

VOTER ID IN WISCONSIN: A BETTER APPROACH TO ANDERSON BURDICK BALANCING

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INTRODUCTION

Ruthelle Frank was born in her home in Brokaw, Wisconsin, in 1927.¹ Her mother made a record of her birth in the family Bible, but the state did not issue her a birth certificate.² A lifelong resident of Wisconsin, she currently serves her community as an elected member of the Brokaw Village Board.³ She has exercised her right to vote in every election since 1948.⁴

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¹ Jon Sherman, *Out in the Cold at Age 84: Wisconsin's Ruthelle Frank Fights for Her Right to Vote, Voter Disfranchisement*, ACLU (Dec. 13, 2011, 11:39am), <https://www.aclu.org/blog/voting-rights/out-cold-age-84-wisconsins-ruthelle-frank-fights-her-right-vote>.

² *Id.*

³ *ACLU Files Lawsuit Challenging Wisconsin's Unconstitutional Voter ID Law, Voting Rights*, ACLU (Dec. 13, 2011), <https://www.aclu.org/voting-rights/aclu-files-lawsuit-challenging-wisconsins-unconstitutional-voter-id-law>.

⁴ *Id.*

Unfortunately, Ruthelle will be unable to cast a ballot in the next election because of Wisconsin's new voter identification ("ID") law. The law requires that Wisconsin residents present one of several qualifying forms of photo ID before voting.⁵ Ruthelle has a certification of baptism, a Medicare statement, and a checkbook; but she has been unable to obtain one of the acceptable forms of ID.⁶ In order to acquire a qualifying form of ID under the Wisconsin law, Ruthelle needs a birth certificate.⁷ However, the state refuses to issue her one because her name on file with the state Register of Deeds contains a spelling error; and she cannot petition the court to amend the document without paying as much as \$200 in fees.⁸ If she successfully fixes the error, she must then pay \$20 for a copy of the birth certificate.⁹ Next, she would need to take it, along with 2 other forms of proof, to a local government office to obtain the ID required by the state.¹⁰ For Ruthelle, a woman in her late 80s on a fixed income, these hurdles are not trivial.

Although Ruthelle Frank's situation may appear unique, an estimated 300,000 of Wisconsin's residents must now take some affirmative action to satisfy these new requirements to vote.¹¹ In December of 2011, the American Civil Liberties Union (ACLU) filed suit on behalf of Ms. Frank and all other similarly situated voters, seeking to prevent implementation of Wisconsin's voter ID law, also known as Act 23.¹² The ACLU claimed Act 23 imposed an undue

⁵ *See id.*

⁶ Tanya Somanader, *Wisconsin Voter ID Law May Force 84-Year-Old Woman To Pay \$200 To Get A Voter ID*, THINKPROGRESS.ORG (Dec. 5, 2011, 4:30pm), <http://thinkprogress.org/justice/2011/12/05/381885/wisconsin-voter-id-law-may-force-84-year-old-woman-to-pay-200-to-get-a-voter-id/>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Sherman, *supra* note 1.

¹¹ Frank v. Walker, 17 F. Supp. 3d 837, 854 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

¹² *ACLU Files Lawsuit Challenging Wisconsin's Unconstitutional Voter ID Law*, *supra* note 3.

burden on voters in violation of constitutional protections under the Fourteenth Amendment.¹³

Supporters of Wisconsin's "strict"¹⁴ voter ID law claimed that it was necessary to detect and prevent voter fraud, maintain confidence in election integrity, and improve election administration.¹⁵ But critics of the law argued that voter fraud is virtually non-existent in Wisconsin and voter confidence is unrelated to the strictness of a state's voting laws.¹⁶ They also argued that the law suppresses voter turnout in large numbers. Because for many, the perceived difference of one vote is outweighed by the time, effort, and cost required to satisfy the new requirement. They also contend the law makes voting impossible for many and that low-income and minority subgroups are disproportionately affected by the regulations.¹⁷ These subgroups of voters are generally more likely to vote democratic. Thus support and opposition for Act 23 among legislators was sharply divided along partisan lines.¹⁸

Mrs. Frank's claim in *Frank v. Walker* came fresh on the heels of the Supreme Court's decision in *Crawford v. Marion County Election Board*, where the high court considered strict voter ID requirements for the first time.¹⁹ In *Crawford*, the Court considered a

¹³ *Id.*

¹⁴ "Strict" voter ID laws require further action from voters without acceptable ID before their ballots will count. For example, Act 23 provides that voters without ID may vote on a provisional ballot but must provide a qualified photo ID to the election inspectors before polls close or to the municipal clerk by 4:00pm on the following Friday. Wendy Underhill, *Voter Identification Requirements, Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 24, 2015), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

¹⁵ *Frank*, 17 F. Supp. 3d at 847.

¹⁶ *Id.* at 847-48, 851.

¹⁷ *Id.* at 862, 870.

¹⁸ *Wisconsin Assembly*, Assembly Bill 7, 2011-2012 Wisconsin Legislature, Wisconsin State Legislature (May 11, 2011, 11:10pm), <http://legis.wisconsin.gov/2011/data/votes/av0331.pdf>; *Wisconsin Senate Roll Call*, Assembly Bill 7, 2011-2012 Wisconsin Legislature, Wisconsin State Legislature (May 19, 2011, 11:03am), <http://legis.wisconsin.gov/2011/data/votes/sv0192.pdf>.

¹⁹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

facial challenge²⁰ to Indiana's SEA 483, a law similar to Wisconsin's Act 23.²¹ There, the Court confirmed that the constitutionality of such voter ID laws is properly analyzed under the Anderson/Burdick balancing test, the prevailing method for evaluating election regulations.²² The Court concluded that state interests advanced by the requirement were sufficient to defeat the facial attack on the law.²³ In his *Crawford* opinion, Justice Stevens noted that where an election regulation is facially neutral²⁴ and supported by some valid justification, courts should not invalidate it merely because legislative proponents were partly seeking to entrench themselves in office.²⁵

This comment argues that the current constitutional evaluation of election regulations is inadequate. A more effective analysis should contemplate whether improper partisanship contributed to the passage of a law. Part I traces the development of the two-part test courts currently employ and its first application by the U.S. Supreme Court to voter ID laws in *Crawford*. Part II explores the recent challenge to Wisconsin's voter ID law in both the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals in *Frank v. Walker*. Finally, Part III analyzes the opinions in *Frank* and argues that a small change to the balancing test would yield more equitable results in cases where political motivations are highly suspect.

²⁰ A "facial challenge" to a law is a challenge that claims the law, as written, is unconstitutional under all circumstances. In contrast, an "as-applied challenge" claims that a law is only unconstitutional in its particular application to the plaintiff. A successful facial challenge will result in complete invalidation of the law, where a successful as-applied challenge will result merely in modification of the law or the circumstances in which it may be applied. Richard H. Fallon Jr., *Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915, 922-25 (2011). available at: <http://scholarship.law.berkeley.edu/californialawreview/vol99/iss4/1>.

²¹ *Crawford*, 553 U.S. at 188.

²² *Id.* at 190-91.

²³ *Id.* at 202.

²⁴ A "facially neutral" law refers to a one that does not explicitly discriminate against a particular group.

