1964).

[29] 377 U.S. at 558.

[30] 377 U.S. at 561-2, *citing* 316 U.S. 535 (1942)

[31] 377 U.S. at 561.

[32] (1966).

[33] 383 U.S. at 664.

indefensible as rational policy, but the court found that it unconstitutionally singled out the poor.[34] More importantly, the Court yet again affirmed the importance of voting, stating that: "Long ago, in *Yick Wo v. Hopkins,* the Court referred to 'the political franchise of voting" as a "fundamental political right, because preservative of all rights.' Recently,[. . .] the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights.'"[35] Again, as in *Reynolds*, the Court drew a parallel between voting and the right of procreation found in *Skinner v. Oklahoma*,[36] 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."[37] Specifically, the Court cites to language in *Skinner* that dictates that efforts to interfere with the right to procreation to procreation must be subject to strict scrutiny.[38]

The legacy of *Classic*, *Reynolds*, and *Harper* is that these three cases stand for the proposition that voting is a fundamental right that must be subject to strict scrutiny. In addition to these three cases, the Court has also reached a similar conclusion elsewhere.[39] Collectively, these cases would seem to

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[34] *Id.* at 666-667

[35] *Id.* at 667.

[36] 383 U.S. at 668, 670.

[37] *Id.* at 670.

[38] 383 U.S. at 670 (*citing* 316 U.S. at 542).

[39] *See e.g.,* Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Bush v. Gore, 531 U.S. 98, 104 (2000); Oregon v. Mitchell, 400 U.S. 112, 142 (1970); Rosario v. Rockefeller, 410 U.S. 752, 767-8 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Williams v. Rhodes, 393 U.S. 23, 38 (1968) (*declaring* "When 'fundamental rights and liberties' are at issue a State has less

suggest that interference with, or regulation of the fundamental right to vote must be subject to strict scrutiny, and that only if a compelling governmental interest is asserted that over rights it, may it be limited.[40] However, the Court itself has created some confusion about this point, as demonstrated in *Burdick v. Takushi*.[41]

In *Burdick*, at issue was a State of Hawaii law prohibiting write-in voting.[42] In rejecting the First and Fourteenth Amendment challenges to the law,[43] the Supreme Court described its approach to regulations regarding voting rights.

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leeway in making classifications than when it deals with economic matters ") (citations omitted); Cardona v. Power, 384 U.S. 672, 676 (1966) (*ruling* that "Where classifications might 'invade or restrain' fundamental rights and liberties, they must be 'closely scrutinized and carefully confined.'"); and Storer v. Brown, 415 U.S. 724, 756 (1974) ("when 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").

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

[41] 504 U.S. 428 (1992).

[42] *Id.* at 430.

[43] 504 U.S. at 430-1.

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). 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. *Munro v. Socialist Workers Party,* 479 U.S. 189, 193, 107 S.Ct. 533, 536, 93 L.Ed.2d 499 (1986). The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections.[44]

Because, according to the Court, states or the government need to structure elections to promote their fairness and honesty,[45] 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

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[44] 504 U.S. at 432-3.

[45] *Id.* at 433.

> 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." [46]

Apparently replacing the strict scrutiny standard previously used to examine the right to vote, 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." [47]

Thus, in examining the State of Hawaii's ban on write-in voting, the court used this new flexible standard to uphold it.[48]

However, the *Burdick* decision is confusing. while it perhaps looks as if the Court is ruling that all regulations affecting voting need to be examined from this new flexible and less rigorous standard, the language citations suggest otherwise. First, in referencing the cases where the Court says the right to vote is not absolute, it cites not to cases about voting rights per se, but to cases involving ballot access and the rights of political parties.[49] These references question the degree to which the Court is diluting

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[46] *Id*.

[47] 504 at 434.

[48] *Id*. at 434.

[49] 504 U.S. at 432-3.

it previous strict scrutiny test. Second, and more importantly, the Court casts the seeds of doubt by distinguishing between two different types of voting regulations—those which impose "severe" versus "reasonable burdens."[50] Regulations imposing the former types of burdens would continue to be examined under the strict scrutiny standard where they must be "narrowly drawn to advance a state interest of compelling importance."[51] However, for the latter, the new standard will be used "'when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[52] Unfortunately, the Court failed to describe what constituted a severe versus reasonable burden, opening up confusion regarding when to apply which standard to what regulation. It is this confusion that sets the stage for later state efforts and disputes over efforts to enact voter ID laws.

II. The Spectre of Voter Fraud

A. The Legacy of Florida 2000

Allegations of voter fraud and election rigging go back to the earliest days of the American history. George Washington was accused of using rum to buy votes,[53] and the 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 in the name of combating election

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[50] 504 U.S. at 434.

[51] *Id.*

[52] *Id.*

[53] MELVIN I. UROFSKY, MONEY & FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS, 4-5 (Lawrence KS: University Press of Kansas, 2005).

fraud,[54] despite the fact, as Keyssar, notes, there was little hard evidence to support the rumors and allegations that this type of corruption was systematic.[55] However, the most recent efforts to restrict or regulate voting rights in the name of fraud grow out of the disputed Florida 2000 presidential election.

The 2000 presidential race between George Bush and Al Gore was close, with the allocation of Florida's electoral votes determining who would become president. The popular vote in Florida gave Bush a narrow less than 1,800 vote lead over Gore,[56] but soon concern surfaced on many fronts regarding the fairness and accuracy of the voting procedures and counting.[57]

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 and 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.[58] While ultimately *Bush*

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[54] Keyssar at 159.

[55] *Id.*

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

[57] *Id.* at 44-49.

[58] GERALD M. POMPER, THE ELECTION OF 2000, 127-128 (2001); Greene at 42-45. *See also:* VINCENT BUGLIOSI, THE BERTRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINDED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001) and ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001) (*detailing* the litany of allegations regarding the rigging of the Florida 2000 election).

v. Gore only addressed the issues of vote counting arising under the Equal Protection clause,[59] rumors arising out of the election persisted,[60] fueling allegations stemming back to the 1990s with the passage of the Motor Voter Act, that mail-in and same-day voter registration would enable voter fraud.[61] Again after the closeness of the 2004 presidential race between John Kerry and George Bush, similar allegations of both voter intimidation and fraud arose in Ohio.[62]

B. Documenting Voter Fraud

Is there widespread voter fraud in United States that is affecting the outcome of elections? The answer is not so easy, given that there are no comprehensive peer-reviewed studies examining voting fraud in the United States.[63] 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

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[59] Bush v. Gore, 531 U.S. 98, 108-110 (2000).

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

[61] Keyssar at 314.

[62] *See generally:* STEVE FREEMAN AND JOEL BLEIFUSS, WAS THE 2004 PRESIDENTIAL ELECTION STOLEN?: EXIT POLLS, ELECTION FRAUD, AND THE OFFICIAL COUNT (2006) and BOB FITRAKIS, WHAT HAPPENED IN OHIO: A DOCUMENTARY RECORD OF THEFT AND FRAUD IN THE 2004 ELECTION (2006) (*discussing* allegations of voter fraud in 2004 presidential election).

[63] UNITED STATES ELECTIONS ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY, 20 (2006).

"voter fraud" is a vague term, lacking precise definition.[64] Lorraine Minnite seeks to define voter fraud by drawing upon a broader Department of Justice definition of election fraud which is the "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."[65]

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."[66] 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.[67] For the purposes of this article, Minnite's definition of voter fraud will be employed. However, it is important to note that besides voter fraud, this article will refer to other forms of election fraud as "election official fraud." The latter will include situations where election officials or parties other than voters falsely register individuals or let them vote, engage in vote buying or swapping, or engage in other forms of vote suppression or manufacturing.[68]

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 falsely register to vote or

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[64] LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD, 6 (2007).

[65] *Id.*

[66] *Id.* at 6.

[67] *Id.*

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

actually to vote. Allegations of voter fraud include claims that illegal immigrants, ex-felons, and impersonators are stealing the identities of others, including the dead, in order that they may illegally vote. Voter fraud could also take place in several venues, such as at the polls on election day, in completing an absentee ballot, 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: How Voter Fraud Threatens Our Democracy*[69] calls for mandatory photo identification to be displayed when voting because of widespread fraud occurring in the United States. Yet what evidence exists that voter fraud is rampant? There is little systematic evidence offered here. *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 ways into the voting booths, stealing elections from honest decent Republicans, and diluting the votes of red, white, and blue Americans. But when smoke of his allegations is cleared there is little fire of voter fraud, 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."[70] Even if one accepts all of his comments

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

[70] *Id.* at 4.

as true, the sloppiness he alleges is not voter fraud, the problems are with election officials. He also alleges that "lax standards for registration encouraged by the Motor Voter Law have left the voter rolls in a shambles in many states."[71] Again, a mere allegation that does not document which states, what shambles means, how the problems do affect voting, and whether those problems constitute voter fraud.

Stealing Elections is rift with these types of unsubstantiated allegations of election fraud, let alone voter fraud, that he 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, 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,[72] seems not to have learned the lessons of his ways. In that *Wall Street Journal* essay he referenced a felon named Ben Miller in Florida who voted illegally for the last 16 years and that in the Florida 2000 election, there were 5,643 voters's names that " perfectly matched the names of convicted felons."[73] However, 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. In terms of the 5,643 names, Fund fails to show that in fact these individuals were barred from voting or 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. 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.

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[71] *Id.* at 24.

[72] John Fund, *Vote-Fraud Demagogues*, WALL STREET JOURNAL, A19 (June 13, 2007).

[73] John Fund, *Vote-Fraud Demagogues*, WALL STREET JOURNAL, A19 (June 13, 2007).

A second report by Senate Republican Policy Committee entitled *Putting an End to Voter Fraud*[74] asserts that "voter fraud continues to plague our nation's federal elections."[75] The basis of its allegations rest in assertions that the National Voter Registration Act of 1993[76] has made it difficult to maintain accurate lists to keep people from voting illegally, [77] that non-citizens are voting illegally,[78] and there may be risks associated with early and absentee voting.[79] What evidence is offered of voter fraud? Again , little of substance or of systematic nature that had been tested. For example, allegations of illegal voting in the 2004 Wisconsin presidential elections are cited, [80] but no firm numbers are provided to show if the allegations were true or significant. In terms of the threat of non-citizens voting, the main reference is to efforts in many jurisdictions to change the law to allow them to vote legally.[81]

A third report, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*,[82] chaired by former president Jimmy Carter and former Secretary of State James Baker ("Carter-Baker Commission") is also cited by those who argue that there is widespread voter

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[74] Senate Republican Policy Committee, *Putting an End to Voter Fraud* (February 15, 2005).

[75] *Id*. at 1.

[76] P.L. 103-31, 42 U.S.C. §1973 *et seq*. ("Motor Voter Act").

[77] *Putting an End to Voter Fraud* at 5.

[78] *Id*. at 7.

[79] *Id*. at 8.

[80] *Id*. at 7.

[81] *Id*. at 7.

[82] CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT, AMERICAN UNIVERSITY, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM (September 2005).

fraud, necessitating measures, such as voter IDs, to combat it.[83] The report asserts that: "While election fraud occurs, it is difficult to measure."[84] Proof of this assertion is citation to 180 Department of Justice investigations resulting in convictions of 52 individuals from October 2002 until the release of the report.[85] Yet while the Carter-Baker Commission called for photo IDs, it also noted that: "There is no evidence of extensive in U.S. elections, or of multiple voting, but both occur, and it could affect the outcome of a close election."[86] 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.[87]

The empirical evidence supporting the Carter-Baker Commission findings of fraud are scant, at best. As noted, its own conclusion is that fraud is not extensive, but when it does cite to support for its claims, it references newspaper articles and other accounts that are not corroborated or subject to critical analysis.[88] As the Brennan Center stated in its analysis and response to the Cater-Baker call for a voter photo ID: "The Report attempts to support its burdensome identification requirements on four specific examples of purported fraud or potential fraud. None of the Report's cited examples of fraud stand up under closer scrutiny."[89] Even accepting all of the documented accounts of fraud as true, the Brennan Center points out that in the State of Washington, for example, six cases of double voting and

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[83] *Id.* at 18 (*calling* for voter IDs when voting).

[84] *Id.* at 45.

[85] Carter-Baker at 52.

[86] *Id.*

[87] *Id.* at 46.

[88] *Id.* at fn. 19 (*citing* to section 1.1 of the report and its accompanying notes).

[89] Wendy Weiser, Justin Levitt, and Catherine Weiss, *Response to the Report of the 2005 Commission on Federal Election Reform*, 9 (September 19, 2005).

19 instances of individuals voting in the name of the dead yielded 25 fraudulent votes out of 2,812,675 cast—a 0.0009% rate of fraud.[90] Also, assume the 52 convictions by the Department of Justice are accurate instances of fraud. This means that 52 out of 196,139,871 ballots cast in federal elections, or 0.000003% of the votes were fraudulent.[91] While critics might assert that these cases represent only the tip of known cases of an iceberg of fraud, it is important to underscore that the prosecutions occurred on the heels of a Justice Department taking an aggressive stance on this crime,[92] and that even a doubling, tripling, or more of successful prosecutions would find that one is in greater danger of being hit by lightening that an election being affected by fraud.[93]

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") *Election Crimes: An Initial Review and Recommendations for Future Study* undertook a broad literature review and expert interviews of what was then known about voter fraud.[94] It concluded that "Many 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.[95] The same was true regarding media accounts,[96] and

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[90] *Id*. at 9.

[91] *Id*. at 10.

[92] Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (April 12, 2007) at A1.

[93] Weiser at 10.

[94] UNITED STATES ELECTIONS ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY at 2-3.

[95] *Id*. at 16.

[96] *Id*.

even stories about prosecutions lacked reliable follow up.[97] Overall, the report noted that "impersonation of voters is 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."[98] Instead of impersonation, absentee ballot voting was described as most susceptible to voter fraud,[99] but even with it the EAC called for more statistical analysis to determine its seriousness.

However, even while 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 by The *New York Times* that was reported on Wednesday."[100] As reported by the *New York Times*, experts hired by the EAC to consult with them largely found that mistakes and errors on the part of election officials, as well honest mistakes by voters have caused some problems, but overall according to Richard G. Frohling, an assistant United States attorney in Milwaukee: "There was nothing that we uncovered that suggested some sort of concerted effort to tilt the election."[101] In effect, while the final version of

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[97] *Id.* at 16-18.

[98] *Id.* at 9.

[99] *Id.*

[100] Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (April 12, 2007) at A1.

[101] *Id.*

the EAC report seemed tentative in dismissing fraud as a phenomena, the experts and perhaps even the original version of the report were even more conclusive on this point.