²⁵ See *Crawford*, 553 U.S. at 204.

I. CONSTITUTIONAL ANALYSIS OF ELECTION REGULATIONS

The U.S. Constitution contains no explicit guarantee of voting rights. For much of the country's early history, federal courts declined to extend any protections to citizens excluded from elections.²⁶ Instead, the federal judiciary insisted that any voting rights for citizens originated with the states.²⁷ During this period, states restricted voting privileges based on gender, religion, race, national origin, property ownership, length of residency, economic status, and literacy.²⁸

Congress has since enacted four amendments to the Constitution to protect certain groups from discrimination at the polls. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments collectively provided that voting rights could not be denied or abridged based on race, color, previous condition of servitude, sex, or age (for those having reached majority).²⁹ The Twenty-Fourth Amendment prohibited the imposition of a poll tax,³⁰ but only in federal elections.³¹ These amendments addressed certain forms of election-related discrimination; however, the Constitution still failed to affirm voting as a right.

The Supreme Court began to recognize voting as a fundamental constitutional right during the civil rights era. With a liberal majority lead by Chief Justice Earl Warren, the Court deduced that the right to vote is fundamental because it is "preservative of other

²⁶ *See, e.g.,* *Minor v. Happersett*, 88 U.S. 162, 178 (1874) ("Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void.").

²⁷ *See, e.g., id.*

²⁸ *See generally* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 53-70 (2000).

²⁹ U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

³⁰ A "poll tax" is any fee or tax required as a precondition to vote.

³¹ U.S. CONST. amend. XXIV.

basic civil and political rights.”³² The Warren Court firmly established this premise over a string of cases challenging malapportioned districts in the early 1960s.³³ And in 1966, the Court extended this reasoning to abolish the poll tax in all elections.³⁴ In these cases, the Warren Court demonstrated that voting rights could be violated through dilution of the weight of a citizen’s vote and by unjustifiably burdening certain groups such as the poor.³⁵ However, many commentators argued the Court failed to establish a clear and consistent method for evaluating ballot access restrictions in the voting rights cases that followed.³⁶ Nearly two decades later in 1983, the Court first began to outline the framework for the constitutional analysis used today in *Anderson v. Celebrezze*.³⁷

A. *The Anderson/Burdick test*

In *Anderson*, the Court analyzed the constitutionality of Ohio’s early filing requirements for ballot access in presidential elections, which the state imposed only on independent candidates.³⁸ There, the Court framed a balancing test.³⁹ Justice Stevens acknowledged that states must substantially regulate their electoral processes.⁴⁰ And in practice, any provision of a state’s complex regulatory scheme will affect voters’ potential political expression to some degree.⁴¹ But,

³² *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³³ *Reynolds*, 377 U.S. at 562; *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

³⁴ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

³⁵ *Harper*, 383 U.S. 663; *Reynolds*, 377 U.S. 533; *Wesberry*, 376 U.S. 1.

³⁶ E.g., Terry Smith, *Election Laws and First Amendment Freedoms-Confusion And Clarification by the Supreme Court*, 1988 ANN. SURVEY OF AM. L. 597, 610, 621-22 (1988); Bradley A. Smith, *Judicial Protection Of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 186-87 (1991).

³⁷ *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

³⁸ *Id.* at 780.

³⁹ *Id.*

⁴⁰ *Id.* at 788.

⁴¹ *Id.*

where a regulation's restrictions are reasonable and nondiscriminatory, a state's need to properly facilitate its election procedures will generally suffice as justification. Therefore, challengers of state election laws face a presumption in favor of the state.⁴²

In his opinion, Justice Stevens stated that to determine whether a particular restriction is justified, courts must weigh the character and magnitude of the asserted impairment to a plaintiff's constitutional rights against the interests the state seeks to advance.⁴³ At the same time, a court should consider the extent to which those burdens are necessary to achieve those state interests.⁴⁴ Because of the numerosity and wide variation in type, effect, and importance of state election regulations, the Court declined to offer any bright line rules.⁴⁵ Instead, it directed lower courts to weigh those factors and reach their own conclusions.⁴⁶

The Court found that because the early filing requirement unequally burdened a certain group with specific and identifiable political preferences, it was "especially difficult for the state to justify."⁴⁷ It also determined that Ohio had less of a legitimate interest in a national election than it would in local contests.⁴⁸ Therefore, the constitutional interests at stake outweighed any justification put forth by Ohio.⁴⁹

Nearly ten years later, the Court created a bifurcated inquiry in *Burdick v. Takushi*.⁵⁰ Justice White noted that under the standard outlined in *Anderson*, the proper level of scrutiny depends on the "extent to which a challenged regulation burdens First and Fourteenth

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 789.

⁴⁵ *Id.*

⁴⁶ *Id.* at 789-90.

⁴⁷ *Id.* at 792-93.

⁴⁸ *Id.* at 795.

⁴⁹ *Id.* at 806.

⁵⁰ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Amendment rights.”⁵¹ Accordingly, where those rights are severely restricted, strict scrutiny applies.⁵² Where restrictions impose less than severe restrictions, courts should apply the *Anderson* balance.⁵³ This two-part test is now commonly referred to as the “Anderson/Burdick test.”

In *Burdick*, the Court considered a challenge to Hawaii’s prohibition on write-in voting.⁵⁴ The voter bringing the action claimed that the state’s refusal to count votes for a candidate not officially on the ballot violated his constitutional rights of expression and association.⁵⁵ First, the Court determined that the burden imposed by this restriction was limited because Hawaii’s system provided ample opportunity for candidates to participate in the state’s open primary.⁵⁶ Because there were no identifiable barriers for candidates seeking to appear on the ballot, “any burden on voters’ freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary.”⁵⁷ The Court previously determined any interest a candidate and his supporters had in making a late rather than early decision was of minimal significance.⁵⁸

Next, the Court considered the interests advanced by the state of Hawaii.⁵⁹ The majority cited several benefits the restriction provided, including avoiding the possibility of unrestrained factionalism, averting divisive sore-loser candidacies, voter focus upon contested races in the general election, and guarding against party raiding.⁶⁰ The opinion implied that these interests are far more

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 430.

⁵⁵ *Id.* at 430-31.

⁵⁶ *Id.* at 435-36, 437.

⁵⁷ *Id.* at 436-37.

⁵⁸ *Id.* at 437.

⁵⁹ *Id.* at 439.

⁶⁰ *Id.* Party raiding refers to a political tactic where a political party’s members will vote in another party’s primary to nominate a weaker candidate.

than adequate to defeat the challenge.⁶¹ Where an election scheme imposes only a minimal burden on the right to vote and provides constitutionally sufficient ballot access, any legitimate state interest will generally prevail.⁶²

B. What is a “Severe Restriction”?

As described above, a court analyzing the constitutionality of an election regulation begins with an inquiry into whether the law imposes a severe restriction on the right to vote.⁶³ In *Dunn v. Blumstein*, the U.S. Supreme Court reaffirmed that a state election law that categorically prevents certain citizens from voting must be narrowly tailored to meet a compelling government interest.⁶⁴ Indeed, complete denial of franchise is the most severe possible restriction of that right. But short of outright denial, what constitutes a severe restriction?