Another study examining the extent of voter fraud in the United States was the Project Vote *The Politics of Voter Fraud* by Lorraine C. Minnite.[102] For example, the study cites statistics provided by the Department of Justice, indicating that between 2002 and 2005 when the Attorney General made election fraud sand corruption a priority.[103] During that time period only 24 individuals were convicted or pled guilty to illegal voting, including five who could not vote because of felony convictions, 14 non-citizens, and five who voted twice in the same election.[104] During that same time period, another 14 individuals were prosecuted but not convicted by the Justice Department.[105] Minnite also noted how states have heavily criminalized voter fraud,[106] and local law enforcement officials do not seem to be shying away from election fraud issues as a result of a lacked of desire, ability, or resources.[107] Moreover, when Minnite examined the often told allegations of illegal voting or registration in Wisconsin during the 2004 presidential race, she found 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

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[102] *See also:* LORRAINE C. MINNITE, AN ANALYSIS OF VOTER FRAUD IN THE U.S. (2007) which is a later version of the original Minnite study and which reaches the same conclusions. References in this article are to the original study.

[103] Minnite at 8.

[104] *Id.*

[105] *Id.* at 9.

[106] Minnite at 10.

[107] *Id.* at 11.

a lack of evidence.[108] Overall, the conclusion of the Minnite report is that voter fraud allegations are really partisan Republican efforts to suppress voting.[109]

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 law is a potential source of voter fraud, a major study of its impact did not discuss fraud.[110] In *The Impact of the National Voter Registration Act* in its discussion of voter verification, this topic is not discussed,[111] and, in fact, the report seems to suggest states have this issue under control. The biggest problem is removal from voter rolls for non-voting.[112] An Office for Democratic Institutions and Human Rights report found only isolated reports of voter fraud or impersonation.[113] Additional analysis on the impact of Motor-Voter by Davis,[114] the Cater-Baker report by Overton,[115] and a Rutgers University study of the

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[108] Minnite at 13.

[109] Minnite at 16.

[110] UNITED STATES ELECTIONS ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT (June 30, 2007).

[111] *Id.* at 12.

[112] *Id.* at 11.

[113] OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, UNITED STATES OF AMERICA MID-TERM CONGRESSIONAL ELECTIONS 7 NOVEMBER, 2006, 16 (March 9, 2007).

[114] 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 (1997).

[115] Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

impact of provisional voting procedures as outlined in the Help America Vote Act of 2002[116] also found little if any evidence of fraud in American elections.[117]

Overall, despite some episodic and sporadic accounts, the best overall evidence is 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 regarding 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,[118] as well as by social capital and trust, for example.[119] In general, the more barriers placed in front of potential voters, such as increased time allotments to

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

[117] Eagleton Institute of Politics, *Appendix A: National Survey of Local Election Officials' Experiences with Provisional Voting* (July-August 2005).

[118] *See, e.g.:* WARREN E. MILLER AND J. MERRILL SHANKS, THE NEW AMERICAN VOTER, 88-90, 111 (1996); PAUL R. ABRAMSON, JOHN H. ALDRICH, AND DAVID W. ROHDE, CHANGE AND CONTINUITY IN THE 2000 AND 2002 ELECTIONS (2003); M. MARGARET CONWAY, POLITICAL PARTICIPATION IN THE UNITED STATES (1991). *See also*: Marjorie R. Hershey, "Affidavit of Marjorie R. Hershey ," 2005 WL 4019117 at 10-13 (*providing* a bibliography documenting this proposition).

[119] ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001).

register to vote, the less likely they are to vote.[120] 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 substantiate that 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 percent for Whites, 6 percent for African-Americans, and nearly 10 percent for Hispanics.[121]

Second, a Brennan Center study found that 7% of the population lacked access to the citizenship type of papers necessary to vote, that 11% of the population did not have a government-issued ID, and that low income individuals were less likely to have the requisite identification to vote.[122] All told, the Brennan Center study indicated that the requirements, time, and money to secure a valid photo ID to vote imposed costs on certain populations that would discourage voting.

Finally, Marjorie Hershey,[123] prepared testimony as an expert witness for the plaintiffs in *Indiana Democratic Party v. Rokita*,[124] seeking to assess the likely impact of the then state's new photo ID law on voter turnout.[125] In developing her analysis Professor Hershey indicates that perhaps the dominant mode that political scientists use to assess voting law is a rational choice or economic model

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[120] RAYMOND E. WOLFINGER AND STEVEN J. ROSENSTONE, WHO VOTES?, 61 (1980).

[121] Timothy Vercellotti and David Anderson, *Protecting the Franchise or Restricting It? : the Effect of Voter Identification Laws on Turnout, 13* (2006) (Unpublished paper on file with the author).

[122] Brennan Center for Justice, *Citizens Without Proof: A Survey of American's Possession of Documentary Proof of Citizenship and Photo Identification*, 2-3 (November 2006).

[123] Marjorie R. Hershey, "Affidavit of Marjorie R. Hershey ," 2005 WL 4019117.

[124] 458 F.Supp.2d 775 (D. Ind. 2006).

[125] Hershey at 1.

that asks what costs new procedures impose upon individuals when making decisions to vote.[126] Simply put, according to Hershey: "[P]eople are likely to vote as long as the perceived costs of voting do not outweigh the perceived benefits."[127] What would be perceived as a cost to voting? The list includes time to register to vote, waiting times, financial and informational costs, registration laws, and physical barriers.[128] Hershey provides in her affidavit ample empirical evidence from political scientists to demonstrate that as the costs of voting increase, registration and turnout decrease.[129] Overall, her argument is that photo ID requirements for voting are a definite cost, [130] especially on some groups such as the poor,[131]those without government-issued IDs, and people of color.[132]

Taken together, these three studies, along with the political and social science literature, demonstrate that new voting requirements, such as photo IDs, impose costs upon citizens when deciding to go to the polls. These costs are likely to negatively impact voting. Couple these studies along with those examining voter fraud in the United States and conclusion becomes obvious—voter ID laws are not neutral. Not only is there negligible (at best) evidence of voter fraud to support these laws but they

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[126] Hershey at 2.

[127] *Id*.

[128] Hershey at 2-3.

[129] Hershey at 3-5. For example, Hershey references studies showing how improvements in transportation in the nineteenth century had a dramatic increase in voter turnout, *Id*. at 4, and how political scientists have concluded that "Registration raises the costs of voting." *Id*.

[130] Hershey at 4.

[131] *Id*. at 6.

[132] *Id*. at 6-7.

are also negative in that they might actually suppress real voter turnout by imposing additional burdens on voters.

III. State Photo ID Litigation

Evidence and potential impact not withstanding, several states have recently enacted photo ID laws for voting. In cases arising out of Indiana,[133] Michigan,[134] Georgia,[135] and Arizona courts[136] have upheld the photo identification voting laws, while in Missouri[137] and in New Mexico[138] similar laws has been struck down. Critical to the decisions in all of these cases was the attitude of the courts towards both the standard of review necessitated to evaluate the ID law given the language in *Burdick*, and the level of deference and recognition given to the purported evidence of voter fraud.

A. Indiana: *Crawford v. Marion County Election Board*

In *Crawford v. Marion County Election Board* at issue was a state of Indiana law mandating that "persons wanting to vote in person in either a primary or a general election must present at the

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[133] Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007).

[134] In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, ___ N.W.2d ___, 479 Mich. 1, 2007 WL 2410868 (Mich.).

[135] Common Cause/Georgia v. Billups, __ F.Supp.2d __ (D. Ga. 2007) , 2007 WL 2601438 (D.Ga.)

[136] Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007).