The Court first used the language of “severe restrictions” in *Norman v. Reed*.⁶⁵ There, the Court considered Illinois’ requirements for new political parties seeking access to local and statewide office.⁶⁶ Illinois required that new political parties gather 25,000 qualified voter signatures in each district their candidates sought office.⁶⁷ A party seeking municipal office for one candidate in the city of Chicago and another candidate for a surrounding suburb had to acquire 25,000

⁶¹ See *id.* at 439-40.

⁶² See *id.* at 439-42.

⁶³ See, e.g., *id.*

⁶⁴ See *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969)) (“We concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’”).

⁶⁵ *Norman v. Reed*, 502 U.S. 279, 280 (1992).

⁶⁶ *Id.* at 282.

⁶⁷ *Id.*

each.⁶⁸ If that party also wished to run a candidate for county-wide office, the signature requirement was essentially 50,000 (where it would otherwise be only 25,000). This is because failure to acquire enough signatures in any district disqualified the party's entire slate.⁶⁹ Although Illinois' ballot-access scheme was onerous, it was not insurmountable. Nevertheless, the Court concluded these requirements severely restricted the right of "like-minded voters to gather in pursuit of common political ends."⁷⁰ Accordingly, it determined that Illinois did not choose the most narrowly tailored means of advancing their interest in demonstrating a distribution of support for new parties.⁷¹

In subsequent decisions, the Court has repeated its position that strict scrutiny⁷² is appropriate for election regulations imposing a severe burden on constitutional rights.⁷³ In *California Democratic Party v. Jones*,⁷⁴ the Court found a California law placed a severe burden on the right of political association.⁷⁵ Proposition 198 changed the state's partisan primary election system.⁷⁶ Before the law took effect, only members of a particular party could vote for its candidates in the primary.⁷⁷ Proposition 198 converted the state's primary to a "blanket" system where each voter would be free to select any candidate, regardless of that candidate's party affiliation.⁷⁸ The law granted voters who refused to expressly affiliate with these parties, or those that openly affiliated with rivals, legal authority to affect the

⁶⁸ *Id.*

⁶⁹ *Id.* at 292-92.

⁷⁰ *Id.* at 288, 293-94.

⁷¹ *Id.* at 293-94.

⁷² To pass strict scrutiny, a law must be narrowly tailored to meet a compelling government interest.

⁷³ *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Clingman v. Beaver*, 544 U.S. 581, 592 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

⁷⁴ *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁷⁵ *Id.* at 582.

⁷⁶ *Id.* at 570.

⁷⁷ *Id.*

⁷⁸ *Id.*

parties' candidate selection.⁷⁹ The Court concluded the law impaired actual party members' ability to choose their own candidates.⁸⁰ Also, the Court compelled the parties to change their message due to the adulteration of their candidate selection process.⁸¹ The Court found that although these restrictions did not completely deny franchise, they severely burdened that right, and therefore strict scrutiny was appropriate.⁸²

These cases illustrate how the Court is willing to apply strict scrutiny even where a regulation's effects threaten less than outright denial of voting rights. However, the Court's opinions do not offer any indication for how lower courts should apply this standard.⁸³ In cases discussing this type of analysis, the Court reaches its conclusions subjectively and declines to further specify when a burden becomes severe. Predictably, lower courts routinely disagree whether a law's effects meet this threshold.

C. *Crawford v. Marion County Election Board extends the election regulation test to voter ID laws*

While certain states have requested optional, non-photo identification from voters since the 1950s, only in recent years have states begun passing laws requiring photo ID at the polls. Indiana and Georgia were the first states to pass a "strict" photo ID requirement in 2005.⁸⁴ First implemented in 2008, these strict voter ID laws required that in-person voters verify their identity with an acceptable

⁷⁹ *Id.* at 577.

⁸⁰ *Id.* at 578.

⁸¹ *Id.* at 581.

⁸² *Id.* at 582.

⁸³ See generally Joshua A. Douglas, Comment, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote*, 75 GEO. WASH. L. REV. 372, 377-86 (2007).

⁸⁴ *History of Voter ID*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 16, 2014), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

government issued photo ID before their ballot will count.⁸⁵ In *Crawford*, the Supreme Court considered a facial challenge to Indiana's law under the equal protection clause of the Fourteenth Amendment,⁸⁶ marking the first time the U.S. Supreme Court examined the constitutionality of a state photo ID requirement for voting.

Indiana's SEA 483 required that in-person voters show either a state or federal government issued photo ID.⁸⁷ Voters who mail in absentee ballots are not affected by the requirement.⁸⁸ Those voting in person without ID may fill out a provisional ballot which will count only if the voter then makes a separate trip to the county election office within 10 days following the election.⁸⁹ There, the voter must either show an acceptable ID or sign an affidavit claiming indigence or a religious objection before their ballot will count.⁹⁰ The law provided an exception for individuals residing in a state-licensed care facility such as a nursing home.⁹¹

Importantly, the plurality affirmed that voter ID requirements are properly analyzed under the framework developed in the election cases outlined above.⁹² Voter ID requirements which place a severe limitation on voters' rights must be narrowly tailored to meet a compelling state interest.⁹³ Where that burden is less than severe, courts should balance it against the benefits the law provides for the state.⁹⁴ Accordingly, "[h]owever slight that burden may appear . . . , it

⁸⁵ *Id.*

⁸⁶ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185 (2008).

⁸⁷ *Id.* at 185.

⁸⁸ *Id.* at 185-86.

⁸⁹ *Id.* at 186.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 190-91.

⁹³ *See id.*

⁹⁴ *Id.*

must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”⁹⁵

The plurality began its analysis by addressing the interests advanced by the state.⁹⁶ Each interest advanced by the state, in some part, relates to the state’s primary concern: voter fraud.⁹⁷ To begin, the plurality discussed election modernization and referenced two recently enacted federal statutes that raise certain concerns SEA 483 addresses.⁹⁸

The National Voter Registration Act of 1993 included a provision restricting states’ ability to purge names from their voter rolls.⁹⁹ The lower court found credible evidence indicating that Indiana’s 2004 registration lists were inflated by as much as 41.4 percent because they contained the names of persons either deceased or no longer living in the state.¹⁰⁰ Although the plurality acknowledged that this is partly a product of Indiana’s own maladministration, it credited the issue as a “neutral and nondiscriminatory reason supporting the state’s decision to require photo identification.”¹⁰¹

The Help America Vote Act required that states keep a digital list of statewide voters and verify new voter registration information against that list.¹⁰² Although this information can be verified by documents such as a bank statement, paycheck or utility bill, Indiana’s photo ID requirement effectively establishes a voter’s qualification.¹⁰³

Next, the plurality discussed Indiana’s interest in deterring and detecting voter fraud.¹⁰⁴ It is well settled that states have a genuine

⁹⁵ *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.* at 192.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 191-92, 196-97.

¹⁰² *Id.* at 192.

¹⁰³ *Id.* at 193.