[137] Weinschenk v. Missouri, 203 S.W.3d 201 (Mo. S. Ct. 2006)

[138] League of Women Voters v. Santillanes, ___F.Supp.2d ___, 2007 WL 782167 (D.N.M.).

polling place a government-issued photo ID,"[139] unless voting in a nursing home or by absentee ballot. Both the district court[140] 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")[141] requiring voters to present a photo ID at the polls when voting.[142] 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."[143] The law was challenged as a facial violation of the First and Fourteenth Amendments as well as various provisions of the Indiana Constitution.[144] Voters lacking an acceptable ID would be subject to challenge by a member of a precinct election board, but allowed to file a provisional ballot and given opportunity to prove eligibility and have the ballot accepted if an acceptable photo is produced at a later date before the clerk or the election board.[145] In order to secure a valid Indiana ID from the State Department of Motor Vehicles, the Court recites a list of documents that would be considered acceptable and sufficient under state law

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[139] 472 F.3d at 950 (*citing* to Ind.Code §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1).

[140] Indiana Democratic Party v. Rokita, 458 F. Supp.2d 775 (D.Ind. 2006).

[141] IND. CODE §§ 3-5-2-40.5.

[142] 458 F. Supp.2d at 782.

[143] 458 F. Supp. 2d at 786.

[144] 458 F. Supp.2d at 782.

[145] *Id.* at 786-7.

to obtain the state-issued photo ID.[146] In addition to the documents necessary to obtain the state-issued ID, there was a minimum $10 fee that had to be paid.[147]

In order to justify the photo ID requirement the State contends that it needs to address voter fraud.[148] However, 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 otherwise false identification."[149] However, as the district court notes, the defendants in the case justify the voter ID requirement by stating that "even 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 from other states. . .Defendants maintain that voter fraud is or should be a concern in Indiana."[150]

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%."[151] The court also pointed out that 35,699 Indiana registered voters who were deceased.[152] Second, the state offered evidence of voter fraud in other jurisdictions, citing, among other sources, John Funds's *Stealing Elections* and other instances of what was considered to be election corruption.[153] The state and the court note what appears to be a corrosive

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[146] *Id*. at 789-791.

[147] Rokita at 792.

[148] *Id*. at 792-3.

[149] *Id*.

[150] *Id*. at 792.

[151] *Id*. at 793.

[152] *Id*.

[153] *Id*. at 793.

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.[154] 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. This evidence included the Hershey report and other surveys by groups in Indiana,[155] and another expert study, called the Brace Report, which documented potentially up to 989,000 voters in the state that did not have the required state-issued ID.[156] In evaluating the arguments to sustain the voter ID law the court largely ignored the Hershey report, and rejected as unreliable introduction of the Brace Report under the Federal Rules of Evidence.[157]

In terms of the of substantive legal analysis challenging SEA,[158] the court begins by noting that the right to vote is fundamental, but then it shifts to *Burdick* in declaring that it is not an absolute right.[159] The court again references *Burdick* in noting that not regulations of the right to vote impose the same burdens, with those imposing lesser ones deserving lesser scrutiny.[160] The court, following *Burdick*, rejected application of strict scrutiny of SEA because not every regulation of voting required

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[154] *Id*. at 794. Specifically, the surveys are used to show that large majorities of those polled support the presentation of photo IDs when voting.

[155] 458 F. Supp.2d at 794-96.

[156] *Id*. at 803.

[157] *Id*. at 803.

[158] This article passes over the extensive discussion of plaintiffs' standing found in 458 F. Supp.2d at 809-820.

[159] 458 F. Supp.2d at 820.

[160] *Id*. at 821.

this level of analysis, even if it did result in some being denied the right to vote.[161] Second, the court rejects that the photo ID requirement is a severe burden under *Burdick* (and therefore triggering strict scrutiny) because plaintiffs, while showing the burden in securing the ID, did not show the severe burden in actually voting.[162] Thus, 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.'"[163] Thus, the state interest in preventing fraud was weighed or balanced against the voting rights of the plaintiffs.[164] Here, the court found no evidence of a significant burden on voting, specifically it pointed out how the plaintiffs could not name a single person burdened by the new law.[165] The court found the Brace report inadmissible or unreliable,[166] it ignored the Hershey study, and it conlcuded that it was not difficult to obtain a photo ID.[167] Overall, it saw no evidence to outweigh the state's interest,[168] and therefore it upheld the law against First and Fourteenth Amendment challenges.[169]

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[161] *Id*. at 822.

[162] *Id*. at 822-3.

[163] *Id*. at 821 (*quoting Burdick* at 434).

[164] *Id*. at 825-6 (*remarking* that requiring a photo ID to vote was no different than similar requirements to cashing a check).

[165] *Id*. at 823.

[166] *Id*.

[167] *Id*. at 824.

[168] The court rejected the assertion that the state had to provide empirical evidence of fraud to

The Seventh Circuit opinion significantly upholds and follows 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),[170] the court also rejects application of strict scrutiny, again preferring using the weighing test articulated in *Burdick* when regulations do not impose a severe burden.[171] 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."[172] This interest needed to be weighted 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."[173] Given this balance, and the fact, according to the court, that voter fraud is hard to detect and that it is often viewed as a minor crime not well prosecuted, it is reasonable for the State to require a voter ID, even if there is no evidence of such fraud in Indiana.[174]

Overall, core to both the district court and Court of Appeals opinions were several characteristics. First, acceptance that the state interest in preventing fraud was valid even it no empirical

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support its interest, *Id.* at 826, but were there such a mandate, enough evidence from other jurisdictions existed to sustain it. *Id.*

[169] *Id.* at 830.

[170] 472 F.3d at 951-2.

[171] *Id.* at 952.

[172] *Id.* at 953.

[173] *Id.* at 952.

[174] *Id.* at 953.

evidence of false identify at the polls could be documented at 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, evidence of a significant burden on voting rights was dismissed, finding that at best, it was difficult but not impossible to get a state-issued ID that would meet the requirements of SEA. Third, because the burden was not significant, strict scrutiny was not dictated (following *Burdick*). Finally, weighing state interests against the slight burden of the photo ID, the latter was upheld. It would be points similar to these three that would be invoked in the other cases upholding state voter ID laws.

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

In Michigan at issue was the state and federal constitutionality of 2005 PA 71, a state law that would require either presentation of a photo ID when voting or the signing of an affidavit stating one does not have the required identification.[175] The Court, in an advisory opinion, found the law to be constitutional under the balancing test found in *Burdick v. Takushi*.[176]

In 1996 the state adopted a voter photo identification law.[177] Before that law took effect the Michigan Attorney General issued an advisory opinion concluding that the requirement was unconstitutional because it did not advance a compelling state interest, lacking evidence of substantial voter fraud in the state.[178] However, as a result of the events such as those surrounding the 2000

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[175] 2007 WL 2410868 at 1.

[176] *Id*.

[177] *Id*. at 1.

[178] *Id*.

presidential election,[179] 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 State Supreme Court invited briefs to determine the facial constitutionality of 2005 PA 71.[180]

As in the Indiana case, the Michigan Supreme Court begin its analysis by declaring that the right to vote is fundamental, but not absolute.[181] The Court noted that in the State's Constitution that 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 registration and absentee voting."[182] The Court noted that the purpose of this constitutional language was to grant the state the power to prevent fraudulent voting.[183] The Court also noted how under federal jurisprudence states were given the authority to regulate their own elections, [184] in order to prevent fraud and protect the right of lawful voter to exercise their franchise.[185]

Thus, while the Michigan Supreme Court indicated that fundamental rights generally must be examined under strict scrutiny,[186] when it came to the area of election law the United States Supreme

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[179] *Id.*

[180] *Id.* at 2.

[181] *Id.* at 4.

[182] *Id.* at 4 (*quoting* Mich. Con. art. 2, sec. 4) (italics in the Court opinion).

[183] In re Request for Advisory Opinion at 4.

[184] *Id.* at 4 (*citing* inter alia, Burdick v. Takushi).

[185] *Id.* at 4.

[186] *Id.* at 5.

Court has rejected that analysis, preferring instead the more "flexible standard" as articulated in *Burdick*.[187] According to the Court, the threshold question then is to determine if

> 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. [188]

The Court quickly disposes of the burden question. It notes that it is slight and that of 2005 PA 71 "the statute merely requires the presentation of photo identification that the voter already possesses."[189] 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.[190] The Court quickly disposes of this objection by stating that the alternative to the photo ID is the signing of an affidavit which itself is not burdensome.[191] Hence, for these reasons, the more flexible standard under *Burdick* is used to analyze the ID requirement.

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[187] *Id*. at 5-6.

[188] *Id*. at 6.

[189] *Id*. at 6.

[190] *Id*.

[191] *Id*. at 6-7.

The Court thus weighs the State's constitutional interest in preventing fraud against what it perceives is the slight burden of the voter ID requirement. It finds that the Article 2, section 4 state constitutional requirement to preserve the purity of the elections and to guard against abuses are compelling interests.[192] In addition, the Court notes that the state is not required to provide empirical evidence of voter fraud and that instead it may take prophylactic action to prevent it.[193] However, even if some proof is demanded, the Court says that in-person fraud is covert and hard to detect, and therefore it cold not seen how such proof could be undertaken.[194] Thus, under the *Burdick* flexible standard, the Michigan Supreme Court upheld 2005 PA 71 against federal constitutional challenges,[195] and eventually that it was not a violation of the state constitution either.[196] Finally, the Court, as was the case in Indiana,[197] rejects the claim that the photo ID is an unconstitutional poll tax, finding that no fee is required to vote and because of the affidavit bypass.[198]

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"),[199] requiring all registered voters in Georgia who vote in person at the polls to present a

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[192] *Id.* at 7.

[193] *Id.* at 7.

[194] *Id.* at 7, fn. 64.

[195] *Id.* at 8.

[196] *Id.* at 8-10.

[197] 472 F.3d at 952.

[198] In re Request for Advisory Opinion at 12.

[199] HB 244 amended O.C.G.A. § 21-2-417, which did not require the production of a

government-issued Photo ID to election officials before being allowed to vote.[200] Subsequently in 2006 the States adopted the 2006 Photo ID Act which repealed the 2005 Amendment and replaced it with near identical language.[201] The one difference between the 2005 Amendment and the 2006 Act was that the latter also amended state law to require the Board of Elections in each county to issue a Georgia photo voter identification card without charge to voters upon presentation of certain identifying documents. This changed previous law[202] which required individuals to complete an affidavit of indigency if they could not afford the ID.[203] For individuals who did not have a state driver's license, the 2006 Act also listed numerous other acceptable identifying the documents to obtain the government ID or vote, including passports and military or tribal IDs.[204] Finally, the Act also mandated that each county have a place open Monday through Friday for a minimum of eight hours each day for the purpose of issuing the IDs.[205]

Common Cause Georgia, NAACP, and several individuals challenged the 2006 Act as a violation of the First and Fourteenth Amendments rights to vote and as a poll tax.[206] They also alleged

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government-issued ID but instead allowed it among several other forms of proof of identification to be used when voting in person. 2007 WL 2601438 at *6.

[200] 2007 WL 2601438 at *7.

[201] *Id*.

[202] O.C.G.A. § 40-5-103.

[203] 2007 WL 2601438 at *7-8.

[204] 2007 WL 2601438 at *8.

[205] 2007 WL 2601438 at *9-11.

[206] 2007 WL 2601438 at *1.

various state constitutional claims and sought a preliminary injunction to halt enforcement of the law.[207] Following a rather complicated history of litigation in both state and federal courts where the plaintiffs filed several complaints and amended motions for temporary and permanent injunctions,[208] a federal district court upheld the 2006 Act and rejected demands to enjoin its enforcement.[209]

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.[210] It then finds that the right to vote is not absolute, but that the state cannot unduly burden that right.[211] The question for the court then is what test to use to determine a burden, and after recounting several possibilities, it settles on the *Burdick* flexible standard approach.[212] In applying this standard the court thus had to weigh the government interests against the magnitude of their impact on the First Amendment rights of the plaintiffs. Interestingly, in arriving at this standard, the court implicitly rejected claims that the

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[207] *Id.*

[208] 2007 WL 2601438 at *3-4.

[209] 2007 WL 2601438 at *50.

[210] 2007 WL 2601438 at *42.

[211] *Id.*

[212] 2007 WL 2601438 at *43-4 ("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 by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights,"*Burdick,* 504 U.S. at 433-34.").

restriction of the Act's ID requirement was severe, therefore making the more flexible weighing approach the appropriate standard for review.[213]

In terms of the state interests being offered, the court notes that the "State and the State Defendants assert that the 2006 Photo ID Act's Photo ID requirement is designed to curb voting fraud."[214] In looking to ascertain the instances of voter fraud in Georgia the court's finding 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."[215] 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,"[216] and that absentee voting was the source of many of the problems.[217] Despite these acknowledgments by the Secretary, the court dismissed them and the need for the State to provide evidence of voting fraud. Instead, the court noted that since it was not applying strict scrutiny the State did not have to offer this 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."[218]

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[213] *See*: 2007 WL 2601438 at *43 for a discussion of where the court begins the analysis of the two tier approach to voting regulations but then simply adopts the flexible standard without explaining why the burden is not severe.

[214] 2007 WL 2601438 at *47.

[215] 2007 WL 2601438 at *21.

[216] 2007 WL 2601438 at *23.

[217] *Id.* at *21.

[218] *Id.* at *48 (*quoting Rokita,* 458 F.Supp.2d at 829).

In terms of weighing this state interest against the injury to the plaintiffs' right to vote, the court notes that the burden to the later is not severe. It notes that the ID is free,[219] that each county has an office that is easily accessible to secure the ID,[220] and that none of the plaintiffs granted standing had difficulty securing the ID.[221] It also pointed out that a public education program to inform voters about the ID requirements was aimed at mitigating the burdens.[222] Thus, the court refused to grant the injunction.

D. Arizona and *Gonzalez v. Arizona*

Gonzalez v. Arizona[223] is the fourth instance where the courts have decided to permit states to go forward with a photo ID law. At issue here was a photo ID enacted as Proposition 200 via a ballot initiative in 2004.[224] 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."[225] A coalition of groups challenged it, claiming it to be a poll tax, that it violated the First and Fourteenth Amendment Equal Protection clause and the right to vote, and that it also violated the Voting Rights Act, among other provisions.[226] Plaintiffs sought to enjoin

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[219] 2007 WL 2601438 at *44.

[220] *Id.*

[221] 2007 WL 2601438 at *43-6.

[222] 2007 WL 2601438 at *46.

[223] 485 F.3d 1041 (9th Cir. 2007).

[224] 485 F.3d at 1046.

[225] *Id.*

[226] 485 F.3d at 1046.

enforcement of Proposition 200 prior to the 2006 election and were initially rejected by a federal district court[227] which rejected the parallels between the photo ID and a poll tax.[228] The court also indicated that the factual record necessary to show a burden on voting rights had not been developed. The Ninth Circuit reversed and granted the injunction,[229] but the United States Supreme Court vacated the stay and remanded the case back to the Court of Appeals.[230] In its reasoning the Supreme Court noted that while the right to vote was important, so was addressing voter fraud, but that the Ninth Circuit had failed to give reasons for why it reversed the lower court[231]. On remand, the Ninth Circuit upheld Proposition 200.