¹⁰⁴ *Id.* at 194.

interest in ensuring the legitimacy of their elections.¹⁰⁵ The plurality claimed that “carefully identifying all voters participating in the election process” also serves a valid interest in orderly administration and accurate recordkeeping.¹⁰⁶ However, the plurality was careful to recognize that the record contained no evidence of in-person voter fraud ever occurring within the state.¹⁰⁷

Finally, the plurality mentioned Indiana’s contention that the law safeguards voter confidence.¹⁰⁸ While this concern really addresses the public perception of voter fraud, the plurality suggested that “public confidence in the integrity of the electoral process has independent significance because it encourages citizen participation in the democratic process.”¹⁰⁹ It further noted that the electoral system cannot inspire this confidence without some protections against fraud or abuse, such as voter ID laws.¹¹⁰

The plurality then considered the injury to voters’ rights. It began with a cursory acknowledgement that the ID requirement presents certain novel issues.¹¹¹ For example, states commonly charge a fee for issuing an ID.¹¹² However, Indiana waives this fee. Other examples include the possibility of physical ID cards getting lost or stolen or a voter’s ID photo no longer accurately depicting the individual due to age, hairstyle, facial hair, etc.¹¹³ But the plurality summarily dismissed these issues because voters have the option of casting a provisional ballot.¹¹⁴ These provisional ballots will ultimately count so long as voters return to the circuit clerk within ten days and either show a proper ID or sign an affidavit claiming

¹⁰⁵ *Id.* at 196.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 194-95.

¹⁰⁸ *Id.* at 197.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 198.

¹¹³ *Id.*

¹¹⁴ *Id.*

indigence or a religious objection.¹¹⁵ The plurality also found any inconvenience cost associated with acquiring the ID insignificant.¹¹⁶

For the plurality, the more troubling issue was eligible voters for whom it is difficult or downright impossible to obtain acceptable identification.¹¹⁷ For many, these problems originate with locating or acquiring documents the state requires before issuing ID, such as a birth certificate.¹¹⁸ The record indicated that some may face financial issues with the document fees or travel costs.¹¹⁹ Many elderly voters, especially the indigent, could not locate any record of their birth from which to obtain a birth certificate.¹²⁰ For some, this was because they were born long ago, out of state, and/or outside of a hospital.¹²¹ However, the plurality minimized this concern by again citing the provisional ballot option and affidavit exception.¹²²

Another obstacle voters faced was finding adequate transportation. Voters without cars must sometimes travel significant distances to acquire the underlying documents and the photo ID.¹²³ Some voters found this far more difficult than traveling to the local polling place, especially because Indiana lacks any form of public transportation in much of the state.¹²⁴

On the other hand, the record did not contain a credible estimation of the number of voters without ID.¹²⁵ It also did not conclusively demonstrate the burden those voters would endure.¹²⁶ Those deposed in the record and the named plaintiffs failed to show

¹¹⁵ *Id.* at 186.

¹¹⁶ *Id.* at 198.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 199.

¹¹⁹ *Id.* at 211 (Souter, J., dissenting).

¹²⁰ *Id.* at 199 (majority opinion).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 213-14 (Souter, J., dissenting).

¹²⁴ *Id.*

¹²⁵ *Id.* at 200 (majority opinion).

¹²⁶ *Id.* at 201.

that the law prevented them from voting.¹²⁷ They were either ultimately successful, eligible to submit an absentee ballot without ID, or presented inadequate testimony otherwise.¹²⁸ The record did contain an affidavit from a homeless woman denied ID because she had no home address, despite having all necessary documentation; however, the plurality could not determine how common this problem was from a single occurrence.¹²⁹

Ultimately, the plurality found the evidence in the record inadequate and therefore, they found it impossible to “quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”¹³⁰ Because of this, the plurality declined to weigh the interests of a small subset of voters against the broad interests advanced by the state.¹³¹ Moreover, Justice Stevens remarked on the high burden of persuasion necessary for the plurality to sustain a facial attack on the entire statute.¹³² But, the plurality opinion left open the possibility that a plaintiff who presents a more developed record, challenges a more burdensome law, or brings an as-applied constitutional challenge might carry this burden. In *Frank v. Walker*, the Seventh Circuit considered such a constitutional challenge.

II. FRANK V. WALKER

In 2011, the Wisconsin Legislature passed its version of a strict photo ID voter eligibility law.¹³³ 2011 Wisconsin Act 23, signed into law by Governor Scott Walker, is somewhat similar to the Indiana law

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 201-02.

¹³⁰ *Id.* at 200.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Frank v. Walker*, 17 F. Supp. 3d 837, 841 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

upheld in *Crawford*. For example, individuals must show one of nine qualifying photo IDs before a poll worker will give them a ballot to vote.¹³⁴ Voters without ID may submit a provisional ballot which is counted after a subsequent trip to the municipal clerk's office.¹³⁵ Also, the law provides an exception for those confined to their home or a care facility due to age, sickness, injury, or disability.¹³⁶

However, Act 23 is more restrictive than Indiana's SEA 483 in several important ways. First, the Wisconsin law does not allow those voting through provisional ballots the option to sign an affidavit claiming indigence or a religious objection.¹³⁷ When subsequently appearing at the municipal clerk's office, voters must show one of the same qualified forms of ID expected by poll workers.¹³⁸ The *Crawford* Court relied on Indiana's affidavit exception as a substantial mitigating factor in its analysis.¹³⁹ Second, Act 23 requires ID from absentee voters.¹⁴⁰ Only those in the military, living overseas, or who have previously satisfied the ID requirement and maintain the same home address are exempted from the ID requirement for absentee ballots.¹⁴¹ Indiana's law does not impose this requirement on absentee voters, and the *Crawford* Court specifically cited this fact to minimize the burden on elderly residents unable to locate the necessary documents.¹⁴²

¹³⁴ *Id.* at 843.

¹³⁵ *Id.* at 844.

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *Id.*

¹³⁹ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 199 (2008).

¹⁴⁰ *Frank*, 17 F. Supp. 3d at 844.

¹⁴¹ *Id.*

¹⁴² *Crawford*, 553 U.S. at 201.

A. The Eastern District of Wisconsin finds Act 23 unconstitutional; the state appeals

In the United States District Court for the Eastern District of Wisconsin, plaintiffs brought an as-applied constitutional challenge to Act 23 under the Fourteenth Amendment.¹⁴³ Before his analysis of Act 23, District Judge Lynn Adelman addressed the precedential effect of the *Crawford* decision. He first concluded that because six of the Justices agreed that the Anderson/Burdick balancing test applied to Indiana's strict photo ID voter eligibility law, Act 23 should be evaluated likewise.¹⁴⁴ Judge Adelman then discussed the effect of the split among Justices regarding whether such laws could be invalidated on the basis of their effect on a subgroup of voters.¹⁴⁵ He determined that *Crawford* is not binding precedent on the issue.¹⁴⁶ However, after consideration of the *Anderson* and *Burdick* cases themselves, he concluded that they "require invalidation of a law when the state interests are insufficient to justify the burdens the law imposes on subgroups of voters."¹⁴⁷

Judge Adelman began his analysis by addressing the state's four justifications for the law: 1) detecting and preventing in-person voter-impersonation fraud; 2) promoting public confidence in the

¹⁴³ *Frank*, 17 F. Supp. 3d at 842. Plaintiffs also brought a statutory challenge under section 2 of the Voting Rights Act; however, any statutory analysis is beyond the scope of this comment.