In upholding the photo ID law the Court of Appeals quickly rejected the poll tax argument by distinguishing it from the fee paid in Virginia in *Harman v. Forssenius.*[232] In *Harman* the right to vote was abridged by the failure to pay the poll tax.[233] Here, voters need only show proof of citizenship and the plaintiffs have not shown how this constitutes a form of poll tax.[234] Next, the court, drawing upon *Burdick,*[235] indicated that the plaintiffs had failed to demonstrate why strict scrutiny needed to be used in this case because they had failed to show how the ID required imposed a severe burden upon the right

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[227] Gonzalez v. Arizona, Slip Copy, 2006 WL 3627297 (D.Ariz.).

[228] 2006 WL 3627297 at *4-5.

[229] 485 F.3d at 1046.

[230] Purcell v. Gonzalez, 127 S.Ct. 5 (2006).

[231] 127 S.Ct. at *7-8.

[232] 380 U.S. 528 (1965).

[233] 485 F.3d at 1049.

[234] *Id.* at 1049.

[235] 485 F.3d at 1049.

to vote.[236] 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 in appropriate to show the hardship claimed.[237] In effect, plaintiffs had thus far been unable to provide a record to show the alleged harms, and therefore the Ninth Circuit upheld the decision of the district court to deny the injunction.[238]

E. Missouri and *Weinschenk v. Missouri*

Among the initial challenges to photo ID laws, *Weinschenk v. Missouri*[239] is the only decision invaliding this voting requirement using strict scrutiny. At issue was SB 1014, a Missouri photo ID requirement that was adopted in 2006.[240] SB 1014 amended State law, mandating that as a condition of voting that "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."[241] According to the 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 Stated passport would be considered an acceptable ID.[242] SB 1014 was challenged as a poll tax, under First and Fourteenth Amendment claims, and as a violation

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[236] *Id.* at 1049-50.

[237] 485 F.3d at 1050-51.

[238] 485 F.3d at 1052.

[239] 203 S.W.3d 201 (Mo. S. Ct. 2006).

[240] 203 S.W.3d at 205.

[241] *Id.* (*citing* 115.427.1, RS Mo Supp.2006).

[242] 203 S.W.3d at 205-6.

of various provisions of the Missouri Constitution.[243] The Missouri Supreme Court sustained the challenges.

Two points are critical to the decision in *Weinschenk* that distinguish it from the other cases sustaining the voter ID laws. First, the court notes that: "This 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."[244] Plaintiffs provided here the empirical evidence to show the actual burden that the ID would cause. They documented the real costs in terms what it would take to obtain proper identification to vote. Specifically, the court noted that in some cases that plaintiff's had to pay $12 or $11 for the driver's or non-driver's license, and that birth certificates would cost up to $20.[245] Documenting real costs proved a real burden, and having shown the latter, the court was convinced that the severe burdens test as mandated in *Burdick* had been met.[246] Second, the court also emphasized that notwithstanding *Burdick*, the photo ID requirement was also going to be examined under the Missouri State Constitution which appeared to offer more protection for the right to vote than found under the federal Constitution.[247] The combination of empirical documentation and appeal to state constitutional law led the Court to reach conclusions under both federal ad Missouri law contrary to the decisions in Indiana, Georgia, Michigan, and Arizona.

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[243] 203 S.W.3d at 204.

[244] 203 S.W.3d at 214.

[245] *Id*.

[246] 203 S.W.3d at 216.

[247] 203 S.W.3d at 212-214.

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

> [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.[248]

In calculating these number of those who lacked current IDs, the Court was able to rely upon statistics that did not seem in dispute, unlike in Indiana were the record was unclear to how many individuals would be burdened by the new ID requirement. Second, as noted above, the court was able to attach real dollars costs to securing identification in terms of fees for driver's and non-driver's licenses and birth certificates.[249] Third, the court was additionally willing to consider non-monetary costs, such as time and ability to navigate bureaucracies in order to vote,[250] especially if individuals are elderly or

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[248] 203 S.W.3d at 206.

[249] *Id.*

[250] 203 S.W. 3d at 215.

handicapped.[251] In addition, the court was concerned by the burden the law would have upon those born out of state seeking to obtain the required birth certificate necessary to obtain the approved ID.[252]

Overall, the Missouri Supreme Court was able to show several instances were the obtaining of a driver's or non-driver's license cost time, effort, and money. These costs are real.

> 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 of the right to vote to these Missourians is more than a *de minimis* burden on their suffrage.[253]

Thus, on the one side of the equation 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 in fact an unconstitutional poll tax.[254]

Next, in using strict scrutiny the court mandated that the State show a narrowly-tailored compelling interest to support SB 1014.[255] The court concedes that combating fraud is compelling,[256] The State failed to make that demonstration. First, the State could not show that recent elections had

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[251] *Id.*

[252] 203 S.W. 3d at 211.

[253] 203 S.W. 3d at 213.

[254] 203 S.W. 3d at 214-5.

[255] 203 S.W. 3d at 215-6.

[256] 203 S.W. 3d at 217.

serious problems with fraud.[257] Second, the fraud that did exist was not associated with voter impersonation but with absentee voting.[258] 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 "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."[259]

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 it was neither narrowly-tailored nor compelling enough to

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[257] 203 S.W. 3d 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.'").

[258] 203 S.W. 3d at 218.

[259] 203 S.W. 3d at 217.

survive strict scrutiny. Hence, SB 1014 was found to be unconstitutional under state constitutional clauses.[260]

F. Albuquerque, New Mexico and *League of Women Voters v. Santillanes*

League of Women Voters v. Santillanes[261] is a second case where a court has struck down a photo ID requirement. However, unlike in *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 elections.[262] The requirement excluded absentee ballots and it was adopted, according to the City, to address voter fraud.[263] Plaintiffs sought an injunction to bar enforcement of the amendment, contending that the photo ID requirement was an unconstitutional burden on voting rights.[264] The district court judge agreed, granting an injunction under both First and Fourteenth Amendment (Equal Protection) grounds.[265]

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[260] 203 S.W. 3d at 221.

[261] ___F.Supp.2d ___, 2007 WL 782167 (D.N.M.).

[262] *Santillanes* at *1, 9 (*citing* Albuquerque, N.M. City Charter, art. XIII, §14 (as amended October 4, 2005).

[263] *Id*.

[264] *Id*.

[265] 2007 WL 782167 at * 41-2.

Judge Armijo began her analysis of the 2005 amendment by noting that the case involved striking balance between the right to vote and the City's right to regulate elections in order to prevent voter fraud.[266] In doing that the judge recognized that voting was a fundamental right both under the state and federal constitutions.[267] However, just because voting is a fundamental right, the court rejected calls by plaintiffs that strict scrutiny was required,[268] finding instead that the Court in *Burdick* had articulated a requirement that determines the level of scrutiny based upon the severity of the burden imposed.[269] Similarly, the judge rejects use of rational basis 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.[270] Hence, the district court interprets the *Burdick* test to require a more intermediate level of analysis, balancing the state interest against the severity of the burden on voting rights.[271]

Employing this test the court agrees that the prevention of voter fraud is a compelling or important governmental interest.[272] But the court rejects the notion that simple assertion of this interest will suffice.

> But the *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

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[266] 2007 WL 782167 at *1.

[267] *Id.* at *2-3.

[268] 2007 WL 782167 at *22-23.

[269] *Id.* at 23.

[270] 2007 WL 782167 at *21.

[271] *Id.* at 25.

[272] 2007 WL 782167 at *32.

> 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."[273]

As the court read 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."[274] What evidence could the City produce? The judge noted that the 2005 Amendment referred only to one instance of alleged voter impersonation, but that otherwise, no admissible evidence was put forward to support its contentions of voter fraud.[275] Furthermore, the court responds to claims, as similarly made by Indiana, that the law should be upheld as a valid measure to prevent the possibility of fraud.[276] Yet unlike in Indiana where the state conceded that it was not up to date in maintenance of its voter-registration rolls, there is no indication or argument being offered by the City or the State that this was a problem in New Mexico.[277] In fact, New Mexico had recently acted to improve its record keeping.[278] Thus, the possibility of voter fraud is found to be meritless. Finally, the court addresses whether preventing future impersonation fraud will support the voter ID

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[273] *Id.* at 32.

[274] 2007 WL 782167 at *32.

[275] *Id.* at *32.

[276] *Santillanes* at *33 (*citing* to 472 F.3d at 953-4).

[277] 2007 WL 782167 at *33.

[278] *Id.*

requirement.[279] Even if this is valid, the court finds that exempting absentee voting from the ID requirement undermined claims that it was attempting to address voter fraud.[280] Employing intermediate level analysis, the judge's 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.[281]

On one side of the scale the judge found that there was no weight to the City's contention of voter fraud. In comparison, Judge Armijo found the ID to place several burdens on the plaintiffs' voting rights. These burdens included concerns about whether their votes will be counted because their photo IDs may be rejected and they will not have enough time to vote absentee or secure another identification.[282] The judge also cited the Missouri Supreme Court which had noted the bureaucratic and other real costs associated with securing the required IDs, [283] and in comparison to Georgia where it was undertaking a significant education program to inform voters about the new voting requirements, the City was not

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[279] 2007 WL 782167 at *33.

[280] *Id*. at *34.

[281] *Id*. at 36.

[282] 2007 WL 782167 at *28.

[283] *Id*. at *29-30.

doing that here.[284] For all of these reasons,[285] the court found the new ID to be a burden on plaintiffs' voting rights.[286] Overall, 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.

G. Summary

In four of the six jurisdictions where voter photo ID laws have been litigated the courts have upheld them. In these four cases the courts have all relied upon the flexible standard test articulated in *Burdick* and using federal constitutional analysis they have ruled the ID requirement is not a severe burden on voting rights, therefore precluding the need to use strict scrutiny. Once a lesser standard of analysis is invoked, all four of the cases have also outweighed the state interest in controlling or addressing voter fraud against any of the burdens associated with photo identification. The courts have consistently not demanded that the states provide empirical evidence to support or document state interests, instead allowing them broad leeway to enact preventive measures. However, when the courts have looked to the evidence to support the states' interests, they have permitted out of state information,

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[284] 2007 WL 782167 at *29.

[285] The court at *28-29 also cites to Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 197-200 (1999) to support the claim the bureaucratic costs associated with securing an ID may constitute a severe burden. Here the judge argued that the issue in question in *Buckley*—requiring petition gatherers to wear ID badges—imposed a severe burden upon the First Amendment free speech rights of these individuals.

[286] 2007 WL 782167 at *31.

relied upon sources that are of questionable value (such as John Fund's *Stealing Elections*), or they permitted other accounts or fraud not directly tied into in person voting at the polls to suffice as acceptable proof. In the cases of Indiana and Arizona, 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, plaintiffs have. Plaintiffs have been asked to show with particularity how the new photo ID burdened their ability to vote, with the courts generally dismissing time or effort factors surrounding obtaining the ID required to vote. The courts also seem to have laid emphasis on the fact that some voting identification cards are free, or how there is an indigent bypass process, or how 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 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.

However, 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, while at the same time asserting that even if the test in that case is used the photo ID requirements are so severe that they necessitate strict scrutiny nonetheless. 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 is 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.

IV. 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 of 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 both flaws in 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 in *Gonzalez*, and the dissent in Michigan, offer some important lessons that could be used 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 use the *Burdick* flexible standard and argue that even under it the burden on rights outweighs any purported state interest. Ideally, both should be argued as alternative theories. On top of this, arguments both at the federal and state constitutional level should be raised.

Weinschenk v. Missouri[287] is 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

[287] 203 S.W.3d 201 (Mo. S. Ct. 2006).

law may be an important source of opposing photo ID laws.[288] While in Michigan and to some extent in Georgia courts rejected state challenges there, the Missouri Supreme Court distinguished the jurisprudence of its voting rights cases under its constitution from that found at the federal level. 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. In fact, the state constitution appeared to offer a compelling state interest to efforts to protect the right to vote. 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. The simple first lesson from *Weinschenk* is that state law matters and that the new judicial federalism may be of benefit to voting rights advocates.[289]

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, for example, because the it could point to real as opposed to hypothetical burdens upon plaintiffs.[290] In part the challenges failed in the other states because either they were facial challenges to the ID laws or plaintiffs had not properly and sufficiently documented the real costs or burdens in terms of dollar amounts or numbers of individuals who would be affected by the new

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[288] *See also*: 2007 WL 2410868 at *30 where the dissent invokes the Michigan Constitution in ruling on the voter ID law.

[289] *See:* 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).

[290] 203 S.W.3d at 214.

voting requirements. In Missouri plaintiffs presented both in pressing their arguments. 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. Second, were the flexible weighing standard under *Burdick* used, the actual documentation of burden could be calculated in the analysis. 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.[291] The Supreme Court, in overturning the Ninth Circuit's injunction, said the same.[292] 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.[293]

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[291] *See e.g.:* 485 F.3d at 1049-50. *See also:* 2007 WL 2601438 at 47 (*contending* that not enough evidence was presented to show a severe burden).

[292] 127 S.Ct. at 7-8.

[293] 127 S. Ct. at 8.

Thus, perhaps the second good advice that emerges from the litigation so far is that either challenges to photo ID requirements must either be as applied or, at least, 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 or burden on voting rights demands strict scrutiny, *Santillanes* took seriously the flexible standard test of *Burdick* and argued the burdens.[294] The judge in this case took serious 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 took seriously the idea that a government cannot assert an interest without documenting evidence for it and it must then be assessed in light of the available evidence on burdens. 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 challenge to the ID laws. Here, Judge Armijo indicated that while real demonstrated burdens to rights might constitute severe burdens that necessitated strict scrutiny but that if the burdens are not certain then while rational basis review is not appropriate, some intermediate level of analysis is a more appropriate way to protect a fundamental right when seeking to anticipate possible burdens.[295]

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[294] *Compare:* 2007 WL 2410868 at *22- 24 where the dissent also does the same.

[295] *See also:* 2007 WL 2410868 at 29 (*examining* the Michigan photo ID law under a less than strict scrutiny approach).

Overall, to challenge voter ID laws, raise claims under federal and state claims,[296] argue both for a strict and intermediate level of analysis, and also first seek an as applied challenge but use facial arguments that still document the burdens while advocating that the level of scrutiny be intermediate.

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 it is flawed 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 either that such an interest is real, or on the basis of evidence that is faulty or inappropriate. In fact, in the decisions upholding the photo ID cases, the courts have generally done a poor job reviewing or handling evidence.[297] As the district court judge stated in *Billups*: "[T]he legislature has wide latitude in determining the problems it wishes to address and the manner in which it desires to address them."[298] There are several problems with this approach.

First, in election law cases the Supreme Court has not stated that the compelling interest may be simply asserted without empirical foundations. Instead, evidence must be offered to support it to

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[296] In fact, a claim that a state constitutional provision requires the voting is a fundamental right may be enough to tip the *Burdick* balance and compel strict scrutiny.

[297] *See:* Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention and Administration*, 68 OHIO ST. L. J. ___ (2007) for a similar point.