¹⁴⁴ *Id.* at 845.

¹⁴⁵ *Crawford*, 553 U.S. at 200-03, 206. While the three Justice concurrence opines that voter ID laws should be evaluated on the "basis of their 'reasonably foreseeable effect on voters generally,'" the three Justice Plurality opinion implies that such laws could be invalidated solely by their effect on a subgroup of voters. *Id.*

¹⁴⁶ *Frank*, 17 F. Supp. 3d at 846 (The plurality opinion was narrowest because it did not reach additional constitutional question of whether "a law could be invalidated based on the burdens imposed on a subgroup of voters.") (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."))).

¹⁴⁷ *Frank*, 17 F. Supp. 3d at 846-47.

integrity of the electoral process; 3) detecting and deterring other types of voter fraud; and 4) promoting orderly election administration and accurate recordkeeping.¹⁴⁸

First, Judge Adelman accorded the state's interest in voter-fraud prevention very little weight despite acknowledging that voter fraud prevention is a legitimate state interest.¹⁴⁹ The evidence at trial demonstrated that in-person voter impersonation fraud is virtually non-existent in Wisconsin.¹⁵⁰ Dispatching any contention that a lack of voter-fraud evidence was attributable to underenforcement of existing laws, Judge Adelman cited three fruitless sweeps in the state's recent history: the 2002 Department of Justice Ballot Access and Voting Integrity Initiative, the 2004 Joint Task Force, and the 2008 Election Fraud Task Force.¹⁵¹ He also dismissed the claim that the lack of evidence was due to the difficulty of detecting such fraud.¹⁵² Although the fraud itself may be difficult to detect, he suggested there would surely be more circumstantial evidence of it.¹⁵³ For example, voters would find that a ballot had already been cast in their name.¹⁵⁴ Lastly, the evidence indicated that any development of future fraud issues was exceedingly unlikely; therefore, "Act 23 cannot be deemed a reasonable response to a potential problem."¹⁵⁵

Second, Judge Adelman concluded that "Act 23 does not further the state interest of promoting public confidence in the integrity of the electoral process."¹⁵⁶ The state presented no empirical evidence supporting this claim; however, the plaintiffs presented evidence in rebuttal.¹⁵⁷ At trial, a professor of political science testified

¹⁴⁸ *Id.* at 847.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 848-49.

¹⁵² *Id.* at 849-50.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 849.

¹⁵⁵ *Id.* at 850.

¹⁵⁶ *Id.* at 852.

¹⁵⁷ *Id.* at 851.

that photo ID requirements have no actual effect on “a person’s level of trust or confidence in the electoral process.”¹⁵⁸ Another professor, specializing in the study of the incidence of voter fraud in contemporary American elections, testified that photo ID laws actually undermine voter confidence.¹⁵⁹ This is because the laws create a “false perception that voter-impersonation fraud is widespread.”¹⁶⁰ Furthermore, Judge Adelman argued that the laws work against public confidence because much of the electorate believes that the ID requirement disenfranchises and marginalizes many voters.¹⁶¹

Third, the Judge addressed the state’s claim that the ID requirement will help detect and deter other forms of fraud, such as voting by felons or non-citizens and double voting.¹⁶² Again, the state presented no evidence in support of this claim.¹⁶³ In fact, the state neglected to adequately explain how the law might prevent these types of fraud.¹⁶⁴

Fourth, Judge Adelman found that any state interest Act 23 serves in promoting orderly election administration and accurate recordkeeping is inseparable from the state’s interest in preventing voter fraud.¹⁶⁵ Because the defendants have failed to show how these interests are distinct, the Judge found that “Act 23 serves the state’s interest in orderly election administration and accurate recordkeeping only to the extent that it serves the state’s interest in detecting and preventing voter fraud.”¹⁶⁶

Judge Adelman then examined the burdens Act 23 imposes on voters.¹⁶⁷ To begin, he acknowledged that the laws adverse effects

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 848, 851.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 852.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 853.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

were felt primarily by those who did not currently possess qualifying ID.¹⁶⁸ Credible evidence at trial indicated that approximately 300,000 registered voters fit this description.¹⁶⁹ Those individuals, who would not otherwise require it, must take the necessary steps to obtain an ID exclusively for the purpose of voting.¹⁷⁰ Evidence also indicated that a substantial portion of those voters without ID are low income individuals.¹⁷¹ And because the Wisconsin law lacked any exceptions similar to the indigence affidavit allowed by the Indiana law, all of those voters must physically obtain proper ID to vote.¹⁷²

To obtain proper ID, voters must first identify the requirements for the ID and any required underlying documents such as a social security card or birth certificate.¹⁷³ The voter must then account for the time and effort required to get the ID. Voters must travel to the DMV at least once, and if necessary, to the other various government offices for the other required documents.¹⁷⁴

There are financial costs to consider as well. Low-income individuals without a driver's license often must pay to use public transportation, which is not available everywhere in the state.¹⁷⁵ Also, although the state offers a free ID card, the underlying documents often cost money.¹⁷⁶ And due to the narrow business hours for state agencies, these voters almost certainly require time off from work.¹⁷⁷

Sometimes problems arise in the form of clerical errors where the name on the birth certificate is not correct.¹⁷⁸ To remedy these

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 854.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 863.

¹⁷³ *Id.* at 857.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 857-58.

¹⁷⁶ *Id.* at 858.

¹⁷⁷ *Id.* at 857.

¹⁷⁸ *Id.* at 859.

problems, the amendment process requires that the voter must make additional trips to various agencies.¹⁷⁹

Judge Adelman then proceeded to weigh the burden on voters against state interests.¹⁸⁰ Because of these obstacles and the supporting evidence at trial, he concluded that a “substantial number of the 300,000 plus voters who lack a qualifying ID will be deterred from voting.”¹⁸¹ In fact, the record contains testimony from eight Wisconsin residents who wished to vote in the upcoming election but could not secure an acceptable ID.¹⁸² Therefore, “it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes.”¹⁸³ Accordingly, the state’s asserted interest in detecting and preventing in-person voter fraud did not justify those burdens.¹⁸⁴ As for the other three justifications advanced by the state, as discussed above, there was either no supporting evidence or counter-balancing considerations.¹⁸⁵ Thus, “the burdens imposed by Act 23 on those who lack an ID are not justified.”¹⁸⁶ Judge Adelman therefore held the law violated Fourth Amendment protections and enjoined its enforcement.¹⁸⁷ The state immediately appealed and motioned for stay. On September 12, 2014, the Seventh Circuit Court of Appeals stayed the district court’s injunction pending the outcome on appeal.¹⁸⁸

B. The Seventh Circuit Reverses

Judge Easterbrook authored the unanimous opinion for the three-judge panel of the Seventh Circuit Court of Appeals, which

¹⁷⁹ *Id.* at 859-60.

¹⁸⁰ *Id.* at 862.

¹⁸¹ *Id.*

¹⁸² *Id.* at 854-55.

¹⁸³ *Id.* at 862.

¹⁸⁴ *Id.* at 862.

¹⁸⁵ *Id.* at 852-53.

¹⁸⁶ *Id.* at 862-63.