[298] 2007 WL 2601438 at *48 (*quoting Rokita,* 458 F.Supp.2d at 829).

override a fundamental right.[299] For example, in *Buckley v. Valeo*,[300] the Court first reviewed a series of pro-offered claims to limit political contributions or expenditures. In doing that it rejected several interests, such as equalizing voices or speech, as illegitimate interests.[301] Second, once the Court did accept one interest as compelling—preventing corruption or its appearance—it demanded that some evidence be offered to support it.[302] The importance of this evidence is underscored in *Nixon v. Shrink Missouri Government PAC* where the Court, in ascertaining what must be shown to 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."[303] In *Randall v. Sorrell*,[304] the Court again underscored the important role of evidence to support state interests when it rejected the contribution and expenditure limits imposed by Vermont.[305] In numerous cases the Supreme Court has demanded that the compelling interest be real and not merely conjecture, [306] or at least some evidence be offered to support the

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[299] *See also:* 2007 WL 2410868 at *22- 24.

[300] 424 U.S. 1 (1976).

[301] *Id.* at 48-9.

[302] *Id.* at 26-7.

[303] 528 U.S. 377, 378 (2000).

[304] 126 S.Ct. 2479 (2006).

[305] *Id.* at 2514 (*stating* that "Still, our cases do not say deference should be absolute").

[306] *See, e.g.:* City of Erie v. Pap's A.M., 529 U.S. 277, 300 (2000); Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 120, 195 (1997); Rubin v. Coors Brewing Co., 514 U.S. 476, 496-7 (1995); Florida Bar v. Went For It, Inc.,515 U.S. 618, 628 (1995); Florida Bar v. Went For It, Inc.,515 U.S. 618, 628 (1995); Edenfield v. Fane, 507 U.S.761, 762 (1993); Lorillard Tobacco Co. v. Reilly,

interest.[307] Letting the government off the hook from having to show the reality of the interest is simply an invitation for abuse of rights.[308]

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 under the *Federal Rules of Evidence* 702 as unreliable.[309] The judge in *Santillanes* repeatedly stressed the lack of *admissible* evidence supporting the governmental interest in addressing fraud. Judges needs to apply Rule 702 and more fully accept their role under *Daubert* standards when deciding to admit evidence about fraud into court.[310] More specifically, as the first part of the article demonstrated,[311] much of the evidence of fraud either is not tied to voters or the studies rely on

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533 U.S. 525, 528 (2001).

[307] First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 788 (1978); Buckley v. Valeo, 424 US. 1, 46 (1976); Federal Election Com'n v. Wisconsin Right To Life, Inc.,127 S.Ct., 2652 2692 (2007) (*discussing* the role of evidence in supporting facial v. applied challenges).

See also: Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication,* 68 B.U. L. REV. 917, 955-6 (1988) (*discussing* the importance of the governmental interest being real).

[308] In addition, if in its jurisprudence the courts interest that plaintiffs have a real injury or interest at stake in order to grant standing, parity would dictate that the government interest in suppressing rights should also be real and not simply hypothetical.

[309] 458 F.Supp.2d 775 at 803.

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

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conjecture or unproven assertions. 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-*Daubert* standards. Finally, some types of evidence just should not be material to supporting photo ID requirements. For example, in *Rokita* the judge cites to survey data as evidence that the public supports the use of photo identification for voting.[312] Public opinion and fear as justifying restrictions on fundamental rights is immaterial, tantamount to a "heckler's veto" on free speech.[313] The entire purpose of the Bill of Rights is to check majority factions or the tyranny of the majority from encroaching upon the rights of a minority.[314]

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

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[312] 458 F. Supp.2d at 794.

[313] *See:* Terminiello v. City of Chicago, 337 U.S. 1, 4-5 (1949) for the origin of this concept.

[314] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943) ("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.").

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) for a similar argument regarding how appeals to the fears of majorities is pandering and not an appropriate measure to justify restrictions on free speech.

evidence in another. For example, in rejecting efforts to limit campaign contributions, the court in *Kruse v City of Cincinnati*[315] noted that the City had no experience with contribution limits at the local level at the time the spending limit was passed. As a result, the City has no evidence that contribution limits are inadequate to prevent actual and perceived quid pro quo corruption. 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. As a result, the court voided the contribution limits.[316]

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. Even more so, 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 government bears the burden to show why the regulation is not severe, instead on placing it on the plaintiff to show the severity.

In dissent in *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA* Justice Cavanagh found that 2005 PA 71 was unconstitutional.[317] In reaching that conclusion he argued that strict scrutiny was required in this case because following *Burdick*, it did impose a severe burden

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[315] 142 F.3d. 907, 916 (6th Cir.1998).

[316] *See also*: David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws,* 18 REV. LITIG 85 (1999) for a similar point on the necessity of making the evidence real and jurisdiction specific.

[317] 2007 WL 2410868 at *15.

on voting rights.[318] Cavanagh supported this point first by contending that because the photo ID will deny some citizens the right to vote the presumption that the statute is constitutional is not applicable.[319] Second, 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.[320] Given the presumption of unconstitutionality and then this differential treatment of some groups, 2005 PA 71 must be subjected to strict scrutiny.[321] Moreover, according to the Justice: "The 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."[322] In effect, 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.

Cavanagh effectively argues that an interest can only be compelling if there is evidence to support it. But 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*

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[318] *Id.* at 18.

[319] *Id.* at 18.

[320] *Id.*

[321] *Id.* at 19-20 (*citing* Harper v. Virginia Board of Elections, 383 U.S. 663 (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.").

[322] *Id.* at 18.

serves."[323] Whatever the test, real evidence is needed to support it and the burden it imposes upon voting. Thus, lacking evidence, the restriction is unconstitutional.

The significance of Cavanagh's comments are many. 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.[324]

The *Burdick* test is also problematic in that it too never explained what "severe" meant, leaving it apparently up to the discretion of judges to ascertain its meaning. However, there is a real circularity and inconsistently to the test. Before one can decide which level of analysis one has to use to examine, as in the case of photo IDs, the court must make a prior determination to 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 forgone conclusion that a not too severe burden will be classified as a legitimate regulation that will be used to uphold the ID requirement. In *Fullilove v. Klutznick,*[325] Justice Marshall once remarked of strict scrutiny that it is "strict in theory, but fatal in fact." Here, under *Burdick*, if the regulation is not severe in theory, it will not be found to be so either 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

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[323] *Id*. at 19 (italics in the original).

[324] *See* Gottlieb *supra* for a similar point.

[325] 448 U.S. 448 (1980).

unsubstantiated government interest against a demonstrated burden, the weight assigned to the interest has to be nearly zero. The point? So far the four courts using the *Burdick* flexible standard seem woodenly to assume that if they have decided the burden is not severe then automatically they will uphold the regulation. This does not appear to be what the Court meant for them to do in *Burdick*. Plaintiffs should thus assign the weights to the interests and burdens and be prepared to argue both the severe and non 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* overturning past precedent that found voting to be a fundamental right. Justice Cavanagh was correct in pointing out this error.[326] The test does not push and examination of the burdens on voting rights to rational basis if the latter are determined not to be severe.[327] Instead, the New Mexico court got it correct that a some form of intermediate scrutiny is demanded.[328]

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[326] 2007 WL 2410868 at *30.

[327] *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 from 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).

[328] *See also:* 472 F.3d 949, 956 (*contending* that *Burdick's* lesser level of scrutiny calls for at least "strict scrutiny light").

Conclusion

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, urban poor and ethnic populations, and ex-felons, the new disenfranchisement uses the same 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 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.

The purpose of this article has been to document the illusionary 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.