¹⁸⁷ *Id.*

¹⁸⁸ *Frank v. Walker*, 769 F.3d 494 (7th. Cir. 2014).

reviewed the case *de novo*, and reversed the lower court's ruling.¹⁸⁹ The panel held that Judge Adelman's findings "did not justify an outcome different from *Crawford*."¹⁹⁰ Although it agreed that Wisconsin's Act 23 differed from Indiana's SEA 483, the panel found any differences legally insignificant.¹⁹¹

First, the court dismissed any claim that Act 23 placed a higher burden on voters than the Indiana law, and insisted voters face no more difficulty in obtaining a qualifying ID in Wisconsin than they did in Indiana.¹⁹² It argued that Wisconsin residents who fail to acquire the requisite ID are not disenfranchised.¹⁹³ Rather, they are merely marginalized.¹⁹⁴ The court did not find this troubling because "any procedural step filters out some potential voters."¹⁹⁵ It stated that because the DMV issues photo ID to anyone with a birth certificate, all that can be inferred from a person without ID is that "he was unwilling to invest the necessary time."¹⁹⁶ The court concluded that foregoing a photo ID is a matter of choice for most eligible voters.¹⁹⁷ In support, it cited a district court finding that more than half of the eligible voters without ID possess a birth certificate.¹⁹⁸ Because the process of obtaining an ID is no more difficult in Wisconsin than Indiana, the lower court's ruling can only stand if the Act does not serve any important purpose.¹⁹⁹

¹⁸⁹ Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 746.

¹⁹² *Id.* at 749.

¹⁹³ *Id.* at 748.

¹⁹⁴ *See id.* at 748-49.

¹⁹⁵ *Id.* at 749.

¹⁹⁶ *Id.* at 748.

¹⁹⁷ *Id.* at 749.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

The Seventh Circuit determined that the important purpose Act 23 served is also indistinguishable from the Indiana law.²⁰⁰ The court dismissed the importance of the lower court's determination that voter fraud is non-existent because this was also the determination in *Crawford*.²⁰¹ The court required no evidence from the state for the remaining three justifications: fraud deterrence, accurate recordkeeping, and strengthening voter confidence.²⁰² The Supreme Court believed these were sound justifications for Indiana's law; therefore, they were equally sound justifications for Act 23.²⁰³

The panel specifically referred to the *Crawford* Court's determination that an ID requirement promotes public confidence in the electoral system.²⁰⁴ It labeled this finding a "legislative fact"²⁰⁵ and stated that the district court must accept such findings from the higher court.²⁰⁶ It reasoned that ID laws "either promote confidence, or they don't; there is no way they could promote public confidence in Indiana (as *Crawford* concluded) and not in Wisconsin."²⁰⁷ Because the Supreme Court already concluded that they promote confidence, a district court judge cannot conclude otherwise, even when presented with new and compelling evidence.²⁰⁸ And because these laws promote confidence, there is sufficient state interest.²⁰⁹ Therefore, unless plaintiffs can show they suffer significantly higher burdens obtaining proper ID than voters in Indiana, the laws are valid in every

²⁰⁰ See *id.* at 749-50.

²⁰¹ *Id.*

²⁰² See *id.* at 750.

²⁰³ See *id.*

²⁰⁴ *Id.*

²⁰⁵ A legislative fact refers to a broad, general fact that is not unique and relates indirectly to the parties to litigation. Judge Easterbrook defines a legislative fact as "a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *id.*

²⁰⁹ *Id.* at 751.

state.²¹⁰ On March 23, 2015, the Supreme Court announced its decision to decline review of the case.

III. ANALYSIS

In the *Frank* opinion, Judge Easterbrook highlighted a very important distinction: the difference between disenfranchisement and marginalization.²¹¹ Indeed, the proper analysis of a particular law depends on it. *Dunn*²¹² and its progeny are still precedential, so where a plaintiff can show that voters have been categorically prevented from accessing the polls, strict scrutiny should be applied. Heightened scrutiny is also appropriate where a law makes it significantly more difficult to vote, thereby suppressing voters.²¹³ But the level of suppression courts should tolerate remains unclear.

A. A strategic balance

As discussed above, the U.S. Supreme Court has been ambiguous about precisely when an election law imposes a severe burden on voters. In *Crawford*, the Court found the record insufficient to support a claim that Indiana's voter ID law crossed that line.²¹⁴ However, the record was more developed in *Frank*.²¹⁵ There, credible evidence suggested that compared to Indiana, six times as many registered voters in Wisconsin would be affected.²¹⁶ Also,

²¹⁰ *Id.* at 750.

²¹¹ *Id.* at 748.

²¹² *Dunn v. Blumstein*, 405 U.S. 330 (1972).

²¹³ *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

²¹⁴ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008).

²¹⁵ *See Frank*, 773 F.3d 783; *Frank v. Walker*, 17 F. Supp. 3d 837, 854-55 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

²¹⁶ District Judge Barker “estimated that as of 2005, when the statute was enacted, around 43,000 Indiana residents lacked a state-issued driver’s license or identification card.” *Crawford*, 553 U.S. at 188-89. District Judge Adelman found

considerations such as financial costs, inconvenience, travel issues, and time off work were more substantiated through statistical and testimonial evidence.²¹⁷ Despite this, the district court in *Frank* seemed to concede, without deliberation, that Wisconsin's law does not impose severe restrictions.²¹⁸ It proceeded directly to balancing the law's burden on voters against the state's asserted justifications.²¹⁹ The conservative panel in the court of appeals certainly did not raise the issue in the district court's stead.

Perhaps Judge Adelman made a strategic choice in his district court opinion. The U.S. Supreme Court rarely characterizes a law's effects as severe. Decided in 2000, *California Democratic Party* was the most recent case where the Court applied strict scrutiny because an election regulation severely burdened voters.²²⁰ This could reasonably imply that this standard is quite high. Additionally, the Court has not suggested any bright line rules or factors for consideration. Instead, it has simply invited the lower courts to make a "hard judgment."²²¹

But in making such a subjective judgment, a lower court leaves itself especially vulnerable to an adverse ruling on appeal. Despite careful use of empirical evidence to show a substantial burden on voters, any characterization of that burden as severe is entirely judicial discretion. Conversely, a lower court would likely be less susceptible to reversal where it carefully evaluated the evidence demonstrating both a law's burden on voters and the supporting justifications advanced by the state. Although there would still be some subjectivity to the balance of interests, a higher court would certainly have to work harder to undo such analysis by a lower court.

Ultimately, the Seventh Circuit panel did overturn Judge Adelson's ruling, but not without exposing its subjectivity. The court

"that approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID." *Frank*, 17 F. Supp. 3d at 854.

²¹⁷ See *Frank*, 17 F. Supp. 3d at 854-55.

²¹⁸ *Id.* at 846-47.

²¹⁹ *Id.* at 847.

²²⁰ *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000).

²²¹ *Crawford*, 553 U.S. at 190.

embraced certain pieces of evidence, ignored others, and supported several of its conclusions with false statements and erroneous assumptions.²²² More importantly, even if the Seventh Circuit arrived at the proper legal result, it is unlikely it secured an efficient outcome.

Credible evidence indicated that 300,000 people would have to take affirmative action to maintain their right to vote.²²³ Many of them must spend substantial time, money, and effort to do so.²²⁴ Furthermore, the district court found the evidence conclusive that the law would prevent more legitimate votes from being cast than fraudulent votes.²²⁵ The counterbalancing benefits for the law were comparatively weak. The problem lawmakers designed the law to fix does not exist in Wisconsin.²²⁶ The Seventh Circuit panel grounded its justification primarily on the Supreme Court's speculative assumption that voter ID laws improved voter confidence,²²⁷ despite credible recent evidence to the contrary.²²⁸ Judges can only reasonably uphold

²²² See generally *Frank* 773 F.3d at 783 (Posner, J., dissenting from denial of rehearing en banc) (describing the Seventh Circuit Panel's erroneous justifications for its ruling. For example, the panel opinion states that Act 23 would prevent voting by underage children and non-citizens; however non-citizens can easily obtain a Wisconsin state-issued ID and acceptable student IDs need not include a date of birth. Other examples include the panel opinion's erroneous assumption that photo ID cannot be a burdensome requirement because one needs it to fly, pick up prescriptions at pharmacies, open a bank account. However, in Wisconsin, one does not need an ID for all prescriptions; bank customers do not need photo ID to open an account; Federal law does not require photo ID to purchase firearms at gun shows, flea markets or online; and the Supreme Court requires no ID of visitors.).

²²³ *Frank*, 17 F. Supp. 3d at 854.

²²⁴ *Id.* at 855-57.

²²⁵ *Id.* at 862.

²²⁶ *Id.* at 847-48.

²²⁷ *Frank*, 768 F. 3d at 750-51 (arguing that because the Supreme Court previously concluded voter ID laws promote confidence, a district judge cannot subsequently dispute this finding, even when presented with recent evidence which contradicts that conclusion).

²²⁸ *Frank*, 17 F. Supp. 3d at 851. See Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1756

a law with such doubtful net advantages so long as the legal test maintains its deference to the state.

B. Addressing the proper concern

The Anderson/Burdick balance grants this deference to state regulations that impose less than a severe burden on voters.²²⁹ The Supreme Court describes such non-severe regulations as evenhanded, reasonable, and nondiscriminatory,²³⁰ essentially referring to facially neutral laws. However, there is compelling evidence that laws like Act 23, though facially neutral, disproportionately affect African Americans, Latinos, women, and the indigent.²³¹ Although several of these subgroups are constitutionally protected classes for purposes of equal protection, a discriminatory impact upon them is not sufficient to violate those protections.²³² A plaintiff must demonstrate discriminatory intent, which can be difficult to confirm.²³³ Perhaps this contributed to the Supreme Court's decision to adopt a balancing test for election regulations. Regardless, few would seriously argue that voter ID laws are primarily motivated by racial prejudice, outright sexism, or animosity toward the poor. However, there is reason to suspect that voter ID laws, like most of history's controversial election regulations, originate with political self-interest.

As mentioned above, the United States has an extensive history of voter suppression with facially neutral laws. For example,

(2008) (concluding no relationship between voter ID laws and a person's level of trust or confidence in the electoral system).

²²⁹ *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Clingman v. Beaver*, 544 U.S. 581, 592 (2005).

²³⁰ *E.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008).

²³¹ *See generally* Frank, 17 F. Supp. 3d at 870-79 (discussing the evidence presented at trial that Act 23 disproportionately affects Black, Latino and indigent voters); Michael J. Pitts, *Empirically Measuring the Impact of Photo ID Over Time and its Impact on Women*, 48 Ind. L. Rev. 605 (2015).

²³² *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 248 (1976).

²³³ *See, e.g., id.*

Massachusetts and Connecticut adopted literacy tests in the 1850s.²³⁴ These requirements suppressed and disenfranchised the poor and uneducated, and thus disproportionately affected African-American and Native American subgroups.²³⁵ Congress waited until 1975 before passing a permanent nationwide ban on literacy tests.²³⁶ More recent examples of facially neutral laws that disproportionately impact minority groups include felon disenfranchisement, the elimination of early voting opportunities, and voter ID laws.

The most troubling contemporary concerns regarding election regulations are political. The obvious fear is that lawmakers might manipulate election laws to entrench themselves in office. Less conspicuous, but equally troubling, is the possibility that confirmation bias²³⁷ blinds lawmakers, leading to the irrational justification of a laws virtue.²³⁸ And to be clear, these concerns lie on both sides of the aisle. For example, literacy tests and other suppressive election regulations made Republicans unelectable in the southern state general elections for a substantial period.²³⁹ Early voting restrictions often disproportionately affect black voters, which adversely affects democratic turnout.²⁴⁰ Both Republican and Democratic controlled

²³⁴ KEYSSAR, *supra* note 27 at 142.

²³⁵ *Id.* at 112, 255.

²³⁶ *Id.* at 274.

²³⁷ See generally Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2(2) Rev. of Gen. Psy. 175 (1998). (“Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”)

²³⁸ *Id.* at 191-92 (discussing cognitive bias as applied to policy rationalization).

²³⁹ See KEYSSAR, *supra* note 27 at 107-08.

²⁴⁰ *Obama for Am. v. Husted*, 697 F.3d 423, 440 (6th Cir. 2012).

Legislatures have gerrymandered²⁴¹ district boundaries to all but guarantee their party victory in certain district-wide elections.²⁴²

Nevertheless, voter ID laws benefit republicans politically. And critics of these laws argue they are designed to do just that. For example, in his dissent from the Seventh Circuit's opinion in *Crawford*, Judge Evans characterized Indiana's voter ID law as "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."²⁴³

When passing Act 23, Wisconsin legislators predictably split along party lines. Republican legislators voted unanimously for the law, democrats united against it.²⁴⁴ The liberal district court judge ruled against it;²⁴⁵ the conservative three-judge panel in the Seventh Circuit ruled in favor of the law.²⁴⁶ Conservative and liberal media outlets predictably tow their respective party's line.²⁴⁷ Of course, the fact that support for this particular policy almost universally depends on party alignment does not necessarily mean that support is guided by politics rather than a genuine interest in election integrity. However, it does raise justifiable suspicion. But because proponents of such laws

²⁴¹ Gerrymandering refers to the manipulation of district boundaries to secure an electoral advantage for a certain political party.

²⁴² Robert Weiner and Tom Sherman, *Gerrymandering: A Plague on Both Our Parties!*, TRUTH-OUT.ORG (Oct. 29, 2014, 09:26 A.M.), <http://www.truth-out.org/opinion/item/27117-gerrymandering-a-plague-on-both-our-parties>.

²⁴³ *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008).

²⁴⁴ Wisconsin Assembly, *supra* note 18.

²⁴⁵ Jennifer Rubin, *A Walker win on voter ID*, THE WASHINGTON POST, Mar. 24 2015, available at <http://www.washingtonpost.com/blogs/right-turn/wp/2015/03/24/a-walker-win-on-voter-id/>.

²⁴⁶ Ian Millhiser, *Three Republican Judges Just Gave A Big Leg Up To Scott Walker's Reelection Campaign*, THINKPROGRESS (Sept. 12, 2014, 6:06 A.M.), <http://thinkprogress.org/justice/2014/09/12/3567181/three-republican-judges-just-gave-a-big-leg-up-to-scott-walkers-reelection-campaign/>.

²⁴⁷ See, e.g., Meagan Hatcher-Mays, *Fox News Viewers Aren't Getting The Full Story On Voter Suppression*, MEDIA MATTERS FOR AMERICA (Nov. 13, 2014, 5:42 P.M.), <http://mediamatters.org/blog/2014/11/13/fox-news-viewers-arent-getting-the-full-story-o/201560>.

have been able to advance *some* justification for them, even if hypothetical or speculative, the laws stand. Again, this is possible because the Anderson/Burdick balance grants deference to states' interests. To remedy this, courts should carve an exception where misconduct appears likely.

C. A better approach to Anderson/Burdick balancing

An effective constitutional analysis of election laws needs to acknowledge the possibility of improper partisanship by lawmakers. Accordingly, where a plaintiff can demonstrate a strong likelihood that the primary motive for a law's passage is political, courts should not accord the state deference.²⁴⁸ Courts should consider factors such as whether a law: (1) confers a political advantage to the enacting lawmakers or their party; (2) politically disadvantages their opponents or an opposing party; (3) dilutes or otherwise weakens the political participation of identifiable groups of voters; and (4) creates sharp division along party lines. Where this improper partisanship appears likely, a court's presumption should shift in favor of the plaintiff; and the burden of showing that the law's benefits outweigh its burden on voters should fall upon the state.

This burden-shifting approach would be effective for several reasons. First, it would help ensure the utility of election regulations and discourage lawmakers from passing unnecessary, bureaucratic laws. Although regulations which offset the benefits they provide by imposing equally burdensome restrictions are generally undesirable, courts appropriately give state lawmakers wide latitude to regulate their own elections.²⁴⁹ However, ethically questionable election regulations that fail to provide clear, demonstrable, and convincing benefits should not stand. The elimination of such zero-sum

²⁴⁸ Of course, plaintiffs must first show that the law interferes with their ability to vote.

²⁴⁹ *E.g.*, *Storer v. Brown*, 415 U.S. 724, 730 (1974) (describing how it is important for courts to allow states to substantially regulate their elections).

regulations would help ensure lawmakers keep focus on public policy rather than political maneuvering.

Second, this approach would increase voter confidence. As the Supreme Court noted in *Crawford*, “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”²⁵⁰ As discussed above, the United States has a troubling history involving election law; yet, the current election law analysis ignores politically self-serving tactics. This initial inquiry into improper politics would bolster a public perception of trust in our electoral system by acknowledging the concern and demanding adequate justification when it arises.

Third, the partisanship inquiry would force judges to confront their own political bias.²⁵¹ Part of the current concern is partisan judicial activism. If the constitutional analysis of election regulations included an explicit inquiry into improper partisanship, judges would be less likely to put a finger on the scale in their party’s favor, consciously or subconsciously. This approach would create more pressure on judges to sufficiently justify any ruling that furthered their own person political interests to both the public and their peers in the judiciary.

Professor Dan Tokaji suggested inappropriate partisan manipulation of state voting processes should trigger heightened scrutiny.²⁵² Going even further, Professor Edward B. Foley recommended courts replace the Anderson/Burdick balance entirely with an inquiry into whether an election regulation was indeed “a ploy to achieve a partisan advantage.”²⁵³ However, both of these approaches fail to allow sufficient room for laws that may appear improper but were passed in good faith and provide adequate utility.

²⁵⁰ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 197 (2008).

²⁵¹ Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1863 (2013) (arguing that a court inquiring into improper partisanship will likely be more aware of its own political bias).

²⁵² Daniel P. Tokaji, *Judicial Activism and Passivism in Election Law*, 159 U. PA. L. REV. PENNumbra 274, 282 (2011).

²⁵³ Foley, *supra* note 241 at 1860-64.

Also, they run contradictory to the Supreme Court's history of allowing states wide latitude in governing their election procedures. In *Crawford*, the Supreme Court stated that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."²⁵⁴ Although entrenchment tactics should be treated harshly in the context of election law, concrete evidence of actual intent will seldom be available. Rather, courts should consider whether wrongful political tactics are *likely*. Then, by reversing the presumption to favor plaintiffs and placing the onus on the state to demonstrate a law's usefulness, courts can adequately address this concern while not overly intruding into state sovereignty.

If the Seventh Circuit employed this balance-shifting approach in *Frank*, the outcome would certainly be reversed. To begin, all the factors supporting a claim of improper partisanship are present; support and opposition for Act 23 split along partisan lines²⁵⁵ and credible evidence indicated the law disproportionately weakened participation by certain subgroups that tend to support democratic candidates.²⁵⁶ Thus, the law disadvantaged the Democratic Party, and accordingly, conferred a political benefit on its primary rival, the Republican Party. Therefore, the Court should disallow the presumption favoring the state replace it with the burden of proof. Next, as discussed in detail above, defendants in *Frank* were unable to establish Act 23's benefits to the extent necessary to outweigh its burden on voters. Under these facts, the plaintiff's challenge is successful.

However, if defendants were able to show that voter fraud was present in Wisconsin and that Act 23 competently addressed this problem, their burden would be carried. In this scenario, a decision favoring defendants is a desirable outcome. Here, the state is

²⁵⁴ *Crawford*, 553 U.S. at 204.

²⁵⁵ Wisconsin Assembly, *supra*, note 18.

²⁵⁶ *Frank v. Walker*, 17 F. Supp. 3d 837, 862, 870 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

hypothetically able to demonstrate that our democratic system of governance was actively perverted through fraud and the law solved or substantially mitigated that problem. Those benefits are substantial enough to defeat plaintiffs challenge in this case, even though partisanship may have influenced the decisions of individual lawmakers.

For this hypothetical, if the panel inquired only whether improper partisanship was present, like Professor Foley suggested, plaintiffs challenge would succeed. This outcome is problematic because the fraud would continue. Furthermore, where the only solutions available are more easily tolerated by affluent members of the electorate, a fix would remain elusive as long as the legislature is controlled by republicans. If the court applied heightened scrutiny here, as Professor Tokaji suggested, the outcome is less certain. Plaintiffs might be able to present a narrower alternative, or the court may insist that the state further tailor the current law. Regardless, this presents a similar problem. While republicans control Wisconsin's legislature, courts would be forced to closely scrutinize all laws more easily tolerated by conservative-leaning groups. Where these laws are otherwise beneficial, courts should not require they meet such lofty standards.

CONCLUSION

The current federal constitutional analysis of individual election regulations allows both lawmakers and judges much discretion in their respective drafting and evaluation of these laws. This is a necessary element for a jurisprudential standard charged with overseeing a body of law whose regulations inherently interfere with fundamental constitutional rights to some degree. However, while the Anderson/Burdick test has provided a more clear and consistent mechanism for courts to use when analyzing ballot access restrictions, a fundamental piece is still missing. An approach that more competently addresses the political nature of election law would both decrease improper partisan activity and increase public confidence and trust in the system. In *Frank*, the Seventh Circuit demonstrated the

malleability of the Anderson/Burdick balance. Neither the District Court nor the Appellate Court clearly erred in their applications of the test. But, because the most historically troubling motive in election law appeared a likely factor there, both judicial and legislative discretion should be narrowed.